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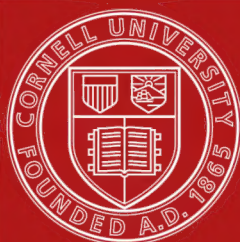
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A treatise on the bankruptcy law of the



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A TREATISE
ON THE
BANKRUPTCY LAW
of the United States

BY HAROLD REMINGTON

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VOLUME I

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BY
HAROLD REMINGTON.

DEDICATED

TO THE

HON. ROBERT W. TAYLER

United States District Judge for the Northern District of Ohio,

whose steadfast administration of the Bankruptcy
Law in its true spirit and intent has been a
source of inspiration to the writer of this treatise.

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INTRODUCTION.

Synopsis.

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- (n) Meaning and Idea of Bankruptcy Law To-Day.

(a) **Release from Debts Not Main Nor Essential Idea of Bankruptcy Law, but Merely Incidental.**—To gain a proper conception of bankruptcy law and of its place in jurisprudence, it is well first to exclude from the idea certain popular misconceptions of its origin, scope and function.

Bankruptcy law is popularly conceived to be a law devised mainly for releasing debtors from the bondage of hopeless indebtedness. This is undoubtedly the first idea that springs to mind when bankruptcy law is mentioned. But it is a wholly inadequate idea. Release from debts is not necessarily a part of bankruptcy law at all and from the standpoint of history is a mere incident to its original object. To be sure, one of the most beneficent features of the bankruptcy laws of present times and one of the most potent arguments in their favor is the privilege granted in them to bankrupts who have given up all their property toward satisfying their debts and have truthfully revealed all information in relation to their affairs, of obtaining a release from the unpaid remainder of their debts. But this release from debts is, as above noted, merely an incident of the later development of bankruptcy law, not its original object.

(b) **Jewish Sabbatical Year of Release.**—Were the granting of release from debts, on the contrary, the distinguishing object of bankruptcy law, one might be justified in tracing the law to a remote origin—before the days, indeed, of David and Solomon, more than 3000 years ago, when the Israelites every seven years had their sabbatical year of release. The fifteenth chapter of Deuteronomy contains, quite explicitly stated, the first law known in history providing for the release of debtors from their

debts, and, were the popular idea correct, the first bankruptcy law. It reads as follows:

"At the end of every seven years thou shalt make a release. And this is the manner of release: Every creditor that lendeth ought unto his neighbor shall release it. He shall not exact it of his neighbor or his brother; because it is called the Lord's release. Of a foreigner thou mayest exact it again; but that which is thine with thy brother thine hand shall release; save when there shall be no more poor among you."

This old Jewish law evidently was found to be, as it necessarily must have been, quite impracticable in its operation. As the stated seventh year approached, new business with poor people must have flagged and old creditors have become nervous and impatient. But in those days defects in laws did not require formal amendment for their correction, but were helped out in a way that is a lost art to modern legislators—the invocation of Divine wrath.

"Beware that there be not a thought in thy wicked heart saying, 'The seventh year, the year of release, is at hand' and thy eye be evil against thy poor brother and thou givest him naught, and he cry unto the Lord against thee and it be a sin unto thee. Thou shalt surely give him and thy heart shall not be grieved when thou givest unto him."

It may well be believed that nothing short of Divine command could have prevented grief, notwithstanding, from entering the heart of the unfortunate creditor of those days.

(c) **Modern Bankruptcy Law Not Criminal Statute.**—Nor is modern bankruptcy law to be looked upon as a criminal statute, although it must be conceded a quasi criminal origin in the statute of King Henry VIII. To be sure, it has created by its terms certain offenses punishable by imprisonment, as for instance, the concealment of assets and the perpetration of false oaths in relation to the bankrupt's affairs, but these criminal provisions will be found in present law to have become simply incidental to the real objects of the law, mere aids in carrying them out.

(d) **"Cessio Bonorum."**—The criminal idea—again digressing to antiquity—seems to have been prominent in the old Roman laws against insolvent debtors, the cruelty of which was monstrous until the time of Julius Cæsar, when the law known as Cessio Bonorum, which might be translated freely "the law relating to assignments for the benefit of creditors," incorporated into Roman jurisprudence the humane principle that where an insolvent debtor had turned over honestly and fully all his property for the benefit of his creditors, he would not be liable either to capital punishment, imprisonment nor slavery, as theretofore might have been his fate. However, this provision of Cessio Bonorum was far removed from the releasing of an insolvent from his remaining debts, such as is to be found in modern bankruptcy law. The law, Cessio Bonorum,

of Cæsar's time, might be thought to have been the prototype of bankruptcy law and in many features it did resemble such a law. It provided for the surrender of all assets by the insolvent and for his examination; and it granted him, in case of his full compliance with its provisions, immunity from personal punishment, although no release from debts. But the main feature distinguishing it from bankruptcy law was that its operation could not be invoked by creditors in the first instance, for it was purely a voluntary proceeding on the debtor's part, in this regard corresponding more to the laws of the present day providing for voluntary assignments for the benefit of creditors than to a true bankruptcy law.¹

(e) English Bankruptcy Acts True Origin American Bankruptcy Law.—American Bankruptcy Law finds its true origin in the English Bankruptcy Acts, which were, originally at least, quasi criminal in their nature. In the first of the English acts the bankrupt was always referred to as "the offender," the odium of crime being thus cast upon the word "bankrupt" that has clung to it to this day. But the true conception of bankruptcy law, as will later more fully appear, is neither that it is simply a law for releasing debtors from debts nor a law for suppressing crime.

(f) Origin and History of Old English Bankruptcy Acts.—It is well briefly to trace the origin and history of the old English Bankruptcy Laws, that a better understanding of the growth of the law and a clearer conception of its place in American jurisprudence may be had.

As Europe began to emerge from the shadows of the Middle Ages, commerce sprang up. Perhaps, indeed, it was the springing up of commerce rather that caused the shadows to lift.

Particularly did England advance with rapidity in the development of commerce, owing, no doubt, to the greater security of her laws, for England was a vast sheep raising country in those days, and history and human nature combine to demonstrate that where every one has his property exposed to easy theft and despoiling, as is necessarily such property, the laws of property are likely to be more stringently enforced and more conscientiously obeyed; and thus naturally in England are found the first attempts at the better protection of commerce by way of bankruptcy laws. Whatever the cause, the fact remains that the commerce of England was the best protected commerce in Europe and that such was the case even before the time England became mistress of the seas and when in fact she was of little power on the seas at all. Foreign merchants began to flock to her shores. Among them were many Lombards from Italy, the first bankers and brokers of Europe, who settled in London and gave their name to Lombard Street. They not only developed the system of exchange that has become the life of commerce, but also gave the name

1. See Justinian's Code, Dig. 2, 4, 25, 48, 19, 1 Nov. 4, 3.

"bankruptcy" to traders who failed, the table or "banque" of the broker who failed being broken or "rupt" as a symbol of his failure. As will later be noted the first English statute on the subject was entitled an "Act against those who do make bankrupt."

The needs of this growing commerce brought to light the inadequacy of English Common Law to the protection of trade. During the Dark Ages and Middle Ages, before the time of the Lombards, the Common Law had grown up and become more or less crystalized. Equity had also established its principles, and no doubt the remedies afforded by these two jurisprudences had been found to be entirely adequate to the needs of those early times. Commerce then was restricted. English sailors and merchants then were few and made but short ventures from home. England was mostly agricultural and pastoral, and had a quick market in the Low Countries and France close at hand. Its manufactures were small and the needs of the people little. The handicraftsman waited for an order before he did a stroke of work. Two or three times a year the farmer deserted his plow and resorted to the fair, and there met the seller of goods and enjoyed a week of boisterous holiday, his shopping being enlivened by carousing and drunken brawls. This was commerce before the discovery of gold in America made men restless and eager for venture, before the springing up of modern trade. In those days creditors undoubtedly had found the Common Law remedies of execution, distraint and the more lately developed "foreign attachment by the custom of London" amply sufficient to protect them from the frauds of debtors. Industrial Society had been in a fixed state. There had been little occasion for one to get largely in debt, and still less opportunity for him to get so without everybody knowing it. There had been little opportunity, for instance, for gathering together a mass of goods, purchased on credit, and then running away with them or their proceeds.

No one could likely have been found who would have been able to buy in bulk and the roads were bad and the tracing of strangers easy. There were no telegraphs to aid in overtaking absconders, to be sure; but, on the other hand, the absconder did not have the railway upon which to whirl out of sight. Troubles between debtor and creditor had been generally individual troubles—no retail merchant had had a multitude of creditors such as bankrupts have to-day; he could not have gotten into that condition. This being so, the Common Law remedy of execution, especially as supplemented in parts of England by the later developed law of foreign attachment, had fulfilled all needs. These remedies were adequate where the contest was simply between two or at most a few individuals, where it was a duel between the debtor and one creditor as a rule, or at most a contest between the debtor and two or three creditors, so to speak; but they became wholly inadequate where many creditors were involved. With the coming, however, of the opportunity and inclination to make commercial ventures and to obtain a stock of goods on hand in ad-

vance of demand and to do business on credit, came also the need for a better means of protecting the common interests of the creditors of the merchant.

The Common Law maxim, "The law favors the diligent creditor," upon which was founded the principle that the creditor making the first seizure by execution or attachment was entitled to precedence to the full amount of his claim over the creditor making the next levy, and so on, was found to work injustice in the new state of commerce where a great body of creditors owed by a single debtor was involved, each having contributed to the common fund and being equitably entitled to share in what was left in proportion to his unpaid for contributions, and a better principle was found in the maxim of equity "Equality is equity," which is the dominant principle of bankruptcy law.

It was, then, the growth of commerce and of trading on credit and the consequent springing up of a community of interest amongst all the creditors of the merchant that made the old remedies of execution and attachment, designed simply for litigation between a few individuals, insufficient and brought about the first English Bankruptcy Act in the reign of King Henry VIII in the year 1542.

(g) **First English Bankruptcy Act, 1542, 34 Henry VIII.**—The first English Bankruptcy Act is instructive to one desiring to acquire a true conception of bankruptcy law of the present time. The following points in it are to be particularly noticed: First, its quaint preamble, which, were all bankruptcies fraudulent, as they happily are not, would furnish a good preamble for a bankruptcy act to-day, so like is the human nature of the days of Henry VIII to that of the twentieth century; next, that the law is framed against debtors and in no way for them, no discharge or release from debts being provided for; next, that it is concerned wholly with fraudulent debtors, not at all with those who are simply unfortunate; and, in truth, as industrial society was then constituted, mere misfortune unconnected with fraud was hardly capable of producing sweeping results; finally that that community of interest amongst creditors which the old Common Law remedies did not contemplate nor provide for, finds expression in the seizure of the bankrupt's property by a common agent acting in behalf of all creditors and by the pro rata distribution amongst them of the proceeds of the bankrupt's goods seized, which are distinguishing features of all true bankruptcy laws.

The text of the law is given below: 34 and 35 Henry VIII, ch. 4 (1542-3):

"An Act against Such Persons as Do Make Bankrupts."

Where (as) divers and sundry persons craftily obtaining into their hands great substance of other men's goods, do suddenly flee to parts
Acts of Bankruptcy. unknown, or keep their houses, not minding to pay or restore to any (of) their creditors, their debts and duties, but at their own wills and pleasures consume the substance obtained, by credit, or

other men, for their own pleasure and delicate living, against all reason, equity and good conscience: Be it enacted by authority of this present parliament, That the lord chancellor of England, or keeper of the great seal, the lord treasurer, the lord president, the lord privy seal, and other of the King's most honorable privy council, the chief justices of either bench for the time being, or three of them at the least, whereof the lord chancellor, or keeper of the great seal, lord treasurer, lord president or the lord privy seal, to be one, upon every complaint made to them in writing by any parties grieved concerning the premises shall have power and authority, by virtue of this Act, to take by their wisdoms and discretions, such orders and directions, as well with the bodies of such offenders aforesaid, wheresoever they may be had, or otherwise, as also with their lands, tenements, fees, annuities and offices, which they have in fee simple, fee tail, term of life, term of years or in the right of their wives, as much as the interest right and title of the same offender shall extend or be and may then lawfully be departed with, by the said offender and also with their money, goods, chattels, wares, merchandises and debts wheresoever they may be found or known. And to cause their said lands, tenements, fees, annuities, offices, goods, chattels, wares, merchandises and debts to be searched, viewed, rented and appraised, and to make sale of the said lands, tenements, fees, annuities and offices, as much as the same offender may then lawfully give, grant or depart with, or otherwise to order the same for true satisfaction and payment of the said creditors: that is to say to every of the said creditors a portion, rate and rate alike, according to the quantity of their debts. And that every direction, order, bargain, sale and other things done by the said lords authorized, as is aforesaid, in writing signed with their hands, by authority of this act, shall be good and effectual in the law to all intents, constructions and purposes against the said offenders, their heirs and executors forever, as though the same order, direction, bargain and sale had been made by the said offender or offenders, as his or their own free will and liberty by writing, indented, enrolled in any the King's Courts of record.

II. And be it also further enacted by the authority aforesaid, That if after any such act or offense committed, and complaint thereof made to the said lords as is aforesaid, any party grieved concerning the premises knowing, supposing or suspecting any of the goods, chattels, wares, merchandises, or debts, of such offender or offenders, to be in custody, use, occupying, keeping, or possession of any person or persons, or any person or persons to be indebted to any such offender or offenders, do make relation thereof to the said lords, to whom authority is given by this present act as is aforesaid, that then the said lords shall by virtue hereof have full power and authority to send for and convent afore them by such process, ways or means, as they shall think convenient by their discretions, all and every such person and persons so known, supposed or suspected, to have any such goods, chattels, wares, merchandises, or debts, in his or their custody, use, occupation, keeping or possession, or supposed or suspected, to be indebted to such offender or offenders; and upon their appearance to examine them and every of them as well by their oaths, as otherwise by such ways and means, as the said lords, by their discretions, shall think meet and convenient for and upon the specialty, certainty, true declaration and knowledge, of all and singular such goods, chattels, wares, merchandises, and debts, of any such of-

fenders as be supposed or suspected to be in his or their custody, use, occupation, or possession, and of all such debts as by them or any of them, shall be supposed or suspected to be owing to any such offender, and if any such person or persons upon such examination do not disclose, plainly declare and show the whole truth of such things as he or they shall be examined of, concerning the premises: then every such person or persons so examined, and not declaring the plain and whole truth concerning the premises upon due proof thereof to be made, before the said lords therefore authorized, as is aforesaid, by witness, examination, or otherwise, as to the same lords shall seem sufficient in that behalf, shall lose and forfeit double the value of all such goods, chattels, wares, merchandises, and debts by them or any of them so concealed and not wholly and plainly declared and shown; which forfeiture shall be levied and recovered by the said lords having authority as is aforesaid, by such ways and means as to them shall seem requisite and convenient. And the same forfeiture to be distributed and employed to and for the satisfaction and payment of the debts of the said creditor or creditors, in such like manner, rate and form as above declared, concerning the ordering of the goods and chattels of the said offenders, keeping their houses, or flying to places unknown, as is aforesaid.

III. And be it also further enacted by the authority aforesaid, That if after any such person or persons shall keep his or their houses, or
Fraudulent Claims. flee to parts unknown, as is aforesaid, any person or persons do fraudulently by covin or collusion, claim or demand any debt, duty or other thing by writing or otherwise, of any such offender or offenders, other than such as he or they can and do prove to be due by right and conscience in form aforesaid, before the said lords having authority by this present act, as is aforesaid, and the same to proceed bona fide, without fraud or covin: that then every such person and persons, so craftily demanding or claiming any such debt, duty or other thing, as is aforesaid, shall forfeit and lose double as much as he or they shall so claim or demand. And the same forfeiture to be levied, recovered and employed, in manner and form as is afore rehearsed.

IV. And be it also further enacted by the authority aforesaid, That if any such person or persons, which shall keep his or their houses, or
Fraudulent Levies and Judgments. flee to parts unknown, as is aforesaid, or intend to delay, or defraud their creditors deceitfully by covin or collusion, suffer or cause any other person or persons, to recover against him or them any debts, goods, chattels, wares or merchandises, without just cause and title so to do, proceeding bona fide, without fraud or covin, that then upon complaint thereof made to the said lords having authority by this present act, as is aforesaid, the same lords shall have power and authority by virtue hereof to convent and call before them the said recoverer or recoverers, and after such fraud, deceit, covin or collusion, shall plainly appear, or be duly proved before the said lords, authorized, as is aforesaid, all the said goods and chattels, of the said offender so recovered, shall be chargeable, employed, ordered and delivered toward the payment of the true and due debts of the said creditor, after the manner, form and rate, as is afore specified, by the discretion of the said lords, having authority by this present act, the aforesaid false and feigned recoveries notwithstanding, so that always such false and feigned recoveries shall not be in force, or any execution thereby had of or upon any goods, chattels, lands, or tenements of any such offender or offenders, until such time as all his or their true and due debts and duties, shall be fully satisfied, contented and paid to his or their creditors. And nevertheless after that

the said true debts and duties, shall be fully satisfied and paid, as is aforesaid as well the body of the said offender, as his lands, tenements, goods and chattels, shall be charged and liable to the execution of the said recovery according to the tenor, force, and effect of the same.

V. And be it also enacted by the same authority, That if any such person or persons which shall be indebted, do withdraw himself out of this realm, and other the King's dominions, into any foreign realm, or country, to the intent thereby to abide and remain,

Absconding Bankrupts Outlawed. in defraud of his creditors: that then upon complaint in writing concerning the premises thereof made to the said lords having authority, as is aforesaid, the same lords shall by virtue and authority of this present act, have full power and authority to award proclamations to be made in such places as to them shall be thought meet and convenient, commanding by the same such offender in the King our sovereign lord's name, to return with all convenient speed into this realm, and to yield his body before the said lords, having authority as is aforesaid, or one of them. And if the said person within three months next after he shall have knowledge of such proclamation, or as soon after as he conveniently may, do not repair, and yield his body as is aforesaid, that then the body of all and every such offender and offenders shall be judged, taken and deemed to all intents and purposes out of the King's protection, and that also all goods, chattels, lands, tenements and debts of every such offender shall be by the order and discretion of the said lords employed and distributed amongst his creditors equally and indifferently rate for rate, in like manner and form as is afore declared. And that also every person or persons that shall willingly help to aid, embezzel or convey any such person or persons,

Punishment of Accomplices as Effecting Fraudulent Removals, etc.

their said goods, chattels, wares, or merchandises out of this realm, and other the King's dominions, into any foreign realm or place, knowing the said person or persons to depart or withdraw themselves, or convey their said goods, chattels, wares, and merchandises for the cause and intent aforesaid, shall suffer such pains by imprisonment of their bodies, or pay such fine to our sovereign lord the King, his heirs or successors, as to the said lords having authority by virtue of this present act, shall seem meet and convenient for their said offence or offences.

VI. Provided always, and be it enacted by the authority aforesaid, That if the creditors of any such offender or offenders, which shall

No Discharge from Unpaid Debts.

keep his or their house or houses, or which shall absent or withdraw themselves into places unknown, for the cause aforesaid, be not fully satisfied and paid or otherwise contented for their debts and duties by the ways and means afore specified and declared, that then the said creditor and creditors, and every of them, shall and may have their remedy for the recovery and levying of the residue of the same debts or duties, whereof they shall not be fully satisfied and paid, or otherwise contented in form aforesaid against the said offender or offenders, in like manner and form as they should or might have had, before the making of this act, and that the said creditor and creditors, and every of them, shall be only barred and excluded by virtue of this act, of and for all and every such part and portion of the said debts and duties, as shall be paid, satisfied, distributed, or delivered unto him or them by the said lords having authority as is aforesaid, and of no more portion or parcel thereof, anything herein specified that may be taken or construed to the contrary notwithstanding.

(h) **Acts of 13 Eliz. 1570 and of 1 and 23 James I.**—Twenty-eight years after the statute of Henry VIII was passed, Queen Elizabeth's parliament, in 1570, passed the second English bankruptcy law. Its preamble sets forth,

"Forasmuch as notwithstanding the statute made against bankrupts in the thirty-fourth year of the reign of our late sovereign lord King Henry the Eighth, those kind of persons have and do still increase into great excessive numbers and are like more to do if some better provision be not made for the repression of them and for a plain declaration to be made and set forth who is and ought to be taken and deemed for a bankrupt: Therefore, be it enacted, etc."

The statute goes on to limit its provisions as to who may be declared bankrupt to the classes of traders, merchants and dealers in money; and to declare what offenses should be sufficient to constitute the fraudulent debtor a bankrupt—for the law was still treating bankruptcy as a crime and the bankrupt as a criminal and none of the acts prohibited were sufficient to make one guilty of bankruptcy unless they were done with intent to hinder or defraud creditors. These "offenses" constituted what would now be denominated acts of bankruptcy and were five in number; thus, the body and property of the debtor were declared to be subject to seizure as a bankrupt's, if with intent to defraud or hinder creditors, first, the debtor should have departed the realm; or second, have kept to his house or absented himself; or third, have taken sanctuary; or fourth, have suffered himself collusively to be arrested for a fictitious debt; or fifth, have suffered himself to be outlawed, etc.

This law of Queen Elizabeth, then, in general simply amplified and made more definite the law of King Henry VIII, but in doing so it made a statute containing almost all the essential features of the bankruptcy law of the present day, excepting that it did not grant discharge to bankrupts and did not prohibit preferences amongst creditors and did not allow debtors voluntarily to go into bankruptcy. By the law of Elizabeth the operation of bankruptcy law was confined to merchants, brokers and traders, which limitation continued in all succeeding bankruptcy acts both in England and the United States until about the middle of the nineteenth century; the kinds of fraudulent acts that should be held sufficient to make one a bankrupt were defined; the recovery from third persons of property fraudulently conveyed to them by the debtor on the eve of his bankruptcy, was provided for; the provisions of the former law for bringing in and examining witnesses touching the bankrupt's property were amplified; the former rule for distributing the bankrupt's assets pro rata amongst his creditors was preserved.

In this law of Elizabeth, as in fact in all these laws until the reign of Queen Anne, nearly two hundred years after the first bankruptcy law of King Henry VIII, there was no provision whatsoever for discharging the bankrupt from his remaining debts. On the contrary, each law contained

express provision that his remaining debts should not be construed to be released notwithstanding all his assets may have been divided up ratably amongst his creditors; and in addition, the law of Elizabeth expressly provided that if the bankrupt should afterwards acquire any new property, the right to it should immediately vest in all his creditors, both old and new, and that it should be administered by the bankruptcy commissioners as part of the bankruptcy estate, no matter how long a time meanwhile might have elapsed.

One could, with considerable interest and not a little profit, follow along the years after these first bankruptcy acts in the study of the development of bankruptcy law as it progressed in the successive enactments made from time to time in the reigns of the subsequent English sovereigns, but space will permit only the briefest reference to them. In the reign of Elizabeth's successor, James I, the law was twice changed, in the first James I, ch. 15, and 21st James I, ch. 19. Then there was a long period during the strenuous times of the English contests with the Stuart dynasty—Cromwell's time and until the Restoration—that the laws against those "who do make bankrupt" were left untouched.

(i) **Queen Anne's Act, 1705, and First Provision for Discharge of Bankrupt.**—In the eighteenth century bankruptcy law was again modified, the principal change to note being that, by the statute of Queen Anne, passed in 1705, known as 4th Anne, ch. 17, the prominence of the criminal idea was taken away and for the first time a discharge was granted to the bankrupt from his remaining debts, if he had surrendered all his assets and made full disclosure to his creditors. The first provision in modern bankruptcy law for the discharge of the debtor is as follows:

"And be it further enacted that all and every person and persons so becoming bankrupt as aforesaid, who shall, within the time limited by this act, surrender him, her or themselves—and in all things conform as in any by this act is directed—shall be discharged from all debts by him, her or them due and owing at the time that he, she or they did become bankrupt."

Later on at various times were added further qualifications upon the right to a discharge from debts, amongst others that the bankrupt's assets should equal a certain percentage of his debts, that a certain per cent. of his creditors should assent to his discharge, etc., etc., although it would seem to have been a sufficiently rigid requirement that the bankrupt should in all things have conformed to the many different provisions of the law in order to be entitled to discharge.

(j) **Bankruptcy Law at Time of American Revolution.**—With these preliminary discussions one is placed in a position to summarize impressions and to understand what was meant by bankruptcy law at the time our forefathers severed the Colonies from the Mother Country and went on making laws of their own. Bankruptcy law at that time, it is evident, was a law directed towards furnishing a better protection to cred-

itors against the devices of dishonest debtors than was afforded by the Common Law with its more limited remedies of execution and attachment, and only incidentally granted a discharge to such bankrupts as conformed fully to its requirements.

As it then was constituted, it might have been defined as a law devised for seizing the person and property of fraudulent and dishonest debtors, for punishing them for their frauds and for distributing their effects ratably amongst their creditors, and, if their assets reached a certain percentage of their debts, of granting them a discharge from the remainder of their debts. It had quite as ample provisions for making searching examination of the bankrupt and of witnesses as there are in the bankruptcy laws of to-day. However, at least one of the distinguishing features of bankruptcy law as it is constituted at the present time, namely, voluntary bankruptcy, was wholly lacking and contrary to the theory of the early law, and this definition therefore will not suffice for bankruptcy law of the present time. At the time of our separation from England, English bankruptcy law did not allow a debtor to go voluntarily into bankruptcy as at present—voluntary bankruptcy, indeed, would have been quite foreign to the purpose and idea that the bankrupt was an escaping offender with creditors in hot pursuit. On the other hand, it exempted from its operation everybody except traders, brokers and merchants—in general, those dealing in money and in buying and selling—they alone could be declared guilty of the offense of bankruptcy, whilst nowadays anybody (except under the law of 1898 a corporation) may go voluntarily into bankruptcy although there do remain still some restrictions as to those who may be forced into bankruptcy. Lastly, the provisions of the present law avoiding preferential payments to creditors received with notice did not then exist. A fraudulent conveyance, to be sure, even then could be set aside, but the mere paying by an insolvent debtor of one creditor, on an honest debt, without the paying of a like proportion to his other creditors, which is what is meant by a preference, was not the subject of any special provisions of bankruptcy law even if the creditor knew it was a preference at the time he took it, the bankrupt's creditors being relegated to the Common Law for their only remedies for recovering property from third persons. Such were the outlines and such the theory of English bankruptcy law at the time the Colonies separated from their mother country. It will be found, indeed, that these same ideas prevailed in the first bankruptcy law enacted in the United States.

By the Constitution the right to regulate and control bankruptcies was given over to the Federal Government, the framers of the Constitution appreciating the wisdom of uniform rules in matters of bankruptcies precisely as in other matters relating to commerce.

(k) **First Bankruptcy Act of United States, 1800.**—The first bankruptcy law of the United States was passed in 1800, during the ad-

ministration of John Adams. It followed in its main features and even in its wording the English bankruptcy laws, and was essentially a law *against* debtors, framed along the lines of suppressing fraudulent and criminal practices rather than along the lines of providing a general system for the rational and equitable administration of insolvent estates, no provision at all being made for one voluntarily to become a bankrupt, the distinguishing feature of the later bankruptcy laws, without which a bankruptcy law can not be said to have arrived at the full stature of a general system of administering insolvent estates which it is at present. Indeed, like the laws that had gone before it in England, its operation even adversely was limited, only traders, merchants, underwriters and brokers being within its purview.

This law was a tentative exercise of federal power over the subject of bankruptcies, being limited by its own terms to five years, but it was even shorter lived than that, being repealed in less than four years, in 1803. The people of the United States had not awakened to the realization that they had formed a nation, and in general they resented federal laws. Moreover, this law came at about the same time the hated Alien and Sedition Laws were creating such an upheaval in American politics and it fell under the same ban of popular opposition. It seemed to the people of those days that the federal government was drawing around the necks of the people the cords of a strongly centralized and domineering government. By the Alien Act, the Federal Government, they thought, had been assuming arbitrary and despotic power and by the Sedition Act been attempting to muzzle free speech, and now, by the Bankruptcy Act, it was still further drawing to itself power, assuming the pursuit of debtors and obliging creditors to resort to federal courts to litigate their rights. Instead of a court close at hand, to which suitors had always been accustomed, now, by this new and much distrusted law they must travel great distances to the federal courts and bring themselves and witnesses there at a great loss of time and money; and naturally they resented the law; and it went down in the general revolt that found expression in Jefferson's election; and for nearly forty years, that is to say until 1841, when the Whigs came into power, there was no national bankruptcy law in the United States and the permissive power of Congress over the "subject of bankruptcies" was not exercised, but was left in abeyance.

(1) **Act of 1841.**—In 1841 was passed the second national bankruptcy law of the United States. Although this law, like its remote predecessor of 1800 was short lived, being repealed within two or three years, for political reasons, this being the most heated period of the States' Rights controversy, yet the law itself was a most admirable one and was the first law on the subject of bankruptcies constructed on broad lines. It was the first American law that wholly abandoned the original idea that bankruptcy law was a law only to be invoked by creditors. In this law ap-

peared all the essential elements of a true bankruptcy law. It provided a general system for administering all insolvent estates of living persons except those under guardianship, by its provisions for the first time debtors being allowed voluntarily to bring their estates into the bankruptcy courts for equitable distribution and its operation no longer being confined to merchants and those who dealt in money. To be sure it also provided, like all its predecessors, for the punishment of offenders, but it recognized on the other hand the justice of granting to the honest debtor who had surrendered all his assets and truthfully revealed all facts in relation thereto and had aided his creditors in realizing as much as possible from the estate, a discharge and release from his remaining debts—the justice of lifting from his shoulders the burden of hopeless debt, that otherwise would have obliged him either to abandon all business enterprise or else to do business under cover of another's name. This law of 1841 contained ample provision for the seizure of property; for its sale and equitable distribution amongst creditors; for the recovery of property fraudulently conveyed and also for that conveyed by way of preference in the payment of one creditor over others; it also contained the usual provisions found in bankruptcy law for bringing witnesses into court and obliging them to submit themselves to examination on the general subjects of the bankrupt's business and behavior. However, it must be conceded that whilst the law was a great advance over all its predecessors in most particulars yet it had certain serious defects that undoubtedly hastened its fall. Among the faults that hindered it from being an ideal system for the United States, was that its courts were long distances apart, were not close to the people. It would be admittedly a great hardship to-day, in this period of quick and cheap travel, were creditors all over an entire district obliged to take train and come to the United States Judge every time they needed to appear in the Bankruptcy Court against, perhaps, a neighbor of their own town. How much more burdensome, then, must it have been, to have had to resort to the United States Judges in those days of stage coaches and bad roads!

It was nearly another quarter of a century after the repeal of the law of 1841 before the next national bankruptcy act of the United States was passed, the last before our present one.

(m) **Act of 1867.**—In 1867 was passed the third bankruptcy act of the United States. This law remained in force for eleven years, being repealed in 1878. •

By a review of some of the causes that brought about this repeal light may be thrown upon certain parts of the present law wherein it was attempted to rectify the defects of the former law.

By the law of 1867, in the first place, it was too easy to throw a debtor into bankruptcy and too hard for him to obtain his discharge after he once became bankrupt, there were so many grounds named in the Act for

declaring a debtor bankrupt, and so many for preventing his discharge. The present law sought to avoid these defects by limiting the number and nature of the acts of bankruptcy and grounds of opposition to discharge; and also in another way, by changing the definition of insolvency. The usual definition of insolvency is the inability of a debtor to meet his obligations as they mature in the due course of business. Now, according to that definition, in times of panic when money is scarce, everyone, almost, would be insolvent and the possible consequences of such holding would be that creditors would be enabled to throw many debtors into bankruptcy most unjustly; such, indeed, was found to be the result of the operation of the law of 1867, and the complaints were justifiable. In avoiding such consequences, the framers of the present law made a different definition of insolvency, and one corresponding more closely to its true meaning, namely, that a debtor should not be held to be insolvent, unless his assets, at a fair valuation, should be found to be less than his liabilities. Upon reflection it will be seen that this change in the meaning of insolvency obviates many of the faults of the law of 1867.

Other causes contributing to the downfall of the law of 1867 were the distance of the courts from the people, the same fault found in all the preceding laws in this country; and the excessive fees allowed to the officers of the court and attorneys practicing in bankruptcy.

In *re Wells*, 8 A. B. R. 75, 114 Fed. 222 (D. C. Mo. 1902): "The Act of 1867 carried with it many evils, real or supposed. One of such evils was its oppressive and expensive features. The estates were eaten up by a most vicious fee system. The litigation was all, or practically all, in the Federal Courts, generally sitting at a great distance from the debtor, the claimant and the witnesses. It was the purpose of the present statute to correct this and limit the fees and expenses, and have the greater part of the litigation where the parties resided."

The law of 1898 was framed with special view to the avoidance of these faults.

Thus, the fault of extravagance of administration has been guarded against by stringent provisions limiting the compensation of the officers of the court to exceedingly low rates of commission and prohibiting any extra or other compensation to them "under any form or guise whatsoever;" also by strict prohibition of unnecessary appointments of receivers, requiring that they be appointed only when it is "absolutely necessary" to do so for the preservation of the estate; the appointment of receivers being discouraged whenever resort to injunction will suffice. Indeed, the whole spirit of the Act of 1898 breathes economy in administration and makes of this law a peculiarly business law.

The fault of distance of the bankruptcy courts from the people which was so serious a defect in the administration of all former bankruptcy laws of the United States has been guarded against by providing that there shall be at least one referee (the judicial officer who constitutes practically the

bankruptcy "court"), for each county, thus bringing the bankruptcy court home to the people and making of it quite as much a "people's court" as is their own county probate or insolvency court.

(n) **Meaning and Idea of Bankruptcy Law To-Day.**—This somewhat extended review of the origin and history of the Bankruptcy Laws of the past from which the present system of bankruptcy law has sprung, places one in a position more intelligently to define the idea of bankruptcy law as it exists to-day in the United States, not meaning by this that the definition so arrived at would have been a proper one at all stages of history; for, as already noted, the idea and objects of bankruptcy law have undergone considerable development and change since the time the first harsh statutes of England were passed to repress and suppress the "offense," as it was then considered to be, of bankruptcy and to punish the offender.

Justice Miller, in *Wilson v. City Bank*, 17 Wall (U. S.) 473, says: "The primary object of a bankruptcy law is to secure a just distribution of the bankrupt's property among his creditors: the secondary object is the release of the bankrupt from the obligation to pay his debts."

United States District Judge Ray, who was a member of the Judiciary Committee of the House of Representatives that passed the Act of 1898, and was chairman of the Judiciary Committee that secured the passage of the Amendment in 1903, and is one thoroughly familiar with the spirit of the Bankruptcy Law of 1898 says, in rendering his opinion in *In re Leslie* found in 9 Amer. B. R. on page 567.

"The main purpose of the bankruptcy law is to prevent preferences and secure a fair and equitable division of the bankrupt estate among the creditors, not to grant discharges. This end accomplished, the bankrupt is granted a discharge from all his debts."

As bankruptcy jurisprudence now stands in the United States, then, it may be said to be a system of laws for the taking possession of the assets of an insolvent, either upon his own initiative or in case he has done certain acts called acts of bankruptcy, considered to demonstrate his unworthiness or incapacity properly to continue his business, upon the initiative of his creditors; for recovering such of his assets as have been transferred fraudulently to third parties or unfairly to particular preferred creditors or have been seized by creditors while the debtor was insolvent; for selling the assets and distributing the proceeds equitably amongst his creditors; and finally for granting to him, in case he has surrendered all his assets and disclosed to his creditors in bankruptcy the truth about his business, a discharge from the unpaid deficit of his debts.

It will at once be seen that a law concerned with such broad objects must be far reaching in its administration.

When Congress passed the law of 1898 the people in general little comprehended the magnitude of the work done. Its passage was secured

chiefly because of its one feature, the release of debts. A great multitude of victims of years of industrial depression were lying stranded on the rocks of hopeless debt. These debtors were skulking along the streets hardly daring to lift their eyes to passers by lest they might remind some creditor of an almost forgotten if not forgiven debt. Either so or the debtor was doing business under the name of his wife or other relative, or as "agent" or "trustee," as he would variously style himself; everybody understanding the real situation except perhaps the courts themselves, whose rules of evidence obliged them oftentimes to find that an experienced business man was merely agent or trustee for a wife who owned nothing originally and hardly knew where the place of business she was made to say she now owned was located, and generally knew nothing in particular about it. But this was the natural result of the barbarism of a country that had no bankruptcy system and these debtors, living their lives of falsehood and pretense, were the legitimate fruits of lack of civilization. These were probably the most potent arguments in securing the passage of the present bankruptcy act; but, after all, the scope of the work done was infinitely broader.

By this law Congress superimposed upon the forty-five widely varying systems of commercial law of the different states, one vast, uniform system of jurisprudence governing the dealings of men with one another in every part of the country, and in their most minute ramifications. Be it in Texas, Oregon, Missouri, Maine or Pennsylvania, almost every commercial transaction is conducted with an eye to the effect of the bankruptcy law upon it. If one or the other of those dealing becomes later a bankrupt, at once the provisions of this law must be searched to ascertain the rights of those involved. If neither party becomes bankrupt, yet if the property involved may have come from some bankrupt before his bankruptcy still the law may be operative. And when it is considered that the great bulk of commercial law practice is taken up with questions that only arise when one or the other of the parties has become insolvent it is then realized how vast the effect of bankruptcy law must be upon commercial transactions and the practice of commercial law. Attachments, executions, receiverships, assignments, fraudulent conveyances—these are the leading topics under commercial law practice and yet not one of them becomes of any importance unless the debtor be an insolvent or unless insolvency somewhere exist along the line.

By this law also the opportunity for one creditor to obtain a preference out of the insolvent estate over other creditors is prevented. The condition of affairs that existed when there was no bankruptcy law preventing preferences is well remembered. Those were days when the law of the survival of the fittest had unrestrained operation. No confidences were possible between a debtor and his creditors. The debtor who found his affairs getting into bad shape dared not breathe a word of his condition to any creditor, lest such a one would become alarmed and come down

upon him with the sheriff. Nor did one creditor dare confer with another about their common debtor's affairs lest the other creditor take immediate action and get ahead of him.

There were no mutual confidences possible, for it was the reign of the old common law whose fundamental maxim, translated into popular language, is "first come, first served." The maxim "The law favors the diligent creditor" too often came to mean "the law favors the favorite creditor," the wife or other relative or some powerful commercial house or bank which was carrying a cognovit note or chattel mortgage for ready levy or for the taking of quick possession.

The commercial world was given over to the unrestrained rule of the "survival of the fittest."

At the hint of coming insolvency began a frantic race for priority. More than likely the debtor himself would already have given a chattel mortgage to some favored creditor or relative and in addition have made an assignment to his own attorney. An attorney specially skilled in such manipulations, would send his clerk to file the mortgage or deed that was the usual incident to the debtor's failure, with instructions to apprise him the moment the filing was done so that immediately thereafter a deed of assignment might be filed. Whilst all this was going on, creditors on their part, would be hurrying out legal papers, one for the appointment of a receiver, another for an execution and so forth.

Those were strenuous times, indeed, when lawyers stayed up all night preparing papers and when sheriffs made levies at midnight—oftentimes to find a receiver or assignee already in charge.

By the passage of the bankruptcy act, preventing preferences amongst creditors, annulling seizures by legal process within four months of bankruptcy, and granting discharge to bankrupts, all this has been changed. Under the protection of the bankruptcy act, a debtor may now be candid with his creditors and may call them in and frankly relate to them his troubles. They, on their part, may deliberate among themselves and devise the best means for mutual benefit. No one can obtain an advantage over his neighbor, for preferences and seizures by legal process on the eve of insolvency are forbidden, and nullified, and the debtor, on his part, has nothing to fear from his own candor—at worst, having merely to surrender his assets for equal distribution, but, in doing so, running little risk of spending his remaining days under the yoke of debt; and these collateral benefits of the act are recognized among business men as affording great possibilities of future development most advantageous to the amicable adjustment of the affairs of failing debtors.

Such is the bankruptcy law of the present time, its object, history and place in jurisprudence, far reaching in its results, intimately bound up with the every day affairs of business life, humane and beneficent, just and efficient in its rules, one of the steps toward a higher civilization and better justice.

PART I.

CONSTITUTIONALITY, GENERAL NATURE AND CONSTRUCTION OF THE ACT
OF 1898; AND JURISDICTION TO ADJUDGE BANKRUPT.

CHAPTER I.

CONSTITUTIONALITY OF THE ACT.

Synopsis of Chapter.

- § 1. Power to Enact Bankruptcy Laws.
- § 2. Constitutional Requirements—"Uniformity" and on "Subject of Bankruptcies."
- § 3. "Uniformity" Geographical, Not Personal.
- § 4. Distinctions between Persons, Not Lack of "Uniformity."
- § 5. Recognition of Diverse Exemption Laws and Priority Laws, Not Lack of "Uniformity."
- § 6. State Law Governing Title, Not Lack of "Uniformity."
- § 7. "Subject of Bankruptcies" Not Necessarily Entire nor Confined to Original "Subject."
- § 8. Operating on Others than "Traders", Not Outside of "Subject."
- § 9. "Voluntary Bankruptcies," Not Outside of "Subject."
- § 10. Dealing with One Part Only of "Subject."
- § 11. Do Not Delegate Legislative Power.
- § 12. Do Not Violate Constitutional Guaranty of "Due Process."
- § 13. Do Not Impair Obligation of Contracts.
- § 14. May Impose Enforcement on State Courts.

§ 1. **Power to Enact Bankruptcy Laws.**—The only power Congress has to pass a national bankruptcy law must, of course, be found conferred in some clause of the constitution. This power is expressly granted in § 8 of Article 1 of the Constitution in the following words: "Congress shall have power to establish * * * uniform laws on the subject of bankruptcies throughout the United States."

§ 2. **Constitutional Requirements—"Uniformity" and on "Subject of Bankruptcies."**—The law so established must be uniform throughout the United States;¹ and be upon the "Subject" of bankruptcies.²

§ 3. **"Uniformity" Geographical, Not Personal.**—That is to say, the law must operate everywhere in the United States precisely alike, but it need not operate precisely alike upon all classes of people nor in all States upon the same kinds of property, provided in all States it operates alike on all persons of the same class and on all property seizable by creditors under their respective State laws.³

1. *Hanover Nat'l Bk. v. Moyses*, 8 A. B. R. 1, 186 U. S. 181; *Leidigh Carriage Co. v. Stengel*, 2 A. B. R. 383, 95 Fed. 637 (C. C. A. Ohio); *Obiter, Singer v. Nat'l Bedstead Mfg. Co.*, 11 A. B. R. 276 (N. J. Ch.); *Obiter, Hargardine-McKittrick Co. v. Hudson*, 10 A. B. R. 225, 122 Fed. 232 (C. C. A. Mo.).

2. *Singer v. Nat'l Bedstead Co.*, 11 A. B. R. 276 (N. J. Ch.).

3. *Hanover Nat'l Bk. v. Moyses*, 8 A. B. R. 1, 186 U. S. 181; *Leidigh Carriage Co. v. Stengel*, 2 A. B. R. 383, 95 Fed. 637 (C. C. A. Ohio); *Obiter, Singer v. Nat'l Bedstead Mfg. Co.*, 11 A. B. R. 276 (N. J. Ch.).

§ 4. Distinctions between Persons, Not Lack of "Uniformity."—The law is not unconstitutional because of its making distinctions between artificial and natural persons, nor between classes of artificial persons.³

§ 5. Recognition of Diverse Exemption Laws and Priority Laws, Not Lack of "Uniformity."—Nor is it unconstitutional because of its recognizing diverse exemption laws.

Thus, in one State the exemptions are different from those in another State and the trustee takes different classes of property, yet the law is uniform because in each State it gives to creditors at least all that in such State would belong to them without bankruptcy law.⁴

Hanover Nat'l Bank v. Moyses, 8 A. B. R. 1, 186 U. S. 181: "It was many times ruled (under the law of 1867) that this provision was not in derogation of the limitation of uniformity because all contracts were made with reference to existing laws, and no creditor could recover more from his debtor than the unexempted part of his assets. Mr. Justice Miller concurred in an opinion to that effect in the case of *Beckerford*, 1 Dill. 45.

"Mr. Chief Justice Waite expressed the same opinion in *In re Deckert*, 2 Hughes 183. The chief justice there said: 'The power to except, from the operation of the law, property liable to execution under the exemption laws of the several States, as they were actually enforced, was at one time questioned, upon the ground that it was a violation of the constitutional requirement of uniformity, but it has thus far been sustained, for the reason that it was made a rule of the law to subject to the payment of debts under its operation only such property as could by judicial process be made available for the same purpose. This is not unjust, as every debt is contracted with reference to the rights of the parties thereto under existing exemption laws, and no creditor can reasonably complain if he gets his full share of all that the law, for the time being, places at the disposal of creditors. One of the effects of a bankrupt law is that of a general execution issued in favor of all the creditors of the bankrupt, reaching all his property subject to levy, and applying it to the payment of all his debts according to their respective priorities. It is quite proper, therefore, to confine its operation to such property as other legal process could reach. A rule which operates to this effect throughout the United States is uniform within the meaning of that term, as used in the Constitution.'

"We concur in this view, and hold that the system is, in the constitutional sense, uniform throughout the United States, when the trustee takes in each State whatever would have been available to the creditors if the Bankrupt Law had not been passed. The general operation of the law is uniform although it may result in certain particulars differently in different States."

Nor is it lacking in "uniformity" because of its recognizing the various orders of priority of debts of the state law, under § 64 (b) (5).⁵

§ 6. State Law Governing Title, Not Lack of "Uniformity."—Nor because the title to property is to be governed by the state law except where the peculiar provisions of the bankruptcy law itself confer title.

3. *Leidigh Carriage Co. v. Stengel*, 2 A. B. R. 383, 95 Fed. 637 (C. C. A. Ohio).

4. *In re Rouse, Hazard & Co.*, 1 A. B. R. 240, 91 Fed. 96 (C. C. A. Wis.).

5. *In re Rouse, Hazard & Co.*, 1 A. B. R. 240, 91 Fed. 96 (C. C. A. Wis.).

Property that will pass to the trustee in one State will not, because of diversity of laws, pass to him in another State; as, for instance, unrecorded conditional sales contracts are void as to creditors in some States and the property covered by them passes to the trustee; in other States they are not void and the same class of property does not pass; yet the law operates uniformly because the creditors still get all the property they would have had had there been no bankruptcy law.⁶

§ 7. "Subject of Bankruptcies" Not Necessarily Entire nor Confined to Original "Subject."—The "subject of bankruptcies" to which the constitution refers is confined to that general "subject" as recognized in the jurisprudence of England and America at the time of the adoption of the constitution.

Obiter, Singer v. Nat'l Bedstead Mfg. Co., 11 A. B. R. 276 (N. J. Ch.): "Of course, Congress cannot extend its power to pass laws on the 'subject of bankruptcy' by merely giving names to laws or by arbitrarily defining certain conduct of natural persons or corporations as acts of bankruptcy. Congress is confined to the 'subject of bankruptcy' as that subject was recognized in 1787."

Nevertheless the laws so established are not confined in their operation to the same class of persons nor the same methods of procedure prevailing on the subject of bankruptcies "when the constitution was adopted."

§ 8. Operating on Others than "Traders", Not Outside of "Subject."—Thus the law is not unconstitutional because of its operating on others than traders, although bankruptcy law, at the time the Constitution was created, was confined exclusively to traders and was supposed to be peculiarly applicable to them.

Hanover Nat'l Bk. v. Moyses, 8 A. B. R. 1, 186 U. S. 181: "Mr. Chief Justice Fuller delivered the opinion of the court: By the fourth clause of section eight of article 1 of the Constitution the power is vested in Congress 'to establish * * * uniform laws on the subject of bankruptcies throughout the United States.' This power was first exercised in 1800. 2 Stat. 19, ch. 19. In 1803 that law was repealed. 2 Stat. 248, ch. 6. In 1841 it was again exercised by an act which was repealed in 1843. 5 Stat. 440, ch. 9; 5 Stat. 614, ch. 842. It was again exercised in 1867 by an act which, after being several times amended, was finally repealed in 1878. 14 Stat. 517, ch. 176; 20 Stat. 99, ch. 160. And on July 1, 1898, the present act was approved.

"The act of 1800 applied to 'any merchant, or other person, residing within the United States, actually using the trade of merchandise, by buying or selling in gross, or by retail, or dealing in exchange, or as a banker, broker, factor, underwriter, or marine insurer,' and to involuntary bankruptcy.

"In *Adams v. Storey*, 1 Paine 79, Mr. Justice Livingston said on circuit: 'So exclusively have bankrupt laws operated on traders that it may well be doubted whether an act of Congress subjecting to such a law every description of persons within the United States, would comport with the spirit of the powers vested in them in relation to this subject.' But this doubt was resolved otherwise, and the acts of 1841 and 1867 extended to persons other than merchants

⁶ *Hanover Nat'l Bk. v. Moyses*, 8 A. B. R. 1, 186 U. S. 181, quoted, ante § 5.

or traders, and provided for voluntary proceedings on the part of the debtor, as does the act of 1898.

"It is true that from the first bankrupt act passed in England, 34 & 35 Hen. VIII., ch. 4, to the days of Queen Victoria, the English bankrupt acts applied only to traders, but, as Mr. Justice Story, in his Commentaries on the Constitution, pointed out, 'this is a mere matter of policy, and by no means enters into the nature of such laws. There is nothing in the nature or reason of such laws to prevent them being applied to any other class of unfortunate and meritorious debtors.' Section 1113. * * *

"*Sturges v. Crowninshield*, 4 Wheat. 122, 195, was cited, where Chief Justice Marshall said: 'The Bankrupt Law is said to grow out of the exigencies of commerce, and to be applicable solely to traders; but it is not easy to say who must be excluded from, or may be included within, this description. It is like every other part of the subject, one on which the legislature may exercise an extensive discretion. This difficulty of discriminating with any accuracy between insolvent and bankrupt laws, would lead to the opinion that a bankrupt law may contain those regulations which are generally found in insolvent laws; and that an insolvent law may contain those which are common to a bankrupt law.'

"In the case, *In re Klien*, decided in the Circuit Court for the District of Missouri, and reported in a note to *Nelson v. Carland*, 1 How. 265, 277, Mr. Justice Catron held the Bankrupt Act of 1841 to be constitutional, although it was not restricted to traders, and allowed the debtor to avail himself of the act on his own petition, differing in these particulars from the English acts. He said among other things: 'In considering the question before me, I have not pretended to give a definition; but purposely avoided any attempt to define the mere word "bankruptcy." It is employed in the Constitution in the plural, and as part of an expression; "the subject of bankruptcies." The ideas attached to the word in this connection, are numerous and complicated; they form a subject of extensive and complicated legislation; of this subject, Congress has general jurisdiction; and the true inquiry is—to what limits is that jurisdiction restricted? I hold, it extends to all cases where the law causes to be distributed the property of the debtor among his creditors; this is its least limit. Its greatest, is the discharge of a debtor from his contract. And all intermediate legislation, affecting substance and form, but tending to further the great end of the subject—distribution and discharge—are in the competency and discretion of Congress. With the policy of a law, letting in all classes, others as well as traders; and permitting the bankrupt to come in voluntarily, and be discharged without the consent of his creditors, the courts have no concern; it belongs to the lawmakers.'

"Similar views were expressed under the act of 1867, by Mr. Justice Blatchford, then district judge, in *In re Reiman*, 7 Ben. 455; by Deady, J., in *In re Silverman*, 1 Sawy. 410; by Hoffman, J., in *In re California Pacific Railroad Co.*, 3 Sawy. 240; and in *Kunzler v. Kohaus*, 5 Hill. 317, by Cowen, J., in respect of the act of 1841, in which Mr. Justice Nelson, then chief justice of New York, concurred. The conclusion that an act of Congress establishing a uniform system of bankruptcy throughout the United States, is constitutional, although providing that others than traders may be adjudged bankrupts, and that this may be done on voluntary petitions, is really not open to discussion.

"The framers of the Constitution were familiar with Blackstone's Commentaries, and with the bankrupt laws of England, yet they granted plenary power to Congress over the whole subject of 'bankruptcies,' and did not limit it by the language used. This is illustrated by Mr. Sherman's observation in the Convention, that 'bankruptcies were, in some cases, punishable with death by the laws of England, and he did not choose to grant a power by which that

might be done here;' and the rejoinder of Gouverneur Morris, that 'this was an extensive and delicate subject. He would agree to it, because he saw no danger of abuse of the power by the legislature of the United States.' Madison Papers, 5 Elliot 504; 2 Bancroft 204. And also to some extent by the amendment proposed by New York, 'that the power of Congress to pass uniform laws concerning bankruptcy shall only extend to merchants and other traders; and the States, respectively, may pass laws for the relief of other insolvent debtors.' 1 Elliot 330. See, also, Mr. Pinkney's original proposition, 5 Elliot 488; the report of the committee thereon, 5 Elliot 503; and the Federalist, No. 42, Ford's Ed. 279."

Compare, *Leidigh Carriage Co. v. Stengel*, 2 A. B. R. 383, 95 Fed. 637 (C. C. A. Ohio): "The history of the bankrupt laws in England shows that a bankrupt law, when our constitution was adopted, which applied to all members of the community alike, would have been a great anomaly. The first Bankrupt Act passed in England was St. 34 & 35, Hen. VIII, ch. 4, 'against such as do make bankrupt.' The provisions of this act were extended and expanded by Act 13, Eliz., ch. 7; by Act 21, Jac. I, ch. 19; by Act 7, Geo. I, ch. 31; by Act 5, Geo. II, ch. 30; by Act 46, Geo. III, ch. 135; by Act 6, Geo. IV, ch. 16; and by Act 1 & 2, Wm. IV, ch. 56. From the days of Henry VIII to the days of Victoria, the English bankruptcy acts applied only to traders, and it was not until the Act of 1861 that the bankruptcy extended to nontraders. The United States Bankruptcy Law of 1800, the first bankrupt law passed after the constitution was adopted, was an involuntary law, and applied only to traders, bankers, brokers, and underwriters. 2 Stat. 19, § 1.

"The question of the classes of persons to be affected by the Bankrupt Law is one largely, if not wholly, within the discretion of Congress. Chief Justice Marshall said in *Sturges v. Crowninshield*, 4 Wheat. 122, 194: 'The Bankrupt Law is said to grow out of the exigencies of commerce, and to be applicable solely to traders; but it is not easy to say who must be excluded from, or may be included in, this description. It is, like every other part of the subject, one on which the Legislature may exercise an extensive discretion.' * * * Certainly it cannot be said that, in enacting the present law, Congress has passed the limits of such discretion. The proper purposes of a bankruptcy act like the present are: First (and this was its original purpose), to enable creditors to protect themselves by summary process against the frauds of their debtors in evading the payment of debts; second, to distribute the assets of the debtor equally among his creditors; and, third, to relieve debtors from the burden of debts which, through business misfortunes and otherwise, they have incurred, and which they are unable to pay. * * * The reason why bankruptcy legislation was limited to traders for so many centuries was because it was considered that traders were the class having the greatest opportunity, and therefore most likely, to commit the frauds which bankruptcy acts were passed to prevent."

§ 9. "**Voluntary Bankruptcies**" Not Outside of "Subject."—It is not unconstitutional because of its permitting voluntary bankruptcies, although bankruptcy law as developed in the mother country, at the time the framers of the Constitution used the words "on the subject of bankruptcies" was wholly adversary in its character and did not permit one to petition voluntarily for his own adjudication. This is the holding of the Supreme Court in *Hanover Nat'l Bk. v. Moyses*, 8 A. B. R. 1, 186 U. S. 181, quoted in the preceding paragraph.

Compare, *Leidigh Carriage Co. v. Stengel*, 2 A. B. R. 383, 95 Fed. 637 (C. C. A. Ohio): "In England, until 1849, there was no provision by which petitions in voluntary bankruptcy could be filed, though there had previously been acts for the relief of insolvent debtors from an early period; and parliament had, as Mr. Justice Vaughan Williams points out in *In re Painter* [1895], 1 Q. B. 85, recognized that the State has an interest in the debtor being relieved from his liability, so that he shall not be weighed down by the burden of indebtedness from discharging the duties of a citizen and may employ himself in honest industry."

§ 10. Dealing with One Part Only of "Subject."—And thus, also, Congress may enact an entire system of bankruptcy laws, or simply may deal with one or more parts, or phases, of the "subject of bankruptcies."

Obiter, *Singer v. Nat'l Bedstead Mfg. Co.*, 11 A. B. R. 276 (N. J. Ch.): "A more or less indefinite, and I think misleading, notion has sometimes been expressed that the Constitution has committed to Congress the whole subject of bankruptcy and insolvency for appropriate legislation, and that therefore whenever Congress passes a general bankrupt law, which it has done four times, each time naming it a 'uniform system of bankruptcy,' all power on the part of the States to legislate upon the subject of bankruptcy or insolvency is immediately suspended. The premise may be deemed to be correct, but it seems to me that the conclusion is entirely erroneous. Congress is not obliged to legislate on the whole subject of bankruptcy; it may deal with only one or several parts. It is the enactment by Congress of a law applicable to a particular case which suspends any State law which otherwise would be applicable to that case. If every case of bankruptcy or insolvency were within the operation of a National Bankrupt Act, then no possible State law on the subject of bankruptcy or insolvency would have any vigor, but every such law would ipso facto be suspended.

"When the present Bankruptcy Act [Act, July 1, 1898, ch. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418)], was under discussion in Congress, my recollection is that a large and influential body of our national legislators earnestly proposed to enact merely a voluntary law—a law under which debtors could come into a bankrupt court, lay down their assets and get a discharge. Would anybody seriously argue that if such a 'uniform system of bankruptcy' had been enacted by Congress it would have had the effect to suspend the operation of State bankruptcy and insolvent laws under which insolvent debtors or fraudulent insolvent debtors are brought involuntarily into court and stripped of their assets for the benefit of their creditors?

"The present 'system of bankruptcy,' which Congress saw fit to enact in 1898, does not pretend to cover the whole field of either voluntary or involuntary bankruptcy and insolvency. Corporations are not allowed to become voluntary bankrupts. Large classes of natural persons and corporations are excluded absolutely from the operation of the involuntary system. All corporations as well as natural persons are excluded if their debts do not amount to \$1,000. It would be a most extraordinary state of affairs if transportation companies, insurance companies and many other kinds of business corporations not within the classes enumerated in the present Bankrupt Act, and also manufacturing, mercantile and trading corporations, whose debts do not amount to \$1,000, could not be subjected to the operation of our New Jersey statute, which provides a means for winding them up and distributing their assets. The re-

sult would be that such corporations, when insolvent, could not be wound up at all at the instance of their creditors. The Bankrupt Act [Act, July 1, 1898, ch. 541, § 4B, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3423)], expressly provides that national banks and banks incorporated under State or Federal laws shall not be adjudged involuntary bankrupts, the intention plainly being to leave these respective banking corporations to be wound up under national or State statutes particularly applicable to them.

"It is perfectly plain that State systems of voluntary and involuntary bankruptcy may remain to-day in full operation upon large numbers of insolvent natural persons and corporations who cannot be brought within the operations of the National Bankrupt Act under any possible state of facts.

"It is also, it seems to me, equally plain that a State system of involuntary insolvency also remains in full operation upon persons and corporations, who are as possible bankrupts within the operation of the National Bankruptcy act, so far as the State system deals with cases of which the bankrupt courts under the Federal act can obtain no jurisdiction. To state the point otherwise, I may say that to my mind there is no distinction between an insolvent insurance company, railroad company or laundry company, which owes \$1,000 of debts and has committed an act of bankruptcy, on the one hand, and an insolvent manufacturing, mercantile or trading company which has committed no act of bankruptcy, or does not owe debts amounting to \$1,000, on the other hand, in respect of the operation of the National Bankrupt Act and the New Jersey Insolvent Corporation Act. In neither instance is a case presented of which the Federal bankrupt court can take cognizance. Each case, therefore, is within the full and complete operation of the New Jersey statute.

"As I read the present Bankrupt Act, the intention of Congress is that every case of bankruptcy or insolvency of which the bankrupt court has jurisdiction is to be dealt with exclusively by that court. The intention of the act is to supply the law of certain cases, and to supply a special court to enforce that law. All other cases of bankruptcy or insolvency are left to be dealt with as the State Legislature may see fit.

"It may be conceded that Congress can provide a law for only a limited number of cases of bankruptcy and insolvency, and expressly prohibit the enactment of any other bankrupt or insolvent laws by the States. For present purposes the concession may be that Congress might pass a voluntary system of bankruptcy, and enact that there should be no other law on the subject of bankruptcy or insolvency, voluntary or involuntary, throughout the United States. Even if this be a sound view, it need not be considered, because the present Bankrupt Act contains no words prohibiting States from passing insolvent or bankrupt laws which deal with cases which are not within the operation of the National Bankrupt Act—which are expressly excluded from it. It would be a singular result, indeed, if because Congress has not seen fit to provide a bankrupt law applicable to corporations engaged in operating railroads, steamboats, insurance companies, laundries, livery stables and large numbers of other business enterprises, the inference must be drawn that Congress did not intend that any bankrupt or insolvent laws should be applied to this class of corporations, but that State insolvency laws applicable to them should be suspended."

§ 11. Do Not Delegate Legislative Power.—The laws so established do not, in contravention of constitutional law, attempt to delegate legislative power because of their recognition and enforcement of the diverse

laws of the several states and of changes in such laws from time to time in the matters of exemptions, dower, priority of payment and the like.⁷

§ 12. Do Not Violate Constitutional Guaranty of "Due Process."—Discharge in bankruptcy and adjudication of bankruptcy without notice to creditors interested, or without personal service of notice, do not violate the constitutional guaranty of due process of law.⁸

Hanover Nat'l Bk. v. Moyses, 8 A. B. R. 11, 186 U. S. 181: "Notwithstanding these provisions, it is insisted that the want of notice of filing the petition is fatal because the adjudication per se entitles the bankrupt to a discharge, and that the proceedings in respect of discharge are in personam, and require personal service of notice. The adjudication does not in itself have that effect, and the first of these objections really rests on the ground that the notice provided for is unreasonably short, and the right to oppose discharge unreasonably restricted. Considering the plenary power of Congress, the subject-matter of the suit, and the common rights and interests of the creditors, we regard the contention as untenable.

"Congress may prescribe any regulations concerning discharge in bankruptcy that are not so grossly unreasonable as to be incompatible with fundamental law, and we cannot find anything in this act on that subject which would justify us in overthrowing its action.

"Nor is it possible to concede that personal service of notice of the application for a discharge is required.

"Proceedings in bankruptcy are, generally speaking, in the nature of proceedings in rem, as Mr. Justice Grier remarked in *Shawham v. Wherrit*, 7 How. 643. And in *New Lamp Chimney Co. v. Brass and Copper Co.*, 91 U. S. 662, it was ruled that a decree adjudging a corporation bankrupt is in the nature of a decree in rem as respects the status of the corporation. Creditors are bound by the proceedings in distribution on notice by publication and mail, and when jurisdiction has attached and been exercised to that extent, the court has jurisdiction to decree discharge, if sufficient opportunity to show cause to the contrary is afforded, on notice given in the same way. The determination of the status of the honest and unfortunate debtor by his liberation from encumbrance on future exertion is matter of public concern, and Congress has power to accomplish it throughout the United States by proceedings at the debtor's domicile. If such notice to those who may be interested in opposing discharge, as the nature of the proceeding admits, is provided to be given, that is sufficient. Service of process or personal notice is not essential to the binding force of the decree."

§ 13. Do Not Impair Obligation of Contracts.—The laws so established do not contravene the constitutional prohibition against the impairment of the obligation of contracts by virtue of discharging debtors from the obligations of their contracts; for such prohibition is solely upon the states, not upon the United States.⁹

Hanover Nat'l Bk. v. Moyses, 8 A. B. R. 7, 186 U. S. 181: "As the States, in surrendering the power, did so only if Congress chose to exercise it, but in the

7. *Hanover Nat'l Bk. v. Moyses*, 8 A. B. R. 1, 186 U. S. 181.

8. *In re Billing*, 17 A. B. R. 841, 45 Fed. 395 (D. C. Ala.); Compare *obiter*, *In re Continental Corporation*, 14 A. B. R. 538 (Ref. Ohio).

9. *In re Milling Co.*, 16 A. B. R. 454, 457 (D. C. Tex.).

absence of congressional legislation retained it, the limitation was imposed on the States that they should pass no 'law impairing the obligation of contracts.' In *Brown v. Smart*, 145 U. S. 454, 457, Mr. Justice Gray said: 'So long as there is no national bankrupt act, each State has full authority to pass insolvent laws binding persons and property within its jurisdiction, provided it does not impair the obligation of existing contracts; but a State cannot by such a law discharge one of its own citizens from his contracts with citizens of other States, though made after the passage of the law, unless they voluntarily become parties to the proceedings in insolvency. Yet each State, so long as it does not impair the obligation of any contract, has the power by general laws to regulate the conveyance and disposition of all property, personal or real, within its limits and jurisdiction.' Many cases were cited, and, among others, *Denny v. Bennett*, 128 U. S. 498, where Mr. Justice Miller observed: 'The objection to the extraterritorial operation of a State insolvent law is, that it cannot, like the Bankruptcy Law passed by Congress under its constitutional grant of power, release all debtors from the obligation of the debt. The authority to deal with the property of the debtor within the State, so far as it does not impair the obligation of contracts, is conceded.'

"Counsel justly says that 'the relation of debtor and creditor has a dual aspect and contains two separate elements. The one is the right of the creditor to resort to present property of the debtor through the courts to satisfy the debt; the other is the personal obligation of the debtor to pay the debt, and that he will devote his energies and labor to discharge it,' 4 Wheat 198; and 'in the absence of property the personal obligation to pay constitutes the only value of the debt.' Hence the importance of the distinction between the power of Congress and the power of the States. The subject of 'bankruptcies' includes the power to discharge the debtor from his contracts and legal liabilities as well as to distribute his property. The grant to Congress involves the power to impair the obligation of contracts, and this the States were forbidden to do.

"The laws passed on the subject must, however, be uniform throughout the United States, but that uniformity is geographical and not personal, and we do not think that the provision of the act of 1898 as to exemptions is incompatible with the rule."

§ 14. May Impose Enforcement on State Courts.—Congress constitutionally may impose the burden of enforcing the substantive rights conferred by the law upon the courts of the several states.

Obiter, *Singer v. Nat'l Bedstead Mfg. Co.*, 11 A. B. R. 276 (N. J. Ch.): "It may be that Congress cannot impose upon the State courts the duty of administering any system of bankrupt laws, but if Congress sees fit to pass general laws on the subject of bankruptcy, without providing the judicial machinery for their administration, all State courts having jurisdiction of bankruptcy or insolvency cases would be obliged to enforce the laws on that subject enacted by Congress, and any conflicting State laws, or any State laws whatever applicable to the cases to which the Federal laws applied, would be superseded. A very complete 'system' of bankruptcy laws could, I think, be enacted by Congress without creating any special bankrupt Courts, at all. Such a code would be enforceable by all the Courts, State or Federal, having jurisdiction of any case to which the code applied, the code being the 'supreme law of the land.' * * *

"In the present instance, Congress has seen fit to provide a more or less

elaborate code of bankruptcy laws applicable to certain specified cases, and to erect special tribunals who have exclusive cognizance of those cases, and who have to a large extent exclusive jurisdiction to administer this code of laws. The result is that the State courts lose jurisdiction of those cases, if they ever had any, because State laws which are applicable to them are suspended, and the State courts are not permitted to administer the Federal Bankrupt Law except to a very limited extent."

CHAPTER II.

IN GENERAL, THE NATURE, OBJECTS AND CONSTRUCTION OF THE LAW AND OF THE PROCEDURE UNDER IT, AND FORMS AND ORDERS.

Synopsis of Chapter.

- § 15. In General.
- § 16. Definition and History of Bankruptcy Law.
- § 17. Objects and Purposes.
- § 18. Bankruptcy Proceedings, Proceedings in Rem, Also in Personam.
- § 19. And All Persons Bound.
- § 20. Bankruptcy Proceedings, Proceedings in Equity.
- § 21. Bankruptcy Act Covers Only Specified Cases of Insolvency.
- § 22. Bankruptcy Act Remedial and to Be Fairly Construed.
- § 23. Celerity of Procedure Intended.
- § 24. Economy of Administration Intended.
- § 25. Official Forms and Orders in Bankruptcy.
- § 26. Are Advance Interpretations as to Procedure, and to Be Followed, Though Not to Override Statute Itself.

§ 15. **In General.**—The bankruptcy law of the United States is a system of jurisprudence originating in the English laws as the same were developed during the two or three centuries preceding our Revolution; and it has for its objects, first, the securing of possession of an insolvent's assets, the procuring of their equitable division among creditors, preventing and avoiding attempts of one creditor to obtain advantage over other creditors therein; and second, the liberation of worthy debtors from the burden of unpaid debts. Such proceedings are proceedings in rem; they proceed in accordance with equitable principles, and the law is to be fairly and reasonably construed with a view to effecting its objects.

§ 16. **Definition and History of Bankruptcy Law.**—For the history of bankruptcy law and a definition of the idea of the law, the reader is referred to the Introduction to this treatise, ante.

Grunsfeld Bros. v. Brownell, 11 A. B. R. 602 (New Mex. Sup. Ct.): "The best definition which we have been able to find of a bankrupt law is in 5 Cyc. 237, which is: 'A bankrupt law, in modern legal significance, means a statutory system under which an insolvent debtor may either on his own petition or that of his creditors be adjudged bankrupt by a court of competent jurisdiction, which thereupon takes possession of his property, distributes it equally among his creditors, and discharges the bankrupt and his after-acquired property from debts existing at the initiation of the bankruptcy proceedings.'"

§ 17. **Objects and Purposes.**—The objects and purposes of modern bankruptcy law are two fold: First, to secure possession of an insolvent's assets, procure their equitable division among creditors, pre-

venting and avoiding attempts of one creditor to obtain advantage over other creditors therein; and second, to free the worthy debtor from the burden of unpaid debts. See the following expressions from the courts:¹

Farmers Bank v. Carr, 11 A. B. R. 733 (C. C. A.): "The essential principle of the Bankruptcy Law is that all of the bankrupt's property be divided equally, without preference, to the payment of his debts. It abhors preferences."

In re Leslie, 9 A. B. R. 567, 119 Fed. 406 (D. C. N. Y.): "The main purpose of the bankruptcy law is to prevent preferences and secure a fair and equitable division of the bankrupt estate among the creditors, not to grant discharges. This end accomplished, the bankrupt is granted a discharge from all his debts."

In re Edes, 14 A. B. R. 383, 135 Fed. 595 (D. C. Me.): "The evident intention of Congress in passing the Bankrupt Law of 1898 was to provide an ample and complete method of administering and disposing of the assets of insolvents. The court created by this law was given jurisdiction which is in the broadest sense equitable. It is the evident intention of Congress to place the details of the administration of the estate within the jurisdiction of the court."

Brown v. Barker, 8 A. B. R. 453, 68 App. Div. 594, 74 N. Y. Supp. 43: "It is well for us to keep in mind that the three fundamental objects, which the Bankruptcy Act was intended to secure and accomplish were: (1) That a debtor who had been unfortunate, and become unable to pay his debts, might be released therefrom, and be enabled to commence his business life anew relieved of the burden, provided that he had not been guilty of fraudulent or other improper practices. (2) That, as the condition and price of being so released, he should turn over to his assignee, fully and unqualifiedly, all of his property which was subject to the demands of his creditors. (3) That this property should be applied equitably and ratably to the payment of his various debts, rather than that creditors should be allowed to pursue it for their own individual and diverse interests, with the result that one might secure payment in full of his claim and another get nothing. This object was emphasized in the act by those provisions which, within certain limits, took away, even from the vigilant creditor, any advantage which he might have secured prior to the filing of the petition in bankruptcy."

Blake v. Valentine, 1 A. B. R. 373, 89 Fed. 691 (D. C. Calif.): "The National Bankruptcy Act establishes a uniform system and regulates, in all their details the relations, rights and duties of debtor and creditor."

Hicks v. Knost, 2 A. B. R. 155, 94 Fed. 627 (D. C. Ohio): "The object and purpose of the law is (1) to discharge honest bankrupts from their debts and (2) to secure to their creditors an equal distribution of their estate."

In re Blount, 16 A. B. R. 101, 142 Fed. 263 (D. C. Ark.): "The main object of the Bankruptcy Act is to secure an equal distribution of the assets of an insolvent among all his creditors and prevent preferences. The duty of the courts is to carry this intention of Congress into effect to the extent which the language of the Act justifies. Mere schemes and artifices, to avoid the letter and spirit of the law will not be tolerated."

U. S. ex rel Adler v. Hammond, 4 A. B. R. 738, 104 Fed. 862 (C. C. A. Tenn.): "The general purpose of the act so far as it relates to creditors, is that the assets of the debtor liable to the payment of their dues shall be speedily collected and distributed to them in accordance with the equitable rules thereby prescribed. As concerns the bankrupt the leading purpose is that having sur-

1. *In re Adams*, 1 A. B. R. 99 (Ref. N. Y.).

rendered to his creditors all his property subject to their demands, he shall be released from all further liability from his debts and be given a clear field for future effort."

Ross v. Saunders, 5 A. B. R. 350, 105 Fed. 915 (C. C. A. Mass.): "The fundamental right of the bankrupt under the statute is to surrender all his assets and obtain his discharge. The fundamental right of the creditor is to have all the assets of the bankrupt applied to his debt, subject to his obligation to submit to a discharge when they have been thus applied."

In re Harr, 16 A. B. R. 217, 143 Fed. 421 (D. C. Mo.): "One of the main objects of the Bankruptcy Act is to protect unfortunate, but honest debtors. Fraudulent debtors are not intended to be protected, nor to escape payment of their just liabilities."

Leidigh Carriage Co. v. Stengel, 2 A. B. R. 383, 95 Fed. 637 (C. C. A. Ohio): "The proper purposes of a bankruptcy act like the present are: First (and this was its original purpose), to enable creditors to protect themselves by summary process against the frauds of their debtors in evading the payment of debts; second, to distribute the assets of the debtor equally among his creditors; and, third, to relieve debtors from the burden of debts which, through business misfortunes and otherwise, they have incurred, and which they are unable to pay."

In re Forbes, 11 A. B. R. 790, 128 Fed. 137 (D. C. Mass.): "The equal and equitable distribution of the estates of insolvents and their discharge from the obligation of their debts are the ends sought by proceedings in bankruptcy."

Barton Bros. v. Produce Co., 14 A. B. R. 504, 136 Fed. 355 (C. C. A. Ark.): "The spirit of the Bankrupt Act is commendable. Its purpose is to release the honest debtor from the burden of debts which he is unable to longer carry; to give freer play to his energies and enterprises, that he may thereafter be better able to support himself and those dependent upon his earnings, and thereby be in position to render a better service to the State and to society. The beneficent policy is conditioned always upon the bankrupt's full and complete surrender of all his unexempt property for the benefit of his creditors. He must be honest in this respect. He must neither conceal nor withhold knowingly anything from his creditors which they are entitled, under the law, to know or receive. Whenever the court is impressed with the belief, after due inquiry and examination, that in the main the bankrupt has intended and tried to comply with the law, he should be dealt with liberally on his petition for manumission from his debts. On the other hand, in order to obstruct gross abuses of the spirit of the Bankrupt Act, that it may not aid the dishonest debtor in being acquitted of his honest debts, while withholding aught that he should surrender for the benefit of his creditors, it is the duty of the court to look into the heart of his transactions."

MacDonald v. Tefft-Wellar Co., 11 A. B. R. 806, 128 Fed. 381 (C. C. A. Fla.): "The object of the Bankrupt Law is twofold—the benefit of the creditors and the relief of the bankrupt. Mr. Justice Story describes a bankrupt law as 'a law for the benefit and relief of creditors and their debtors in cases in which the latter are unable or unwilling to pay their debts.' 2 Story, Const., § 113, note 2. Mr. Stephen speaks of it as 'a system of law of a peculiar and anomalous character, intended to afford to the creditors of persons engaged in trade a greater security for the collection of their debts than they enjoyed at common law under the ordinary remedy by action.' 2 Steph. Com. 189. It cannot be necessary that both objects shall be attainable in order to warrant proceedings in bankruptcy. In many, perhaps a majority, of cases, the relief to the bank-

rupt is the only question, for there are no assets to distribute, and in many other cases the benefit and relief of creditors is the only object. A bankrupt may through fraud have lost his right to a discharge. An insolvent corporation whose property, including all franchises, has been distributed to creditors in involuntary proceedings in bankruptcy, takes little, if anything, by a discharge."

Continental Nat'l Bk. v. Katz, 1 A. B. R. 20 (Superior Ct. Ill.): "There are two principles which lie at the foundation of the Bankrupt Act: (1) that the debtor may be discharged from his provable debts; and (2) that his collectible assets may be divided equitably and ratably between his creditors."

Stevens v. Nave-McCord Co., 17 A. B. R. 615 (C. C. A. Colo.): "The discharge of the bankrupt from his debts and the equal distribution of his unexempt property among his creditors of the same class were the chief objects which Congress sought to attain by the enactment of this statute. The preference of one or more creditors over others of the same class was one of the principal evils at which the statute was leveled. Witness the prohibition of the allowance of the claim of a preferred creditor and of his participation in the meetings of creditors until he surrenders his preference and the right granted to the trustee to recover from him the property he has obtained thereby or its value."

Swarts v. Fourth Nat'l Bk., 8 A. B. R. 676, 117 Fed. 1 (C. C. A. Mo.): "No one can become familiar with the bankruptcy law of 1898, without a settled conviction that the two dominant purposes of the framers of that act were: (1) The protection and discharge of the bankrupt; and (2) the distribution of the unexempt property which the bankrupt owned four months before the filing of the petition in bankruptcy against him, share and share alike, among his creditors. All the earlier sections of the act are devoted to the security and relief of the bankrupt, and, when the distribution of his property is reached, the provisions relating to it are all drawn from the standpoint of the insolvent, and not from that of his creditors. The rights and privileges of the bankrupt, and the equal distribution of his property, dominate every provision, while the rights, wrongs, benefits, and injuries of his creditors are always incidental, and secondary to these controlling purposes."

[1867] *Wiswall v. Campbell*, 93 U. S. 347: "Congress, in enacting the Bankrupt Law (that of 1867) had apparently in view (1) the discharge under some circumstances, of an honest debtor under legal liability for debts he could not pay; and (2) an early pro rata distribution, according to equity, of his available assets among his several creditors."

Compare *In re Hicks*, 6 A. B. R. 183, 107 Fed. 910 (D. C. Vt.): "Involuntary proceedings in bankruptcy are not mere suits against the bankrupt for the collection of debts, but are broader, for the equal distribution of his property among his creditors."

§ 18. Bankruptcy Proceedings, Proceedings in Rem, Also in Personam.—Bankruptcy Proceedings are proceedings in rem.¹

1. *In re Benedict*, 15 A. B. R. 232, 238, 140 Fed. 55 (D. C. Wis.); *In re Reynolds*, 11 A. B. R. 760 (D. C. Mont.); *In re Elmira Steel Co.*, 5 A. B. R. 486 (Ref. N. Y.); *Southern Loan & Trust Co. v. Benbow*, 3 A. B. R. 9, 96 Fed. 514 (D. C. N. Car., reversed, on other grounds, in 3 A. B. R. 710); *In re Continental Corp'n*, 14 A. B. R. 538 (Ref. Ohio); *In re Reese*, 8 A. B. R. 411, 115 Fed. 993 (D. C. Ala.); *In re Beals*, 8 A. B. R. 644, 116 Fed. 530 (D. C. Ind.).

Hanover Nat'l Bk. v. Moyses, 8 A. B. R. 1, 186 U. S. 181: "Proceedings in bankruptcy are, generally speaking, in the nature of proceedings in rem, as Mr. Justice Grier remarked in *Shawham v. Wherrit*, 7 How. 643. And in *New Lamp Chimney Co. v. Brass and Copper Co.*, 91 U. S. 662, it was ruled that a decree adjudging a corporation bankrupt is in the nature of a decree in rem as respects the status of the corporation. Creditors are bound by the proceedings in distribution on notice by publication and mail, and when jurisdiction has attached and been exercised to that extent, the court has jurisdiction to decree discharge, if sufficient opportunity to show cause to the contrary is afforded, on notice given in the same way. The determination of the status of the honest and unfortunate debtor by his liberation from encumbrance on future exertion is matter of public concern, and Congress has power to accomplish it throughout the United States by proceedings at the debtor's domicile. If such notice to those who may be interested in opposing discharge, as the nature of the proceeding admits, is provided to be given, that is sufficient. Service of process or personal notice is not essential to the binding force of the decree."

In *re Beals*, 8 A. B. R. 644, 116 Fed. 530 (D. C. Ind.): "The adjudication of bankruptcy proceeds in rem, and all persons interested in the res are regarded as parties to the bankruptcy proceedings."

Carter v. Hobbs, 1 A. B. R. 224, 92 Fed. 594 (D. C. Ind.): "The adjudication proceeds in rem, and all persons interested in the res are regarded as parties to the bankruptcy proceedings. These parties include not only the bankrupt and trustee, but also all the creditors of the bankrupt."

But compare trenchant remarks of Holt, J., in *Whitney v. Wenman*, 14 A. B. R. 592, 140 Fed. 960 (D. C. N. Y.): "It is claimed that the order passing the receivers' accounts was a judgment in rem. The counsel asserts that proceedings in bankruptcy are proceedings in rem, and that probate proceedings are proceedings in rem, and that a receiver's accounting is analogous to an executor's accounting. But in the first place the term 'a judgment in rem' is one which has various meanings. As Judge Holmes says, in *Tyler v. Court of Registration* (175 Mass. 76): 'No phrase has been more misused.' An adjudication of bankruptcy upon a petition in an involuntary proceeding is a judgment in rem, in the sense that it determines the status of the bankrupt; but the ordinary proceedings taken in a bankruptcy proceeding to decide questions arising in it are not, as I understand it, proceedings in rem. A proceeding, for instance, to determine a disputed claim, would not bind anybody except the parties to it. So a decree admitting or refusing to admit a will to probate is a proceeding in rem, so far as it determines the status of the will, but all the proceedings in the administration of an estate in the Surrogate's Court which result in orders are not proceedings in rem. A decree passing an executor's accounts, for instance, is of no effect against parties not cited. *Butterfield v. Smith*, 101 U. S. 570; *Hood v. Hood*, 19 Hun 300; *Ib.* on Appeal, 85 N. Y. 561; *Black on Judgments*, § 644. Many judgments which are sometimes called judgments in rem, but which are more properly described as being quasi in rem, bind only the parties, such as judgments on attachments or in foreclosure. *Freeman v. Alderson*, 119 U. S. 185; *Black on Judgments*, § 793; *Freeman on Judgments*, § 617. I think, therefore, that the proceeding to pass the receivers' accounts was not a proceeding in rem, and that the order entered upon it was not binding upon the defendants. If that is so, it was not binding upon the complainant, for estoppels by judgment must be mutual. Suppose the complainant, instead of objecting to the items in the receivers' accounts, had brought a separate action against the receivers to recover the value of the money and property which they delivered to the defendants."

Indeed, they are both proceedings in rem and, in some phases, also proceedings in personam.²

§ 19. And All Persons Bound.—Thus all persons are bound thereby (as to the proceedings that are strictly “bankruptcy proceedings” proper; although not necessarily as to “controversies” arising out of bankruptcy proceedings).³

In re Beals, 8 A. B. R. 644, 116 Fed. 530 (D. C. Ind.): “These parties include not only the bankrupt and trustee, but also all the creditors of the bankrupt.”

In re Reynolds, 11 A. B. R. 760 (D. C. Mont.): “An adjudication of bankruptcy operates in rem, and from the moment of the adjudication the bankrupt’s estate is under the jurisdiction of the bankruptcy court, which will not permit any interference with its possession, even though it be by an officer of a State court acting under its process. Being a proceeding in rem, all parties interested in the res are regarded as parties thereto, including the bankrupt and trustee, as well as the creditors, secured and unsecured. The adjudication vests in the trustee or temporary receiver the title of the bankrupt’s property, and stays all seizures made within four months.”

Thus all creditors are parties and bound thereby.⁴

Bear v. Chase, 3 A. B. R. 751, 99 Fed. 920 (C. C. A. S. C.): “Upon the adjudication of the bankrupt, all creditors become parties to the bankruptcy proceedings by operation of law, and particularly those creditors by whose act the bankruptcy was caused.”

All creditors “proving claims” thereby become parties.⁵

But as to proceedings not “bankruptcy proceedings” proper but merely “controversies” arising out of or in the course of bankruptcy proceedings, persons not made parties thereto are not bound thereby. Thus, an order requiring a bankrupt to assign a life insurance policy to the trustee does not purport to pass upon the rights of a person to whom he had already previously assigned it.⁶ And notice to creditors is not necessary to the binding force of the decree of adjudication;⁷ nor of the subsequent proceedings in the administration of the estate.

2. Dressel v. North State Lumber Co., 5 A. B. R. 744, 107 Fed. 256 (D. C. N. C.); In re Tybo Min. & Reduc. Co., 13 A. B. R. 62, 132 Fed. 697 (D. C. Nev.); Compare, In re Magid-Hope Silk Mfg. Co., 6 A. B. R. 610, 110 Fed. 352 (D. C. Mass.).

3. Southern Loan & Trust Co. v. Benbow, 3 A. B. R. 9, 96 Fed. 514 (D. C. N. Car., reversed, on other grounds, in 3 A. B. R. 710); Carter v. Hobbs, 1 A. B. R. 215, 92 Fed. 594 (D. C. Ind.). Compare, In re Continental Corp’n, 14 A. B. R. 538 (Ref. Ohio).

4. Hackney v. Hargreaves Co., 13 A. B. R. 164, 68 Neb. 624; In re Pekin Plow Co., 7 A. B. R. 369, 112 Fed. 309 (C. C. A.); In re Frazier, 9 A. B. R. 21, 117 Fed. 746 (D. C. Mo.); In re Beerman, 7 A. B. R. 431, 112 Fed. 662 (D. C. Ga.).

5. In re Keller, 6 A. B. R. 334, 350 (D. C. Iowa).

6. In re Madden, 6 A. B. R. 614, 110 Fed. 348 (C. C. A. N. Y.).

7. In re Billings, 17 A. B. R. 80, 145 Fed. 395 (D. C. Ala.). Obiter, In re Mason, 3 A. B. R. 599, 99 Fed. 256 (D. C. N. Car.).

And creditors are entitled to such notice only as the statute prescribes.⁸

In *re Reese*, 8 A. B. R. 413, 115 Fed. 993 (D. C. Ala.): "Proceedings in bankruptcy are in the nature of a proceeding in rem, and certainly a creditor who has received notice of the filing and that he has been scheduled as a creditor, is charged with notice of whatever transpires in the further administration of the bankrupt's estate."

Nor is personal notice of the application for discharge essential to the binding force of the discharge decree.⁸

§ 20. Bankruptcy Proceedings, Proceedings in Equity.—Bankruptcy proceedings are a branch of equity jurisprudence.⁹

Bardes v. Bank, 4 A. B. R. 173, 178 U. S. 533: "Proceedings in bankruptcy generally are in the nature of proceedings in equity; and the words 'at law,' in the opening sentence conferring on the courts of bankruptcy 'such jurisdiction, at law and in equity, as will enable them to exercise original jurisdiction in bankruptcy proceedings,' may have been inserted to meet clause 4, authorizing the trial and punishment of offenses, the jurisdiction over which must necessarily be at law and not in equity."

Dodge v. Norlin, 13 A. B. R. 176, 133 Fed. 363 (C. C. A. Colo.): "This is a proceeding in bankruptcy and a proceeding in bankruptcy is a proceeding in equity."

In *re Rochford*, 10 A. B. R. 609, 124 Fed. 187 (C. C. A. S. Dak.): "The administration and distribution of the property of bankrupts is a proceeding in equity, and when authorized by act of Congress it becomes a branch of equity jurisprudence."

And the rules of equity control;¹⁰ and this is so although certain issues may be triable to a jury by the statute, such jury being the jury to which the chancellor always has had the power to refer questions of fact for their advice.¹¹

§ 21. Bankruptcy Act Covers Only Specified Cases of Insolvency.—The bankruptcy act was not intended to cover all cases of insolvency, but only such cases as are within its provisions.¹²

§ 22. Bankruptcy Act Remedial and to Be Fairly Construed.—The bankruptcy act is remedial and should be interpreted reasonably and

8. *Hanover Nat'l Bk. v. Moyses*, 8 A. B. R. 1, 186 U. S. 181. See ante, § 12.

9. In *re Broadway Sav. Trust Co.*, 18 A. B. R. 256 (C. C. A. Mo.); *Swarts v. Siegel*, 8 A. B. R. 689, 117 Fed. 16 (C. C. A. Mo.); In *re Waugh*, 13 A. B. R. 187, 133 Fed. 281 (C. C. A. Wash.); In *re Lipke*, 3 A. B. R. 569, 98 Fed. 970 (D. C. N. Y.); *Lockman v. Lang*, 11 A. B. R. 597, 12 A. B. R. 497, 132 Fed. 1 (C. C. A. Colo.); In *re Herzikopf*, 9 A. B. R. 746, 118 Fed. 101 (D. C. Calif.); In *re Siegel-Hillman Dry Goods Co.*, 7 A. B. R. 351, 111 Fed. 983 (D. C. Mo.); In *re Christensen*, 4 A. B. R. 99, 101 Fed. 802 (D. C. Iowa); In *re Rude*, 4 A. B. R. 319, 101 Fed. 805 (D. C. Ky.); In *re Edes*, 14 A. B. R. 384, 135 Fed. 595 (D. C. Me.); *Mason v. Wolkowich*, 17 A. B. R. 714 (C. C. A. Mass.); In *re Huddleston*, 1 A. B. R. 572 (Ref. Ala.).

10. In *re N. Carolina Car Co.*, 11 A. B. R. 490, 127 Fed. 178 (D. C. N. Car.); In *re Chambers, Calder & Co.*, 3 A. B. R. 537, 98 Fed. 865 (D. C. R. I.).

11. See post, § 405, et seq.

12. In *re Wilmington Hosiery Co.*, 9 A. B. R. 581, 120 Fed. 180 (D. C. Del.); *Singer v. Nat'l Bedstead Co.*, 11 A. B. R. 276 (N. J. Ch.). See ante, "Subject of Bankruptcy," § 7, et seq.; post, § 102.

according to the fair import of its terms with a view to effect its objects and to promote justice.¹³

Botts v. Hammond, 3 A. B. R. 775, 99 Fed. 916 (C. C. A. Md.): "As was well said in *Blake v. Francis-Valentine Co.*, the National Bankruptcy Act is remedial, and should be interpreted reasonably and according to the fair import of its terms, with a view to effect its objects and to promote justice."

Brown v. Barker, 8 A. B. R. 453 (Sup. Ct. N. Y. App. Div.): "We may take judicial notice that the present bankruptcy act is the result of a long continued agitation and discussion and that it is our duty, if possible, to so construe its provisions, liberally, if necessary, as to secure the objects for which it was created, rather than, by a narrow or technical construction, to defeat them."

In re Scott, 11 A. B. R. 331 (D. C. Del.): "Further, the Bankruptcy Act includes a large body of remedial legislation."

Impliedly, *In re Edes*, 14 A. B. R. 384, 135 Fed. 595 (D. C. Me.): "The Federal Courts have in fact liberally interpreted the whole statute as giving full equitable powers to the Court."

In re Beatty, 17 A. B. R. 743 (C. C. A. Mass.): "As the statutes of bankruptcy are to have an honest and practical interpretation, we are not to inject into what we have quoted therefrom, such phraseology as would require that the cause of the receivership need be solely insolvency."

Attempted judicial construction of the unequivocal language of a statute or of a contract serves only to create doubt and to confuse the judgment. There is no safer nor better settled canon of interpretation than that when language is clear and unambiguous it must be held to mean what it plainly expressed, and no room is left for construction.¹⁴

§ 23. Celerity of Procedure Intended.—The bankrupt act contemplates that proceedings in bankruptcy shall progress with all reasonable despatch compatible with the due and orderly administration of justice and a proper regard for the fundamental rights of the citizen.¹⁵

Boyd v. Glucklich, 8 A. B. R. 393, 116 Fed. 131 (C. C. A. Iowa): "The Bankrupt Act contemplates that proceedings in bankruptcy shall go forward with all reasonable dispatch compatible with the due and orderly administration of justice and a proper regard for the fundamental rights of the citizen."

Obiter, *In re Paine*, 11 A. B. R. 354, 127 Fed. 246 (D. C. Ky.): "The Bankruptcy Act furnishes much evidence of its purpose to require the winding up of estates as speedily as possible."

[1867] *Wiswall v. Campbell*, 93 U. S. 347: "Prompt action is everywhere re-

13. *Southern Loan & Trust Co. v. Benbow*, 3 A. B. R. 9, 96 Fed. 514 (D. C. N. Car., reversed, on other grounds, in *Frazier v. Southern Loan & Trust Co.*, 3 A. B. R. 710); *In re Scott*, 3 A. B. R. 628, 96 Fed. 607 (D. C. N. Car.); *Blake v. Francis-Valentine Co.*, 1 A. B. R. 372, 89 Fed. 691 (D. C. Calif.); [1867] *In re Muller*, Fed. Cas. No. 9912; [1867] *In re Silberman*, Fed. Cases No. 1728.

14. *Swarts v. Siegel*, 8 A. B. R. 697, 117 Fed. 13 (C. C. A. Mo.). In one case, it is held, that in the Construction of the Bankrupt Act, the maxim "expressio unius, exclusio alterius" has no application. *In re Bay City Irrigation Co.*, 14 A. B. R. 370 (Ref. Tex.).

15. Obiter, *In re Koenig & VanHoogenhuyze*, 11 A. B. R. 618, 127 Fed. 891 (D. C. Tex.); *U. S. ex rel Adler v. Hammond*, 4 A. B. R. 738, 104 Fed. 862 (C. C. A. Tenn.).

quired by the law. In *Bailey v. Glover*, 21 Wall. 346, we said, speaking through Mr. Justice Miller that 'It is obviously one of the purposes of the Bankrupt Law that there should be a speedy distribution of the bankrupt's assets. This is only second in importance to securing equality of distribution. The Act is filled with provisions for the quick and summary disposal of questions arising in the progress of the case, without regard to the usual modes of trial attended with some necessary delay.'"

But they are not to be so summary as to deprive parties of a reasonable opportunity to defend. While proceedings in bankruptcy may be summary, they should not be so summary as to deprive the bankrupt of those fundamental rights and privileges that belong to every citizen, among which are the right to be advised of the demand made upon him and the right, after being so advised, to have a reasonable time to prepare his defense and produce his witnesses.¹⁶

Lockman v. Lange, 12 A. B. R. 497, 504, 132 Fed. 1 (C. C. A. Colo.): "A proceeding in bankruptcy is a proceeding in equity. * * * If it is so summary that it is not governed by the specific times fixed for pleadings and for the taking of evidence by the rules and practice in equity, it is not so summary that rights of person or of property may be taken from the parties to it without opportunity to frame or to try the issues that are tendered."

§ 24. **Economy of Administration Intended.**—The Bankrupt Act was framed in a manifest spirit of economy and is to be administered economically.¹⁷

In *re Oppenheimer*, 17 A. B. R. 60 (D. C. Pa.): "Economy is strictly enjoined, by the well-known policy of the Bankruptcy Act, in the administration of bankrupt estates."

In *re Young*, 16 A. B. R. 109 (D. C. N. Car.): "The principal object of the Bankrupt Law was to secure to creditors their portion of the bankrupt estate and at a minimum cost."

Fellows v. Freudenthal, 4 A. B. R. 495, 102 Fed. 731 (C. C. A. Ills.): "This provision is in harmony with the purpose manifested throughout the act, to so

16. *Boyd v. Glucklich*, 8 A. B. R. 393, 116 Fed. 131 (C. C. A. Iowa).

17. *Norcross v. Nathan*, 3 A. B. R. 622 (D. C. Nev.).

(1) **Abuse of Power of Appointment of Special Masters.**—A practice has grown up in some districts of referring to special masters various matters that form part of the regular duties of referees, thus putting estates to additional and unnecessary expense. The practice is to be reprehended in view of the manifest spirit of economy in which the present law was framed.

For an instance of this practice see, In *re Hoyt & Mitchell*, 11 A. B. R. 784, 127 Fed. 968, the district judge there having referred to a special master the auditing of the trustee's reports, a duty clearly enjoined on the referee by the statute and General Orders in Bankruptcy as well.

(2) **Present Law Brings Courts Close to Suitors.**—The present Bankrupt Act brings the bankruptcy courts close to suitors since it provides for a referee for each county. In *re Steiner*, 5 A. B. R. 214 (D. C. Mass.).

(3) **Malicious Prosecution of Bankruptcy Petition.**—A bankruptcy proceeding is not a mere civil suit. It is sui generis and is far reaching and drastic in its effects. Whether accompanied by seizure of property or not, it places an embargo on his right to dispose of his property and to do business generally. No prudent person will buy from him, and all those dealing with him are liable to have their transactions investigated and questioned by litigation. Hence, for maliciously instituting or maintaining a bankruptcy petition action will lie. *Wilkinson v. Shoe Co.*, 15 A. B. R. 554, 141 Fed. 218 (U. S. C. C. Mo.).

limit all allowances as to secure economical administration of proceedings and estates in bankruptcy; and [it is] the duty of the Courts to construe and administer the act in conformity with that purpose."

In *re Curtis*, 4 A. B. R. 27, 91 Fed. 737 (C. C. A. Ills.): "The policy of the present Bankrupt Act, in contrast with the provisions of the previous law, disclosed clearly the design of Congress that the administration of bankrupt estates should be had at the minimum of expense. Under the former law much scandal had arisen because of the large cost of administering estates. The present act, so far as it specifies the amount of fees of officers whose services may be required in execution of the law, fixes them at a low figure, possibly much lower than is compensation for the service; but it is not for us, for that reason, to disregard the law, or seek to thwart the design of Congress, however inadequate we may think the compensation allowed. This thought is well expressed by the court below in the opinion filed. It is there said:

"The present bankrupt law was evidently intended to reduce to the lowest minimum the costs of administration, as regards fees of officers created by the act, as well as those of attorneys who may be called to assist the court in the preservation and distribution of the bankrupt estate."

§ 25. Official Forms and Orders in Bankruptcy.—Necessary rules, forms and orders as to procedure and for carrying the act into force and effect are to be prescribed and may be amended from time to time, by the supreme court of the United States.¹⁸

§ 26. Are Advance Interpretations as to Procedure, and to Be Followed, Though Not to Override Statute Itself.—These rules, forms and orders, are to be taken as interpretations, in advance, of the meaning of the act itself relative to procedure under it.

Impliedly, In *re Jamieson*, 9 A. B. R. 681, 120 Fed. 697 (D. C. Ills.): "For the purpose of making the proceedings under the act more specific, the Supreme Court adopted and established certain rules, orders, and forms to be followed in the execution and application of the statute. * * * These rules have the same weight in this case as though they were included in the express language of the statute."

Impliedly, *Orcutt Co. v. Green*, 17 A. B. R. 75 (C. C. A. N. Y.), 204 U. S. 96: "* * * the order being simply somewhat of an amplification of the law with respect to procedure, but nothing which can be construed as beyond the powers granted to the court by virtue of the law itself."

Contra, In *re Edes*, 14 A. B. R. 384, 135 Fed. 595 (D. C. Me.): "While this General Order has no force as legislation, and while it is not even a judicial interpretation of the Statute, it is an order of the Supreme Court of the United States based upon the bankruptcy statute. It cannot be held to be in derogation of such statute."

The rules and orders are obligatory and binding upon courts of bankruptcy and must be followed.¹⁹ Indeed, one case has held they confer substantive rights as well as prescribe rules of practice.²⁰

18. Bankr. Act, § 30 (a).

19. In *re Scott*, 3 A. B. R. 625 (D. C. N. Car.). Apparently, In *re White*, 14 A. B. R. 241, 135 Fed. 199 (D. C. Penna.). To same effect, *Gage v. Bell*, 10 A. B. R. 696, 124 Fed. 371 (D. C. Tenn.).

20. In *re Scott*, 3 A. B. R. 625 (D. C. N. Car.).

But the forms and rules prescribed as to pleading indicate only the form in general and are not exclusive.

In *re Paige*, 3 A. B. R. 679, 99 Fed. 538 (D. C. Ohio): "In answer to a petition for involuntary bankruptcy, the respondent is entitled not only to deny insolvency, but also to set up any defense and counterclaims which may show him to have been solvent at the time when it is charged the act of bankruptcy was committed. The forms and orders prescribed by the Supreme Court indicate only the form in substance of the answer, but are not exclusive in their provisions."

In *re Bellah*, 8 A. B. R. 310, 116 Fed. 49 (D. C. Del.): "Rule 11 of the general orders in bankruptcy deals with amendments to a petition and schedules, but was not intended to abrogate or restrict the general power of amendment in other respects vested in the court."

And in general the forms and rules are merely directory as to procedure, and will not override the provisions of the statute themselves as to substantive rights.²¹

Burke v. Guarantee Title & Trust Co., 14 A. B. R. 31, 134 Fed. 562 (C. C. A. Pa.): "It is true that among the forms promulgated by the Supreme Court is 'Schedule B (5)' in which is contained the words: 'Property claimed to be exempted by the State laws, its valuation,' etc. But waiving the question whether in this instance the property claimed and its valuation were not stated in substantial accordance with this direction, it is enough to say that we do not understand it to be anything more than a direction. It could not have been intended to be mandatory. These forms were not designed to effect any change in the law. They are 'forms,' and nothing more. As was said by the Supreme Court (General) orders 38, 89 (Fed. xiv, 32 C. C. A. xxxvii), they are to be 'observed and used with such alterations as may be necessary to suit the circumstances of any particular case;' and, under the circumstances of this case, we decline to hold that the failure of the bankrupt to precisely observe one of them was fatal to his claim, because we could not do so without subordinating substance to form, and refusing a legal right, merely on account of a defect in procedure, which has caused no injury to any one, and which, if requisite, might be cured by amendment. General Order 11, 89 Fed. vii, 32 C. C. A. xiv; Rev. St., § 954 (U. S. Comp. St. 1901, p. 696); In *re Duffy* (D. C.), 9 Am. B. R. 358, 118 Fed. 926; In *re White* (D. C.), 11 A. B. R. 556, 128 Fed. 513."

West Co. v. Lea, 2 A. B. R. 463 (C. C. A. Va.), 174 U. S. 590: "The fact that the official form for involuntary petitions contains an allegation of insolvency, does not make such an allegation material where the statute provides that other facts alone constitute a sufficient case for an adjudication."

In *re Ingalls Bros.*, 13 A. B. R. 512, 137 Fed. 517 (C. C. A. N. Y.): "The authorities hereinbefore cited do or do not correctly declare the meaning of § 57 (n). If they do correctly declare it, the Supreme Court is powerless to vary it."

21. Inferentially, *Lipman v. Stein*, 14 A. B. R. 30, 134 Fed. 235 (C. C. A. Pa.).

All Pleadings of Fact in Bankruptcy to Be Verified.—All pleadings in bankruptcy containing matters of fact should be verified. Bankr. Act, § 18 (c). "All pleadings setting up matters of fact shall be verified under oath." *Rogers v. Mining Co.*, 14 A. B. R. 253, 136 Fed. 407 (C. C. A. Alaska); In *re Bellah*, 8 A. B. R. 310 (D. C. Del.).

Nevertheless, the simple forms prescribed by the Supreme Court should be followed, and there should be no unnecessary departure by using the more prolix forms of chancery.

Gage v. Bell, 10 A. B. R. 696, 124 Fed. 371 (D. C. Tenn.): "It is to be observed that Form No. 6 (89 Fed. xxx, 32 C. C. A. liv) does not contemplate any other pleading than that of a brief and simple denial (1) that the defendant debtor has committed the act of bankruptcy, or (2) that he is insolvent, and (3) an averment 'that he should not be declared a bankrupt for any cause in said petition alleged.' At first I was inclined to hold that no other pleading whatever was permissible than this, and that under it any defense whatever, whether by demurrer or otherwise, could be made that would defeat the petition for any cause. But yielding to the license given by General Order No. 38 (89 Fed. xiv, 32 C. C. A. xxxvii), that the several forms shall be observed and used with such alterations as may be necessary to suit the circumstances of any particular case and conforming to the practice in other districts, reluctantly and with constantly increasing regret, I allowed other and special pleadings to be framed, and now, as in this case, in almost every case there are demurrers, formidable answers after the manner of pleadings in chancery, with exceptions, replications, etc., until the practice has departed from the simple forms prescribed and degenerated into those of a suit in equity. I doubt if this is proper practice."

CHAPTER III.

JURISDICTION TO ADJUDGE BANKRUPT.

Synopsis of Chapter.

- § 27. In General.
- § 28. U. S. District Courts Created into Bankruptcy Courts.
- § 29. Jurisdiction in Bankruptcy Limited, though Bankruptcy Courts Not Inferior Courts.
- § 30. Limitations as to Residence, Occupation, etc., Jurisdictional.

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- § 31. Limitations as to Residence, Domicile or Principal Place of Business.
- § 32. Limitations Where Debtor Nonresident or Where Adjudged Bankrupt Outside United States, but Owns Property Here.
- § 33. Not All Three Qualifications, Residence, Domicile and Place of Business Coincidentally Requisite.
- § 34. "For Preceding Six Months or Greater Portion Thereof" Defined.
- § 35. Actual Principal Place of Business Governs.
- § 36. Residence, etc., of One Partner Sufficient.

DIVISION 2.

- § 37. Who May Be Voluntary Bankrupt.
- § 38. "Voluntary" Bankruptcy a Later Development.
- § 39. Partnerships Included.
- § 40. But Not Mere Joint Contractors or Joint Owners.
- § 41. No Specified Amount of Indebtedness Requisite though Debts Must Be "Provable."
- § 42. Insolvency Not Requisite to Voluntary Bankruptcy.
- § 43. Creditors May Not Intervene to Oppose Voluntary Petition.
- § 44. Corporations May Not Be Voluntary Bankrupts.

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- § 45. Who May Be Adjudged Involuntary Bankrupt.

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- § 46. "Wage Earners" and "Farmers," etc., Excluded.
- § 47. "Wage Earner" Defined.
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- § 51. Infants.
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- § 56. Partnerships Included.
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- § 62. Adjudication in Name of Ostensible Partner.
- § 63. Only "Actual" Partnerships Subject to Adjudication.
- § 64. Individual Members Joinable with Partnership, in either Voluntary or Involuntary Proceedings.
- § 65. Where Firm, Alone, Adjudicated, Nevertheless Individual Estates Brought in for Administration.
- § 66. Act Need Not Be Actually Committed by All Partners.
- § 67. But All Partners to Be Made Parties.
- § 68. Nonconsenting Partner Not Made Party, No Adjudication on Voluntary Partnership Petition.
- § 69. Individual Petitions Not Amendable to Include Partnership.
- § 70. Secret or Silent Partners, on Discovery, Brought in.
- § 71. Petition by One Partner, Where Remaining Partners Do Not Join.
- § 72. Remaining Partners Not Joining, Petition Treated as Involuntary as to Nonconsenting Partner, but Voluntary as to Creditors.
- § 73. No Act of Bankruptcy Requisite, Even Where Not All Join.
- § 74. Not All Defenses Available, but Only Insolvency, Though Entitled to Jury on That Issue.
- § 75. Whether Partner May File Ordinary Involuntary Petition.
- § 76. Creditors May Not Intervene.
- § 77. "Unincorporated Companies" May Be Adjudged Bankrupt.
- § 78. Definition of "Unincorporated Company."
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SUBDIVISION "C".

- § 80. Classes of Corporations Included and Excluded.
- § 81. Jurisdiction over Corporations More Limited under Act of 1898 than under Act of 1867.
- § 82. Commonly Accepted, and Popular Meaning Given to Classes.
- § 83. Definitions of "Trading" and "Mercantile Pursuits."
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- § 85. Must Be "Principally" So Engaged.
- § 86. How, if Engaged in Different Occupations, Some within and Others without the Classes.
- § 87. Actual Occupation Governs.
- § 88. Decree of Dissolution of Corporation.
- § 89. Quasi Public Corporations.
- § 90. Manufacturing Corporations.
- § 91. Trading Corporations and Those Engaged in Mercantile Pursuits.
- § 92. Printing and Publishing Corporations.
- § 93. Mining Corporations.
- § 94. Corporations Not within Statutory Classification Exempt.

SUBDIVISION "D".

- § 95. Change of Debtor's Class after Commission of Act but before Filing of Petition.
- § 96. Death or Insanity after Commission of Act but before Filing of Petition.
- § 97. Dissolution of Corporation, or Ceasing Business, after Act but before Petition.

§ 98. Death or Insanity after Filing of Petition, No Abatement.

§ 99. Rights of Widow and Children on Bankrupt's Death after Filing of Petition and before Adjudication.

§ 100. Their Rights Where Death Occurs after Adjudication.

§ 101. Dissolution of Corporation after Filing of Petition.

§ 27. **In General.**—The United States District Courts are, by the Act, erected into bankruptcy courts; their jurisdiction as such is limited, each District Court being confined to the adjudication and administration of the estates of those debtors only who have resided or been domiciled or have had their principal place of business within the district the greater portion of the six months next preceding the filing of the petition; and of those debtors who are nonresidents of the United States or have been adjudged bankrupts outside of the United States, and have property within the district; in voluntary cases having jurisdiction over all natural persons, but not over any corporation; and in involuntary cases being confined to debtors who owe \$1,000 or more and who, if natural persons, are not wage earners nor farmers, or, if corporations, are engaged principally in manufacturing, mining, trading, printing, publishing or mercantile pursuits.

§ 28. **U. S. District Courts Created into Bankruptcy Courts.**—The United States District Courts are, by the Act, created into bankruptcy courts.¹ They are still the United States District Courts, but are sitting "in bankruptcy." The machinery of the District Court is used, subject to such modifications as the Bankruptcy Act requires for its administration.

§ 29. **Jurisdiction in Bankruptcy Limited, Though Bankruptcy Courts Not Inferior Courts.**—Jurisdiction in bankruptcy is limited.²

Taft v. Century Savings Bk., 15 A. B. R. 597, 141 Fed. 369 (C. C. A. Iowa): "The District Court as a court of bankruptcy is undoubtedly a court of limited jurisdiction."

And the bankruptcy courts are expressly limited in the exercise of bankruptcy jurisdiction to their territorial limits.³

1. Bankr. Act, § 1 (8): "Courts of bankruptcy shall include the district courts of the United States and of the Territories, the supreme court of the District of Columbia, and the United States court of the Indian Territory, and of Alaska." *Blake v. Valentine*, 1 A. B. R. 373, 89 Fed. 691 (D. C. Calif.).

2. *In re Billing*, 17 A. B. R. 86, 145 Fed. 395 (D. C. Ala.); *Edelstein v. U. S.*, 17 A. B. R. 652, 149 Fed. 636 (C. C. A. Minn.); *In re First Nat'l Bk. of Belle Fourche*, 18 A. B. R. 273 (C. C. A.), quoted at § 30; *In re Elmira Steel Co.*, 5 A. B. R. 485 (Ref. N. Y.).

3. Bankr. Act, § 2; *In re Owings*, 15 A. B. R. 475, 140 Fed. 739 (D. C. N. Car.); [1867] *Lathrop v. Drake*, 91 U. S. 516.

But the bankruptcy courts are not inferior courts.

In re Billing, 17 A. B. R. 86, 145 Fed. 395 (D. C. Ala.): "The District Court of the United States is a court of limited but not inferior jurisdiction. Congress has conferred upon it original and exclusive jurisdiction to adjudge bankruptcies, and its judgments therein are supported by the same presumptions which are indulged in favor of the judgments of all superior courts of general jurisdiction. When jurisdiction is shown to have attached, the indisputable presumption, save when the question is raised by appeal or an attack upon the adjudication for fraud in its procurement, is that there was sufficient evidence to support the judgment."

Edelstein v. U. S., 17 A. B. R. 652, 149 Fed. 636 (C. C. A. Minn.): "It is true the District Court as a court of bankruptcy is one of limited jurisdiction—that is, limited in respect of the subjects over which it may exercise jurisdiction—but it is unlimited in respect of its power over proceedings in bankruptcy, specifically made subject to its jurisdiction by § 2 of the Act. When judgments are rendered by that court upon questions arising in such proceedings, they possess all the incidents and qualities of finality and conclusiveness appertaining to judgments of courts of general jurisdiction. Its judgments, unless reversed on appeal or writ of error, import absolute verity."

In re First Nat'l Bk. of Belle Fourche, 18 A. B. R. 266 (C. C. A.): "While the jurisdiction of the national courts is limited, they are not inferior courts, and their judgments possess every attribute of finality and estoppel which pertains to those of courts of general jurisdiction."

§ 30. Limitations as to Residence, Occupation, etc., Jurisdictional.—The limitation of the operation of the bankruptcy act to those having their residence, domicile or principal place of business within the particular district for the requisite period of time, and also the exclusion from involuntary proceedings of wage earners and farmers, etc., and of corporations not engaged principally in manufacturing, mining, trading, printing, publishing or mercantile pursuits are jurisdictional matters: they concern the jurisdiction of the court over the subject matter and not merely over the person, the court's jurisdiction being confined to those classes of cases and not extending over the entire "subject of bankruptcies"; and the lack of the requisite conditions is not a personal privilege, waivable by the respondent; nor may jurisdiction be conferred by consent to adjudge a person bankrupt who does not come within the limitations.⁴

Taft v. Century Sav. Bk., 15 A. B. R. 597, 141 Fed. 369 (C. C. A. Iowa): "From this section it appears that all persons are not subject to the provisions of the Bankruptcy Act. Wage earners, or persons engaged chiefly in farming or the tillage of the soil, or persons or corporations not owing debts to the amount of \$1,000, are either expressly or by necessary implication, excluded.

"The District Court, as a court of bankruptcy, is undoubtedly a court of limited jurisdiction. Congress alone had power to determine the subjects over

⁴ In re Plotke, 5 A. B. R. 176, 104 Fed. 964 (C. C. A. Ills.). Inferentially, In re Elmira Steel Co., 5 A. B. R. 486 (Ref. N. Y.). Inferentially, In re Clisdell, 2 A. B. R. 424 (Ref. N. Y.). Compare, also, In re Columbia Real Estate Co., 4 A. B. R. 411, 101 Fed. 965 (D. C. Ind., affirmed in 7 A. B. R. 441).

which it might exercise jurisdiction. As said by the Supreme Court in *Johnson Company v. Wharton*, 152 U. S. 252, 260.

"The distribution of the judicial power of the United States among the courts of the United States is a matter entirely within the control of the legislative branch of the government."

"It is suggested that the bankruptcy court had jurisdiction over the alleged bankrupt in this case by due service of the subpoena upon him, and over the subject matter by virtue of the Bankruptcy Act, which confers upon it plenary jurisdiction in bankruptcy proceedings. But this does not solve the question. It was said by the Supreme Court in *Windsor v. McVeigh*, 93 U. S. 274, 282, that:

"All courts, even the highest, are more or less limited in their jurisdiction. They are limited to particular classes of actions. * * * Though the court may possess jurisdiction of a cause, of the subject matter and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. * * * The judgments mentioned * * * (in the cases referred to for illustration) would not be merely erroneous. They would be absolutely void, because the court in rendering them would transcend the limits of its authority in those cases.'"

"To the same effect are the following cases: *Ex parte Lange*, 18 Wall. 163, 176; *Cornett v. Williams*, 20 Wall. 226, 250. In the last-cited case, it is said:

"The settled rule of law is that, jurisdiction having attached in the original case, everything done within the power of that jurisdiction, when collaterally questioned, is to be held conclusive of the rights of the parties, unless impeached for fraud."

"Applying the foregoing principles to the statute under consideration, it appears that Congress limited the jurisdiction of the District Court, as a court of bankruptcy to cases in which the debtor owes at least \$1,000. Cases in which the debtor owes less than that sum are not brought 'within the power' of its jurisdiction, and debtors owing less than that sum are not subject to the provisions of the Bankruptcy Act. It has been held by the Circuit Court of Appeals for the Seventh Circuit that a petition in involuntary bankruptcy must show clearly that the debtor is not a wage earner or engaged chiefly in farming or the tillage of the soil. In *re Taylor*, 4 Am. B. R. 515, 102 Fed. 728. To the same effect is the decision of this court in *In re Plymouth Cordage Company*, 13 Am. B. R. 665, 135 Fed. 1000, and the decision of the Circuit Court of Appeals of the Fifth Circuit in *Beach v. Macon Grocery Company*, 9 Am. B. R. 762, 120 Fed. 736. We observe no difference in principle between the omission of an averment bringing the debtor without the exception as to wage earners or persons engaged chiefly in farming or the tillage of the soil and the omission of an averment bringing the debtor within the class which owes debts to the amount of \$1,000 or over. These provisions are both, in our opinion, jurisdictional, and either of the omissions just mentioned, shows that the debtor proceeded against is not within the class of persons subject to the provisions of the Bankruptcy Act, or subject to the jurisdiction of the court in bankruptcy. The petition in this case was therefore defective in not disclosing that the debtor owed at least \$1,000, and for that reason it conferred no jurisdiction upon the court to subject Cohen, the debtor, to the provisions of the Act."

In *re Garneau*, 11 A. B. R. 679, 127 Fed. 677 (C. C. A. Ills.): "He was a sojourner merely, and not a resident, of East St. Louis. We look upon this transaction as an imposition upon the jurisdiction of the court. The Congress did not intend that one may select any court of bankruptcy which he pleases

in these broad United States, and be enabled, through a pretentious removal to the district of that court, to obtain his discharge from his debts. To allow that to be done would open the door to grave frauds upon creditors, which we are not disposed to countenance.

"It is objected that the petition to dismiss for want of jurisdiction comes too late; that the adjudication in bankruptcy is a judgment; that the only relief to the creditor was to appeal within 10 days from that adjudication. To so hold would be to deny in 99 cases out of 100 all relief whatever, and to make easy the perpetration of fraud. In voluntary cases the adjudication passes *ex parte* and forthwith. The time for appeal would have passed before creditors would in most cases receive notice of the adjudication, and the record made by the bankrupt would show nothing erroneous. Here there were no laches chargeable to the creditors, for promptly upon ascertaining the facts from the examination of the bankrupt the petition to dismiss was made. But, aside from that, it would be the duty of the court *sua sponte*, when it is led to suspect that its jurisdiction has been imposed upon, to inquire into the facts by some appropriate form of proceeding, and, for its own protection against fraud or imposition, to act as justice may require. *Morris v. Gilmer*, 129 U. S. 329."

In *re Taylor*, 4 A. B. R. 515, 102 Fed. 728 (C. C. A. Ills.): "The defense to proceedings in involuntary bankruptcy that the person sought to be declared a bankrupt is within the exceptions of § 4, is not simply personal to the bankrupt—it goes to the jurisdiction of the Court and may be raised by any creditor."

Compare, *obiter*, *Louisville Trust Co. v. Cominger*, 7 A. B. R. 427, 184 U. S. 18: "Jurisdiction as to the subject matter may be limited in various ways, as to civil and criminal cases, cases at common law or equity, or in admiralty, probate cases, or cases under special statutes, to particular classes of persons, to proceedings in particular modes and so on."

In *re Keystone Coal Co.*, 6 A. B. R. 378, 109 Fed. 872 (D. C. Penna.): "The question here involved is jurisdictional. Unless this court is vested with jurisdiction over this corporation by statutory grant, none exists."

Compare, inferentially, In *re Brett*, 12 A. B. R. 492, 130 Fed. 981 (D. C. N. J.): "The demurrant insists that the first two causes of demurrer deal with jurisdictional defects in the petition, and that it is beyond the power of the court to permit an amendment of the petition which shall relate back to the time when the petition was filed. The purport of the argument is that the petition is so defective in form and substance that the court acquired by it no jurisdiction of the subject matter of the proceedings, or of the person of the alleged bankrupt. But it is not the petition that confers upon the court jurisdiction of the subject matter. That is done by the law. Jurisdiction of the person is acquired by filing a petition, and serving a copy of it, with a subpoena, upon the alleged bankrupt. The demurrant by its demurrer necessarily admits that the petition has been filed, and the record of the case shows that a copy of the petition and the subpoena have been served on the alleged bankrupt. The court therefore has jurisdiction both of the subject matter and the person."

But compare, In *re Mason*, 3 A. B. R. 599, 99 Fed. 256 (D. C. Car.): "Entire want of jurisdiction over the res may be taken advantage of at any time and attacked collaterally. But where objection goes only to the jurisdiction over the person, it must be taken promptly. A creditor cannot prove his debt, participate in election of trustee and distribution of assets, and then, upon application for discharge, object to jurisdiction on account of bankrupt's non-residence."

And also compare *First Nat'l Bk. v. Klug*, 8 A. B. R. 13, 186 U. S. 204: "The conclusion was, it is true, that Klug could not be adjudged a bankrupt, but the

court had jurisdiction to so determine, and its jurisdiction over the subject matter was not and could not be questioned."

Compare, also, *In re Urban & Suburban*, 12 A. B. R. 690 (D. C. N. J.): "The Bankruptcy Act confers on the courts jurisdiction of the subject matter of bankruptcy proceedings, and jurisdiction of the company was in this case acquired by due service of a subpoena and of a copy of the petition in bankruptcy. The jurisdiction of subject matter and of the company was, therefore, complete at the time of adjudication. *In re Williams*, Fed. Cas. No. 17,700; *Roche v. Fox*, Fed. Cas. No. 11,974."

In re Frischberg, 8 A. B. R. 610 (Ref. N. Y.): "If the court had jurisdiction of the subject matter and this it undoubtedly had by reason of the doing business, residence or domicile of the alleged bankrupt within the statutory period of time, then it is immaterial whether jurisdiction of the person was thereafter acquired by the service of process or by the voluntary appearance of the bankrupt; such jurisdiction could be acquired by either method."

It is analogous to the jurisdiction of the court in other proceedings for the determination of the status of a person or the administration of estates.

Nevertheless, it has been held, by one Circuit Court of Appeals, in two cases, that neither the allegation nor the fact that a corporation is engaged principally in manufacturing, trading, etc., is jurisdictional.

In re Broadway Savings & Trust Co., 18 A. B. R. 254 (C. C. A. Mo.): "The contention of counsel for the petitioner that the omitted allegation, or the fact that the desk company was engaged principally in one of the pursuits which subjected it to the adjudication, was jurisdictional, has received deliberate and studious consideration, and our conclusion, the reasons for it, and authorities in support of it may be found in our opinion in *In re First National Bank of Belle Fourche*, which is filed herewith. Our judgment is that neither the allegation nor the fact was jurisdictional, because neither conditioned the power of the court to hear the cause and decide every issue in it between the parties. It had the same jurisdiction of the cause and of the parties, and the same power to determine the issues between them, whether the desk company was or was not engaged in one of the pursuits mentioned in section 4b of the bankruptcy law. The only difference the decision of that issue made was that if it was so engaged the court should have given judgment for the petitioners, and if it was not so occupied it should have refused to adjudicate the desk company a bankrupt."

In re First National Bank of Belle Fourche, 18 A. B. R. 266 (C. C. A. Mo.): "The contention that the fact that the Widell Company was principally engaged in manufacturing conditioned the jurisdiction of the court and the validity of the adjudication, that the judgment is a nullity because this fact did not exist, and that its invalidity may be shown at any time by collateral attack, or otherwise by proof that the Widell Company was not engaged in any pursuit which subjected it to adjudication in bankruptcy, disregards the fundamental distinction between the facts essential to the jurisdiction of a court over the subject matter and the parties and those requisite to establish the cause of action. Jurisdiction of the subject matter and of the parties is the right to hear and determine the suit or proceeding in favor of or against the respective parties to it. The facts essential to invoke this jurisdiction differ materially from those essential to constitute a good cause of action for the relief sought.

A defective petition in bankruptcy, or an insufficient complaint at law, accompanied by proper service of process upon the defendants, gives jurisdiction to the court to determine the questions involved in the suit, although it may not contain averments which entitle the complainant to any relief; and it may be the duty of the court to determine either the question of its jurisdiction or the merits of the controversy against the petitioner or plaintiff. Facts indispensable to a favorable adjudication or decree include all those requisite to state a good cause of action, and they comprehend many that are not essential to the jurisdiction of the suit or proceeding. The fact that Widell Company was engaged in a manufacturing pursuit was not of the former, but of the latter, class. It was not essential to invoke the jurisdiction of the court over the parties to the proceeding and the property it involved, because the Act of Congress gave that court, upon the filing of the petition of the creditors, jurisdiction to hear and determine the questions it presented, upon proper service of the subpoena upon the defendant. The facts which conditioned the jurisdiction of the court were the filing of the petition and the service of the subpoena. In *re Plymouth Cordage Co.*, 13 Am. B. R. 665, 135 Fed. 1000, 1004, 68 C. C. A. 434, 438.

"Concede, for we do not stop to consider or decide, that the nonexistence of either of these facts might be shown at any time, by collateral attack or otherwise, to destroy the validity of the adjudication, and this is the extent of the effect of many of the authorities cited by counsel here. *Williamson v. Berry*, 8 How. 495, 540, 12 L. Ed. 1170; *Adams v. Terrell* (C. C.), 4 Fed. 796, 800. Nevertheless, the fact that the Widell Company was, or that it was not, principally engaged in manufacturing, was not of this class. It did not condition the jurisdiction of the court, but the judgment which it ought to render, only. The court had the same jurisdiction to decide the issues between the parties, whether the Widell Company was or was not principally engaged in a manufacturing pursuit. The only difference the determination of that issue made was that if it was so engaged the court should have given judgment for the petitioners, and if it was not thus occupied it should have rendered judgment against them."

The argument of these last two cases is that such facts pertain, not to the subject matter, but simply to the cause of action. However, it would seem that did they pertain simply to the cause of action their non-existence would be waivable; but, assuredly, neither consent nor waiver can confer jurisdiction in the bankruptcy court of one district to adjudge bankrupt a debtor not resident, domiciled nor having his principal place of business therein, although the ascertainment of such jurisdictional fact must be left to the same court for determination and its determination may not be subject to collateral attack. Nor would any attempt to administer in bankruptcy a banking corporation or other corporation not included within the designated classes subject to bankruptcy be otherwise than null and void. Such ruling is familiar in probate jurisprudence upon the subject of attempts to administer upon the estate of a decedent who was not a resident at the time of his death or otherwise within the statutory classification.

The ruling that the *fact* of occupation is not jurisdictional is purely obiter in each of these cases; and the ruling that the *allegation* of occupa-

tion also is not jurisdictional, evidently has reference to the unimpeachability of the record by collateral attack where the record does not affirmatively show the debtor does *not* belong to the particular class but simply omits all allegation whatsoever as to the occupation. As is later noted (§§ 437, 450), the record of adjudication imports jurisdiction where jurisdictional findings are merely omitted and makes the adjudication impervious to collateral attack, but if the record of adjudication affirmatively shows the debtor did *not* belong to one of the classes subject to bankruptcy it would without question be absolutely void on its face.⁵ Section 2 of the Act grants "jurisdiction" to adjudge bankrupt debtors who have resided or had their domicile or place of business within the district a certain specified time. Such residence, domiciliation, etc., are, therefore, declared to be jurisdictional. Of the same nature are the limitations regarding occupation and amount of debts: they are limitations upon or extensions of the general subject matter of "bankruptcies." In other words, not all "bankrupts" (as the general term may be used) may be adjudged involuntary bankrupts under the present Act but only those owing debts of \$1000 or more. On the other hand, the general subject matter of bankruptcy was originally confined to "traders," "bankruptcy" being predicated, originally, only of "traders;" but under the present Act the subject matter in this regard has been extended so that "bankruptcy" now embraces other classes than those to which it originally applied. Likewise, the exception of merely wage earners, farmers, etc., is in reality an extension of the subject matter of bankruptcy beyond its original meaning, for now involuntary bankruptcy may be predicated of *all* natural persons "except" wage earners and farmers, whilst formerly it was predicable only of "traders." Thus it will be seen that these limitations are jurisdictional, pertaining to the "subject of bankruptcies," as the same may be limited or extended, under the present law.

5. But Existence of Jurisdictional Facts Need Not Appear on Face of Record.—But the existence of jurisdictional facts need not appear on the face of the record. *Bryant v. Kinyon*, 6 A. B. R. 242, 53 L. R. A. 871 (Mich.); *In re First Nat'l Bank of Belle Fourche*, 18 A. B. R. 271 (C. C. A.). See post, "Effect of Adjudication on Rights of Parties," §§ 437, 450.

But if Lack of Jurisdictional Facts Affirmatively Appears on Face of Record, Decree Void.—But if the lack of jurisdictional facts affirmatively appears on the face of the record, the decree is void, the distinction being between mere failure to show jurisdiction and the affirmative showing of failure of jurisdiction.

Inferentially, *In re First Nat'l Bk. of Belle Fourche*, 18 A. B. R. 271 (C. C. A.): "The petition contained no statement that the Widell Corporation was not engaged principally in a manufacturing pursuit, and no showing that the court was without jurisdiction of the case; but it set forth the substance of a good cause of action, and it was impregnable to attack after the adjudication." See post, "Effect of Adjudication on Rights of Parties," §§ 437, 450.

DIVISION 1.

JURISDICTION AS DEPENDENT ON RESIDENCE, DOMICILE OR PRINCIPAL
PLACE OF BUSINESS OR ON OWNERSHIP OF
PROPERTY IN DISTRICT.

§ 31. Limitations as to Residence, Domicile or Principal Place of Business.—No one may be adjudged bankrupt, upon his own petition or upon the petition of another, by his own consent or contrary thereto, except by the bankruptcy court of the district where he has had either his residence, domicile or principal place of business for the preceding six months or for the greater portion thereof, preceding the filing of the petition.⁶

In *re R. H. Williams*, 9 A. B. R. 736, 128 Fed. 38 (D. C. Ark.): "Has this court jurisdiction in bankruptcy when the party has not had his principal place of business, residence or domicile within the district for more than three months preceding the filing of the petition in bankruptcy against him? Section 2 of the Bankrupt Act of 1898 confers jurisdiction on the District Court to (1) 'adjudge persons bankrupt who have had their principal place of business, residence, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof.' U. S. Comp. St., p. 3422. It will thus be seen that in order to adjudicate a debtor a bankrupt, such person must have had his principal place of business, residence or domicile within that district for the preceding six months, or the greater portion thereof. The greater portion of what? There can be but one answer to this: the greater portion of the six months preceding the filing of the petition. This is the conclusion reached by the United States Circuit Court of Appeals for the Seventh Circuit. In *re Plotke*, 5 Am. B. R. 171, 44 C. C. A. 282, 104 Fed. 964."

§ 32. Limitation Where Debtor Nonresident or Where Adjudged Bankrupt Outside of United States, but Owns Property Here.—Or, if he has neither his residence, domicile nor principal place of business within the United States, or has been adjudged bankrupt in a foreign country and has property in the United States, then by the bankruptcy court where the property is located.⁷

§ 33. Not All Three Qualifications, Residence, Domicile and Place of Business Coincidentally Requisite.—If the person have either his residence, domicile or principal place of business in the district for the requisite period, it is sufficient: he need not have all nor any two therein.⁸ Thus,

6. Bankr. Act, § 2 (1); In *re Elmira Steel Co.*, 5 A. B. R. 485 (Ref. N. Y.); In *re Garneau*, 11 A. B. R. 679, 127 Fed. 677 (C. C. A. Ills.); *Tiffany v. LaPlume Condensed Milk Co.*, 15 A. B. R. 413 (D. C. Pa.).

7. Bankr. Act, § 2 (1).

8. In *re Harris*, 11 A. B. R. 650 (Ref. N. J.); In *re Brice*, 2 A. B. R. 197, 93 Fed. 943 (D. C. Iowa); In *re Clisdell*, 2 A. B. R. 424 (Ref. N. Y.).

Residence and Domicile Distinguished.—Residence and domicile are different terms. Both mean a home instead of a mere staying place. Residence may be

a more or less temporary home; but domicile is the permanent home place to which one expects ultimately to return for permanent abode when away and has no intention of leaving permanently when there.

In *re Garneau*, 11 A. B. R. 679, 127 Fed. 677 (C. C. A. Ills.): "There is, of course, a legal distinction between 'domicile' and 'residence,' although the terms are generally used as synonymous, the distinction depending upon the connection in which and the purpose for which the terms are used. 'Domicile' is the place where one has his true, fixed, permanent home, and principal establishment, and to which, whenever he is absent, he has the intention of returning, and where he exercises his political rights. There must exist in combination the fact of residence and the *animus manendi*. 'Residence' indicates permanency of occupation as distinguished from temporary occupation, but does not include so much as 'domicile,' which requires an intention continued with residence. 2 Kent 576. Residence has been defined to be a place where a person's habitation is fixed without any present intention of removing therefrom. It is lost by leaving the place where one has acquired a permanent home and removing to another place *animo non reverendi*, and is gained by remaining in such new place *animo manendi*. *Tracy v. Tracy*, 62 N. J. Eq. 807, 48 Atl. 533. In *Shaeffer v. Gilbert*, 73 Md. 66, 20 Atl. 434, the word is thus defined: 'It does not mean one's permanent place of abode where he intends to live all his days, or for an indefinite or unlimited time; nor does it mean one's residence for a temporary purpose, with the intention of returning to his former residence when that purpose shall have been accomplished, but means, as we understand it, one's actual home, in the sense of having no other home, whether he intends to reside there permanently or for a definite or indefinite length of time.'"

In *re Dinglehoef Bros.*, 6 A. B. R. 242, 109 Fed. 866 (D. C. N. C.): "Residence is personal presence in a fixed and permanent abode as distinguished from a temporary occupation, but it does not include as much as domicile, which requires an intention continued with residence. In a case in which the claimant of an exemption under the laws of North Carolina had no residence in such State except during a sojourn in a boarding house soon after her marriage, nor any right to her exemption except such as she acquired through her deceased husband, who was not a resident of the State, she has never been a resident and her intention to return to the State cannot avail her."

In *re Williams*, 3 A. B. R. 677, 99 Fed. 544 (D. C. Wash.): "Domicile, meaning that residence from which there is no present intention to remove or to which there is a general intention to return, cannot be changed except *facto et animo*." In *re Owings*, 15 A. B. R. 473, 140 Fed. 30 (D. C. N. C.); In *re Clisdell*, 2 A. B. R. 424 (Ref. N. Y., reversed in 4 A. B. R.).

In *re Berner*, 3 A. B. R. 325 (Ref. Ohio): "Domicile and residence are distinct terms in bankruptcy proceeding. Residence may involve the intent to leave when the purpose for which it has been taken ceases; domicile implies no such intent. The abiding is *animo manendi*. One is a resident of a place from which his departure is indefinite as to purpose; and for this purpose he has made the place his temporary home, while if his intent be to remain permanently, it becomes his domicile. Residence for voting purposes, or for the benefit of the poor laws is not necessarily the same as residence in cases involving jurisdiction for judicial purposes. Where it is sought to be proved that there has been an abandonment of the old domicile and an establishment of a new one, the burden of proof lies upon those asserting such change."

And the question of residence or domicile is principally a question of fact and of intent. In *re Williams*, 3 A. B. R. 677, 99 Fed. 544 (D. C. Wash.); In *re Clisdell*, 2 A. B. R. 424 (Ref. N. Y., reversed, on other grounds, in 4 A. B. R. 95). Instance, In *re Scott*, 7 A. B. R. 35 (Ref. Mass.).

And the burden of proof of change of residence or domicile rests on the one asserting the change. In *re Berner*, 3 A. B. R. 325 (Ref. Ohio); In *re Waxelbaum*, 3 A. B. R. 267, 97 Fed. 562 (D. C. N. Y.); In *re Clisdell*, 2 A. B. R. 424; In *re Grimes*, 2 A. B. R. 160, 96 Fed. 529.

The residence, domicile or principal place of business must be *bona fide*. In *re Garneau*, 11 A. B. R. 679, 127 Fed. 677 (C. C. A. Ills.). In this case the court holds, that the removal of a person from one district to another, for the purpose of pretending to acquire a residence solely for the purpose of filing a petition in bankruptcy in a district in which he did not reside with the intention of leaving the place as soon as his discharge, does not make him a resident of the district, and the facts being disclosed upon his examination his creditors are entitled to have the proceedings dismissed for want of jurisdiction, the adjudication in bankruptcy, not being conclusive upon them.

But domicile is not lost by the absconding of the debtor to escape prosecu-

foreign corporations having their principal places of business within the district, although resident and domiciled elsewhere, are subject to bankruptcy in the district.⁹ Likewise, one who is clerking in one district but running a store in another district is also subject to bankruptcy.¹⁰

§ 34. **"For Preceding Six Months or Greater Portion Thereof"** Defined.—This residence, domicile or principal place of business must have existed during the preceding six months or the greater part thereof; which means a length of time, either continuous or interrupted, aggregating more than three months, occurring sometime within the preceding six months.¹¹ And the provision of § 2, 1, does not require residence or domicile, etc., either at the beginning or at the end of the six months period.¹² It does not mean, as is maintained in *In re Ray*, 2 A. B. R. 158 (Ref. Wash.), that the bankrupt may file his petition, nor that creditors may file their petition against him, in the district wherein he has longest resided or been domiciled during the preceding six months, if such longest period is less than three months.¹³

§ 35. **Actual Principal Place of Business Governs.**—In determining the principal place of business of a corporation, it is its actual principal place of doing business that will govern.¹⁴ Thus it is its actual place of doing business that will govern, rather than its home office as designated in its articles of incorporation.¹⁵

On the other hand, its home office may be its principal place of business, although it operates manufactories and mines elsewhere.

tion for a criminal offense. *In re Filer*, 5 A. B. R. 332, 108 Fed. 209 (D. G. N. Y.).

Estoppel to Deny Residence.—Where a bankrupt secures dismissal of bankruptcy proceedings against him in one district by plea of nonresidence and allegation of residence in another State he, and later on his administrator will be estopped to deny residence in the latter district. *Long v. Lockman*, 14 A. B. R. 172 (D. C. Colo.).

9. *In re Magid-Hope Silk Mfg. Co.*, 6 A. B. R. 610, 110 Fed. 352 (D. C. Mass.); *In re Marine Machine & Conveyor Co.*, 1 A. B. R. 421, 91 Fed. 630 (D. C. N. Y.); *Dressel v. Lumber Co.*, 5 A. B. R. 744, 107 Fed. 255 (D. C. N. C.). *Obiter*, *In re Elmira Steel Co.*, 5 A. B. R. 485 (Ref. N. Y.).

10. *In re Brice*, 2 A. B. R. 197, 93 Fed. 942 (D. C. Iowa).

11. *In re Berner*, 3 A. B. R. 325 (Ref. Ohio); *In re Plotke*, 5 A. B. R. 171, 104 Fed. 964 (C. C. A. Ills.); *In re R. H. Williams*, 9 A. B. R. 736, 120 Fed. 38 (D. C. Ark.).

12. *In re Berner*, 3 A. B. R. 325 (Ref. Ohio). *Contra*, *In re Stokes*, 1 A. B. R. 35 (Ref. Wash.).

13. *In re R. H. Williams*, 9 A. B. R. 736, 120 Fed. 38 (D. C. Ark.); *In re Plotke*, 5 A. B. R. 171, 104 Fed. 964 (C. C. A. Ills.); *obiter*, *In re Berner*, 3 A. B. R. 325 (Ref. Ohio).

14. Compare analogous rulings as to occupation, "Must Be Principally Engaged," post, § 85.

15. *Dressel v. North State Lumber Co.*, 5 A. B. R. 744, 107 Fed. 255 (D. C. N. C.); *In re Marine Machine & Conveyor Co.*, 1 A. B. R. 421, 91 Fed. 630 (D. C. N. Y.); *In re Duplex Radiator Co.*, 15 A. B. R. 324, 142 Fed. 906 (D. C. N. Y.).

In *re Slate Co.*, 16 A. B. R. 408, 144 Fed. 737 (C. C. A. Mass.): "We are of the opinion that when a corporation operating factories, mills, or mines in various states, has a principal office where business is transacted of the character of that conducted at the Boston office of the Matthews Consolidated Slate Company, such principal office, rather than a factory, mill, or mine, according to ordinary understanding and speech, as well as according to the intent of Congress, constitutes the 'principal' place of business,' within the meaning of the Bankruptcy Act. Not only is this the natural interpretation, but it seems to us the only practical interpretation; for, since there can be but one principal place of business, if regard is paid to the amount of property owned or kept in a particular jurisdiction, or to the amount of product there turned out, or to the number of workmen employed, it might follow that the inquiry would be, which is the largest mine or factory? a question having little relation to the purpose of administering the assets."

Nor will the failure of a foreign corporation to obtain a certificate of permission to do business, prevent its principal place of business being within the district.¹⁶

In *re Duplex Radiator Co.*, 15 A. B. R. 324, 142 Fed. 906 (D. C. N. Y.): "At all events, in my opinion, if a foreign corporation has, in fact, had its principal place of business for six months in this district, this court has jurisdiction, and the fact that it has not obtained a certificate from the Secretary of State, permitting it to do business here, does not divest this court of jurisdiction. If it has not complied with the law of this State in obtaining such a certificate, it is liable to the consequences provided by that law. But, in my opinion, the fact that no certificate was obtained does not change the fact that the principal place of business is where the principal business is done."

§ 36. Residence, etc., of One Partner Sufficient.—A partnership petition may be filed in any district wherein any one of the partners has had his residence, domicile or principal place of business long enough to have supported the jurisdiction of the court had he individually petitioned.¹⁷

DIVISION 2.

WHO MAY BECOME VOLUNTARY BANKRUPTS.

§ 37. Who May Be Voluntary Bankrupt.—Any natural person who owes debts, but no corporation, may be adjudged bankrupt upon his own petition, such one being termed a "voluntary" bankrupt.¹⁸

^{16.} As to facts constituting principal place of business, *Obiter*, In *re Elmira Steel Co.*, 5 A. B. R. 486, 109 Fed. 471 (Ref. N. Y.).

^{17.} Sec. 5: "The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property."

In *re Blair*, 3 A. B. R. 588, 99 Fed. 76 (D. C. N. Y.).

As to vacating of adjudication for want of jurisdiction for lack of proper residence, etc., in the particular district; also as to collateral attack on same, see post, "Adjudication, Vacating of;" also, "Adjudication—Collateral Attack upon," §§ 437, 450.

Possession of bankrupt's assets by State Court receiver, sheriff or other officer, does not affect the jurisdiction of the bankruptcy court to adjudge the debtor bankrupt. In *re Moench*, 12 A. B. R. 240, 130 Fed. 685 (C. C. A. N. Y., affirming 10 A. B. R. 656).

^{18.} Bankr. Act, § 4 (a).

§ 38. **"Voluntary" Bankruptcy a Later Development.**—Bankruptcy law at the time we derived our Common Law from England, and even until 1826 in England and 1841 in the United States, could not be set in motion at all by the debtor himself, but only by his creditors; that is to say, until then, there was only one kind of bankruptcy, adversary bankruptcy; or, as the rather ambiguous term of the present Act has it, "involuntary" bankruptcy. Before those years a debtor could not voluntarily file a petition to be adjudged a bankrupt, no matter how insolvent he might be, nor how wise a step such might be for his creditors and for himself as well. Before then, the law was chiefly a creditors' law, a swift and sharp remedy placed in the hands of creditors for seizing and distributing the estates of dishonest insolvents and of punishing the offenders, only incidentally granting any favors to the debtors, much less giving them the right of initiative; and it was only by slow steps and gradual progress (see Introduction, ante) that bankruptcy law came to approach the full measure of a general system for the administration of insolvent estates that it is, speaking in general terms, at the present time.

But, although the debtor is now permitted voluntarily to seek his own adjudication as a bankrupt, and although the operation of the law is not confined to those known at common law as traders as it originally was confined at the time we derived our Common Law from England, nevertheless, even so, it is not every debtor, yet, that may voluntarily bring into operation the functions of the Bankruptcy Act, nor that may be thrown involuntarily into bankruptcy by creditors.

§ 39. **Partnerships Included.**—Partnerships are included among those who may become voluntary bankrupts, for § 5 (a) provides that a partnership during the continuation of the partnership business or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.¹⁹

§ 40. **But Not Mere Joint Contractors or Joint Owners.**—Mere joint contractors or joint owners are not permitted to file a joint petition. Nothing short of a partnership will authorize the joining of two or more individuals in one petition. Thus, husband and wife may not join in a single petition where simply bound on the same obligations.

But compare contra rule in the State of Washington, evidently by virtue of statute.

Obiter, In re Herbold, 14 A. B. R. 118 (D. C. Wash.): "Early in the administration of the Bankrupt Act the district judge of this district stated from the bench that he would, for the purpose of the Act, consider the family relation as a partnership. Under the community law, a family undoubtedly partakes of the nature of a quasi partnership, but the statutes of the State have provided that while a partnership for certain purposes, still, etc., etc."

19. See post, § 56, et seq.

§ 41. **No Specified Amount of Indebtedness Requisite, Though Debts Must Be "Provable."**—It is not necessary that the voluntary bankrupt owe any particular amount of debts.²⁰ But it is necessary that the debts be such as are termed "provable." What debts are provable and what are not provable will later be discussed.²¹

If he owe any provable debt, it is enough: he is entitled to go voluntarily into bankruptcy.²²

In *re Schwaninger*, 16 A. B. R. 427, 144 Fed. 555 (D. C. Wis.): "It is my belief that Congress had not in mind any purpose to discriminate against an unfortunate debtor who is oppressed by a single obligation, and that the will of Congress will be effectuated by making the definition above recited applicable to § 4, and treating the term 'debts' where it occurs in such section as the equivalent of 'debt'."

And if there is no provable debt he is not so entitled.

In *re Yates*, 8 A. B. R. 69, 114 Fed. 365 (D. C. Calif.): "But a cause of action against him for unliquidated damages for a personal tort, such as is involved in the action of *Risdon v. Yates*, before referred to, is not within either of the classes named. * * * With much stronger reason should the decree adjudging *Yates* a bankrupt be vacated, and the proceeding instituted by him be dismissed, because at the date of the filing of his voluntary petition there was no existing provable debt against his estate under the Bankruptcy Act. It will be time enough for him to apply for relief under the Bankruptcy Act, and to ask the court to pass upon the many questions which may arise in such a proceeding, when it shall be ascertained that he is indebted to some person upon a claim provable under the Bankruptcy Act."

§ 42. **Insolvency Not Requisite to Voluntary Bankrupt.**—Nor is it necessary that he be insolvent. The reason of this is probably that, if he be solvent, it is nobody's business but his own if he chooses to have his creditors paid through the machinery of the bankruptcy court; and if, on the other hand, he be actually insolvent, why then he *ought* to go into bankruptcy. So runs the argument at any rate.²³

§ 43. **Creditors May Not Intervene to Oppose Voluntary Petition.**—For the reason above stated, a debtor is adjudicated bankrupt at once

20. In *re Schwaninger*, 16 A. B. R. 427, 144 Fed. 555 (D. C. Wis.).

21. See post, "What Debts Are Provable," chap. XXI, § 625, et seq.

22. Perhaps even though all debts be outlawed. This has been held to be so in partnership cases, even though all firm obligations be outlawed, if the right of contribution still exists unsettled among the partners. In *re Levy & Richman*, 2 A. B. R. 21 (Ref. N. Y.).

In one case it was held, that a voluntary petition should be dismissed where the only debt was a nondischargeable debt. In *re Maples*, 5 A. B. R. 426, 105 Fed. 919. But this case is not correct in such ruling, because bankruptcy may be proper in behalf of creditors even though unprofitable to the debtor.

23. In *re Jehu*, 2 A. B. R. 498, 94 Fed. 638 (D. C. Iowa). Compare, to same effect, *obiter*, In *re Chappell*, 7 A. B. R. 612, 113 Fed. 545 (Ref. Va., affirmed by D. C.).

on filing his voluntary petition, and no one is permitted to file a defense to it.²⁴

In *re Jehu*, 2 A. B. R. 498, 94 Fed. 638 (D. C. Iowa): "I know of no provision of the Bankrupt Act which authorizes creditors to file answers to a voluntary petition in bankruptcy."

Nat'l Bk. v. Moyses, 8 A. B. R. 10, 186 U. S. 181: "These are not issuable facts and notice is unnecessary. * * * Adjudication follows as matter of course."

In *re Ives*, 7 A. B. R. 692, 113 Fed. 911 (C. C. A. Mich.): This was the case of a partnership filing a voluntary petition and being adjudicated bankrupt, creditors afterwards seeking to intervene to have the adjudication vacated.

In *re Carbone*, 13 A. B. R. 55 (Ref. Wash.): "Adjudication of bankruptcy will be granted to a voluntary petitioner whose petition sets forth the jurisdictional requirements. A creditor may not object to such adjudication, but has his remedy if the averments are false."

Thus, a creditor may not intervene and oppose it, by setting up that the petitioner is not insolvent.²⁵ And this is so, even in partnership cases where one of the partners does not consent; the defense of solvency not being available to creditors in a partnership petition filed by one partner, but only to the nonjoining partner.²⁶

§ 44. Corporations May Not Be Voluntary Bankrupts.—Corporations may not petition for their own adjudication as bankrupts. Why it is that no corporations are allowed to go voluntarily into bankruptcy under the present law whilst almost all classes of them may be forced involuntarily into bankruptcy by creditors, is perhaps not easy to understand. Such a distinction was not in any of our former acts nor in any of those of England. A corporation may, however, as will be later noted in considering the subject of acts of bankruptcy, admit in writing its inability to pay its debts and its willingness on that ground to be adjudged bankrupt. Such admission itself being an act of bankruptcy, it may then, by the co-operation of creditors holding sufficient claims, be thrown into bankruptcy—necessarily a semi-voluntary proceeding.²⁷

DIVISION 3.

WHO MAY BE THROWN INVOLUNTARILY INTO BANKRUPTCY.

§ 45. Who May Be Adjudged Involuntary Bankrupt.—Any natural person having sufficient legal capacity, except a wage earner or a person

²⁴ In *re Carleton*, 8 A. B. R. 270, 115 Fed. 246 (D. C. Mass.). Also a partnership case.

²⁵ In *re Carleton*, 8 A. B. R. 270, 115 Fed. 246 (D. C. Mass.).

²⁶ In *re Carleton*, 8 A. B. R. 270, 115 Fed. 246 (D. C. Mass.).

²⁷ But it has been held a fraud on the statute resulting in the dismissal of all proceedings, for a corporation, desiring to go into bankruptcy, and having only two of its creditors who are willing to file a petition against it, to induce a third creditor to assign its claim so that the two willing creditors and the assignee of the third creditor might file the petition. In *re Independent Thread Co.*, 7 A. B. R. 704, 113 Fed. 908 (D. C. N. J.). But still such ruling seems unnecessary.

engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, mining or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and be subject to the provisions and entitled to the benefits of the act. Private bankers, but not national banks nor banks incorporated under State or territorial laws, may be adjudged involuntary bankrupts.²⁸

SUBDIVISION "A."

AS TO NATURAL PERSONS.

§ 46. **"Wage Earners" and "Farmers," etc., Excluded.**—Wage earners and farmers and tillers of the soil are excepted and no one can be adjudged bankrupt in involuntary proceedings who is a wage earner or is chiefly engaged in farming or the tillage of the soil.²⁹

In re Taylor, 4 A. B. R. 515, 102 Fed. 728 (C. C. A. Ills.): "We think the court erred in holding that the alleged bankrupt being a farmer and therefore not coming within the provisions of the law governing involuntary bankruptcy, was a personal privilege, which could only be set up by the bankrupt in person. The question was jurisdictional rather than personal. The law (Bankr. Act, 1898, § 4) provides that any natural person, except a wage earner or a person engaged chiefly in farming or the tillage of the soil, may be adjudged an involuntary bankrupt upon default or an impartial trial. The alleged bankrupt did not appear or answer, but the appellant who had obtained a lien upon this property, appeared and set up the fact in an answer. There was nothing in the petition to bring the alleged bankrupt within the terms of the statute. It did not allege what the defendant's business or occupation was, and there was no allegation to show that he did not come within the excepted classes, which, under the law, are too important to be wholly ignored. Farmers and wage earners constitute a large majority of the people. These are excepted from that portion of the clause relating to involuntary bankruptcy, and the petition should either have shown what the business of the defendant was, or that he did not come within the excepted classes."

28. Bankr. Act, § 4 (b).

"Engaged Principally in Manufacturing, Trading, etc.," Applicable Only to Corporations, Not to Natural Persons.—The qualification "Engaged principally in manufacturing, trading, etc.," applies only to corporations, not to natural persons. Cleage v. Laidley, 17 A. B. R. 598 (C. C. A. Mo.).

29. In re Pilger, 9 A. B. R. 245, 118 Fed. 206 (D. C. Pa.). Impliedly, In re Bellah, 8 A. B. R. 310, 116 Fed. 69 (D. C. Del.); In re Mero, 12 A. B. R. 171, 128 Fed. 630 (D. C. Conn.); Brake v. Callison, 11 A. B. R. 797, 129 Fed. 201 (C. C. A. Fla.); In re Callison, 12 A. B. R. 344, 130 Fed. 987 (D. C. Fla.); In re Brett, 12 A. B. R. 492, 130 Fed. 981 (D. C. N. J.). Obiter, Moore v. Green (as to farmer), 16 A. B. R. 652 (C. C. A. W. Va.). Obiter and impliedly, Edelstein v. U. S., 17 A. B. R. 649 (C. C. A. Minn.); Beach v. Macon Grocery Co., 9 A. B. R. 762, 120 Fed. 736 (C. C. A. Ga.). Impliedly, In re Livingston, 13 A. B. R. 357 (D. C. Hawaii); In re White, 14 A. B. R. 241, 135 Fed. 199 (D. C. Penna.); Hoffschlaeger v. Young Nap, 12 A. B. R. 514 (D. C. Hawaii).

These exceptions, of wage earners and farmers, exclude from the operation of involuntary bankruptcy the vast majority of those engaged in the industrial life of the country;³⁰ and indicate an adherence, more or less accurate, to the original restriction of bankruptcy proceedings to traders and merchants.

Compare *Brown & Adams v. Button Co.*, 17 A. B. R. 566 (C. C. A. Del.): "Bankruptcy is supposedly concerned with commercial matters and was early confined to traders. And while it has been gradually extended and enlarged, the original idea has not altogether been departed from."

And the exclusion of the classes named goes to the jurisdiction of the Court over the subject matter itself.³¹

§ 47. **"Wage Earner" Defined.**—A wage earner is defined to be an individual who works for wages, salary or hire, at a rate of compensation not exceeding fifteen hundred dollars a year.³²

§ 48. **Farmer Must Be Engaged "Chiefly" in Farming, etc.**—Only those engaged "chiefly" in farming or in tilling the soil are exempt; mere incidental farming or tilling does not exempt.³³

Bank of Dearborn v. Matney, 12 A. B. R. 483, 132 Fed. 75 (D. C. Mo.): "It is not every person engaged in farming or the tillage of the soil who is exempt from the operation of the Bankrupt Act, but it is a person 'engaged chiefly in farming or the tillage of the soil.'"

And mere ownership of a farm is not sufficient to exempt. Thus, a farmer's wife in whose name the farm had been placed in order to escape creditors, the husband managing the same, is not exempt from bank-

30. In re Taylor, 4 A. B. R. 515, 102 Fed. 728 (C. C. A. Ills.).

31. See ante, § 30.

32. Bankr. Act, § 1 (27).

Instances: (1) An ordinary day laborer who does work with his hands, lifting logs, holding a plow, driving his team, and similar service for different people at irregular intervals, lasting from a day to a week at a time, is a "wage earner."

In re Yoder, 11 A. B. R. 445, 127 Fed. 894 (D. C. Penna.): "Upon these facts I think it is clear that the bankrupt was a wage earner and not an independent contractor. He was a servant hired by successive masters, and was always paid by the day, never by the job. The fact that he used his horses and wagons in performing the services for which he was paid by the day does not seem to me of any special importance. A carpenter, or any other skilled mechanic, employs tools—often his own tools—to assist him in earning his daily wages, and the bankrupt's horses and wagons stand, I think, in precisely the same category. * * * He was not an independent contractor looking for his income to the profits that he might make by carrying out a contract for a lump sum, but was an ordinary day laborer, who did work with his hands, lifting logs, holding a plow, driving his team and similar service, for which he was paid at a fixed rate by the day."

(2) A stockholder, and officer of a corporation may nevertheless be a wage earner within the meaning of the Statute. In re Pilger, 9 A. B. R. 244, 118 Fed. 206 (D. C. Wis.).

33. Bankr. Act, § 4 (b).

ruptcy.³⁴ And a mere owner of a farm leased to another is not exempt.³⁵

And a cattle dealer, using lands simply as a mere feeding station, relying more upon purchased feed from the market for preparing the cattle for sale than on his own agricultural products, is not engaged chiefly in farming nor the tillage of the soil.³⁶

In *re Mackey*, 6 A. B. R. 577, 110 Fed. 355 (D. C. Del.): "A person engaged chiefly in farming' within the meaning of the Bankruptcy Act is one whose chief occupation or business is farming; and one's chief occupation or business so far as worldly pursuits are concerned, is that which is of principal concern to him, of some permanency in its nature, which he deems of paramount importance to his welfare, and on which he chiefly relies for his livelihood, or as a means of acquiring wealth, great or small."

But a stock dealer has been held to be within the exemption.³⁷

It is impracticable, if not impossible, to define with precision the facts which will in all cases determine whether one is engaged chiefly in farming and each case must be decided on its own circumstances.³⁸ And that one may principally devote his physical exertions, or his time, or his capital, to a given pursuit, while a factor entitled to consideration, is not, in all cases, determinative of the question whether that pursuit is his chief occupation or business.³⁹

§ 49. But Incidental Other Occupation Not Fatal to Jurisdiction.

—Conversely, one engaged chiefly in farming is exempt, although incidentally he also conducts a small business not belonging to the exempted classes; thus, where he is incidentally a private banker in a small way, yet he is exempt,⁴⁰ or where incidentally a storekeeper.⁴¹

Wulbern v. Drake, 9 A. B. R. 695, 120 Fed. 493 (C. C. A. S. C., affirming *In re Drake*, 8 A. B. R. 137, 114 Fed. 229, cited in *Dearborn v. Matney*, 12 A. B. R. 485): "The statute does not apply to such persons only as are engaged solely in farming or tillage of the soil, but exempts from the provisions relating to involuntary bankruptcy all persons who are chiefly so engaged. It does not matter, therefore, if the person may have other business or other interests, if his principal occupation is that of an agriculturist, if that is the business to which he devotes more largely his time and attention, which he relies upon as

34. In *re Johnson*, 18 A. B. R. 74 (D. C. N. Y.).

35. In *re Matson*, 10 A. B. R. 473, 123 Fed. 743 (D. C. Penna.); *Hoffschlaeger v. Young Nap*, 12 A. B. R. 521 (D. C. Hawaii). Compare *Wulbern v. Drake*, 9 A. B. R. 695, 120 Fed. 493 (C. C. A. S. C.), where the bankrupt cultivated part of his land himself through hired laborers but leased out a great portion of it to tenant farmers, besides keeping a store himself.

36. *Bank of Dearborn v. Matney*, 12 A. B. R. 482, 132 Fed. 75 (D. C. Mo.). Also, In *re Brown*, 13 A. B. R. 140, 132 Fed. 706 (D. C. Iowa).

37. In *re Thompson*, 4 A. B. R. 340, 102 Fed. 287 (D. C. Iowa Dist. in *Bk. v. Matney*, *supra*).

38. In *re Mackey*, 6 A. B. R. 577, 110 Fed. 355 (D. C. Del.).

39. In *re Mackey*, 6 A. B. R. 577, 110 Fed. 355 (D. C. Del.).

40. *Couts v. Townsend*, 11 A. B. R. 126, 126 Fed. 249 (D. C. Ky.).

41. In *re Mackey*, 6 A. B. R. 577, 110 Fed. 355 (D. C. Del.).

a source of income for the support of himself and family, or for the accumulation of wealth, although, as before suggested, he may have other interests."

Rise v. Bordner, 15 A. B. R. 298, 140 Fed. 566 (D. C. Pa.): "The respondent may be said to have had several occupations. He had a store, he was agent for the sale of fertilizers and ran a farm. The question is, in which business he was actually engaged. This is to be determined by which was of paramount importance to him, on which he depended for a living about which there can be no serious question: * * * That it was upon the farm that he depended for a livelihood is evident; what is called his store being the merest excuse for one and yielding him but a pittance."

Or where incidentally an attorney at law and collector.⁴²

§ 50. "**Farming**" and "**Tillage of Soil**" Distinguished.—"Farming" is not synonymous with "tillage of the soil."⁴³

Bank of Dearborn v. Matney, 12 A. B. R. 482, 132 Fed. 75 (D. C. Mo.): "The courts are generally agreed that the term 'farming' is not synonymous with a tiller of the soil. To constitute one a farmer it is not essential that he in person should till the soil, or that his operations should be limited to agricultural planting, sowing and cultivation of the soil. Yet the context indicates that the terms 'farming' and 'tilling of the soil' are more or less closely allied. The word 'farming' was doubtless employed in the act as a generic term, in a comprehensive sense. The lawmakers, coming from the wide extent of the Republic, with its diversified agricultural adaptability, are to be presumed to have had in mind their knowledge of the methods in different localities of conducting the business of farming. It is therefore reasonable to conclude that the term was not limited merely to the production of grains and grasses and the like. The farmer may cultivate all or a part of his lands. He may be general or special. He may devote his cultivation to the production of corn, or wheat, oats, or rye, or grasses, whichever, in his judgment, may be the more useful and profitable. He may include also with these breeding, feeding and rearing of live stock, embracing cattle, horses, mules, sheep, and hogs, for domestic use and for market. If he find it more profitable to feed his agricultural products or his grasses to live stock than to rely upon marketing the surplus, he may not be limited to the quantity of live stock for such purpose to what he may breed or rear on his farm. For this purpose he may rely entirely upon the purchase of such live stock from his neighbors or on the market, and utilize his farm products in feeding and fattening such 'feeders' for market."

Hoffschlaeger Co. v. Young Nap, 12 A. B. R. 510 (D. C. Hawaii): "One whose principal occupation is raising live stock and producing fodder for feeding them by cultivation of the soil is 'chiefly engaged in farming,' but not chiefly engaged in 'the tillage of the soil.'"

Corporations engaged chiefly in tillage of the soil are not within the exemption and they may be proceeded against in involuntary bankruptcy.⁴⁴

Wage earners and men of small salaries and farmers, then, are exempt from any liability to being proceeded against in involuntary bankruptcy,

⁴². In re Hoy, 14 A. B. R. 648, 137 Fed. 175 (D. C. Iowa).

⁴³. In re Thompson, 4 A. B. R. 340, 102 Fed. 287 (D. C. Iowa).

⁴⁴. In re Lake Jackson Sugar Co., 11 A. B. R. 458 (Ref. Tex.).

no matter if they owe more than a thousand dollars, be insolvent and have committed one of the acts known as acts of bankruptcy.

§ 51. **Infants.**—An infant may be the subject of bankruptcy if he owes debts upon which he is absolutely bound and which he cannot disaffirm.⁴⁵ But if the debts of the petitioning creditors are such as can be repudiated by the infant, it has been held that involuntary proceedings will not lie.⁴⁶ A fortiori, if all the debts are such as can be repudiated, bankruptcy proceedings will not lie.⁴⁷

In partnership bankruptcies, if one of the partners is an infant, the partnership and the remaining partners may be adjudged bankrupt.⁴⁸ And the partnership assets will pass into the hands of the trustee.⁴⁹ But the proceedings must be dismissed as to the infant.⁵⁰

After all, there seems no valid reason for any distinction between cases where the infant's debts are repudiable and where not. The immunity is granted because of the infant's lack of capacity; because, in short, he is an infant—not because the debts are repudiable. The right to repudiate the debt is a personal one and the debts themselves are none the less *provable*. Yet the reason of the exemption of infants is probably that it would be an act of frivolity for courts to take up the administration, for the sake of repudiable debts.⁵¹

§ 52. **Married Women.**—Married women are subject to bankruptcy proceedings even in States where judgment in personam can not be taken against them and debts can only be enforced out of their separate estate by proceedings in equity;⁵² but not where they cannot be bound.⁵³

§ 53. **Indians.**—Ruling has been made as to Indians of the Chickasaw and Choctaw tribes, that they are subject to bankruptcy;⁵⁴ so, also, as to those of the Umatilla Reservation.⁵⁵

45. In re Brice, 2 A. B. R. 197, 93 Fed. 942 (D. C. Iowa): Infant engaged in business; In re Penzansky, 8 A. B. R. 99 (D. C. Mass.), where the only creditor was a judgment creditor in an action for breach of contract to marry. Contra, In re Duguid, 3 A. B. R. 794, 100 Fed. 274 (D. C. N. C.).

46. In re Eidemiller, 5 A. B. R. 570, 105 Fed. 595 (D. C. Ills.).

47. Obiter, In re Brice, 2 A. B. R. 197, 93 Fed. 942 (D. C. Iowa); *Rex v. Cole*, 1 Lord Raymond 443.

48. In re Dunnigan Bros., 2 A. B. R. 628, 95 Fed. 428 (D. C. Mass.); In re Duguid, 3 A. B. R. 794, 100 Fed. 274 (D. C. N. C.).

49. In re Duguid, 3 A. B. R. 794, 100 Fed. 274 (D. C. N. C.).

50. In re Dunnigan Bros., 2 A. B. R. 628, 95 Fed. 428 (D. C. Mass.).

51. See note to In re Dunnigan Bros., 2 A. B. R. 628.

52. *MacDonald v. Tefft-Weller Co.*, 11 A. B. R. 800, 128 Fed. 381 (C. C. A. Fla.).

53. See discussion, obiter, In re Brice, 2 A. B. R. 197, 93 Fed. 942 (D. C. Iowa).

54. In re Rennie, 2 A. B. R. 182 (Ref. Ind. Ter.).

55. In re Russie, 3 A. B. R. 6, 96 Fed. 608 (D. C. Ore.).

§ 54. **Insane Persons.**—A person judicially declared insane or incapable of managing his affairs, cannot commit an act of bankruptcy, nor will a court entertain a petition against him.⁵⁶

In re Eisenberg, 8 A. B. R. 551 (D. C. N. Y.): "It must be assumed that Congress was familiar with the difficulties that would be encountered by the courts in attempting to administer in bankruptcy the affairs of lunatics, and did not intend to include cases other than those mentioned in section 8, where provision is made for the continuance and settlement of estates of which the courts had acquired jurisdiction before the insanity occurred."

§ 55. **Decedents.**—A deceased person may not be proceeded against.⁵⁷

SUBDIVISION "B."

PARTNERSHIPS AND UNINCORPORATED COMPANIES.

§ 56. **Partnerships Included.**—All kinds of partnerships and unincorporated companies may be adjudged involuntary bankrupts; likewise may be adjudged voluntary bankrupts.⁵⁸

This is so, for the special section of the statute governing partnership bankruptcies contains no restriction, nor is there any restriction elsewhere as to the kinds of partnerships that may be adjudged bankrupt. It simply provides in clause (a) that "A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof may be adjudged a bankrupt." There being a special statute prescribing the requisites in this particular, such special provisions will govern. Thus, a partnership, even if it be not engaged in manufacturing, trading, printing, publishing, mining or in a mercantile pursuit, may be adjudged an involuntary bankrupt; also even if it be engaged in farming. Of course, a wage earner can only be an individual in any event, by the definition in § 1 of the statute, as well as by the necessary meaning of the term itself.

§ 57. **Only During Continuance of Partnership or before "Final Settlement."**—The statute says, in § 5, clause (a), that a partnership may be adjudged bankrupt during the continuance of the partnership business or after its dissolution and before the final settlement of its affairs. The question then arises as to when a partnership is "finally settled" within the meaning of the bankruptcy act. It certainly does not mean that it is settled when it has simply been dissolved, for the section

⁵⁶. In re Funk, 4 A. B. R. 96, 101 Fed. 244 (D. C. Iowa). Quære, In re Stein & Co., 11 A. B. R. 536, 127 Fed. 547 (C. C. A. Ills.). Quære, In re Burka, 5 A. B. R. 844, 104 Fed. 331 (D. C. Tenn.). This subject will be considered post, "Change of Debtor's Class," § 95, et seq.

⁵⁷. Obiter, In re Hicks, 6 A. B. R. 183, 107 Fed. 910 (D. C. Vt.); Adams v. Terrell, 4 Fed. 796 (C. C.). This subject will be considered post, "Change of Debtor's Class," § 95, et seq.

⁵⁸. Bankr. Act, § 5; see also, ante, § 39.

expressly says "after its dissolution" and before its "final settlement." Nor is it "finally settled" when its assets are all distributed, for then creditors may still resort to the individual estates of the ex-partners. Therefore, the rule cannot be that a partnership is to be considered as "finally settled" merely when it has been dissolved and all its assets gone.

§ 58. **"Final Settlement"—When.**—As long as there are any undistributed assets or any unpaid debts owed by it, a partnership is not finally settled and so may be adjudicated bankrupt as such.⁵⁹ Mere existence of unpaid debts has been held sufficient;⁶⁰ even though the debts be outlawed, provided there remain rights of contribution among partners, etc., to be settled.

In *re Hirsch*, 3 A. B. R. 348, 97 Fed. 571 (D. C. N. Y.): "And incontestably, it seems to me, there is no 'final settlement' of the business of the firm, until its debts are paid or in some way extinguished, by the statute of limitations, or otherwise."

For a still broader rule, see *In re Levy & Richman*, 2 A. B. R. 21 (Ref. N. Y.): "As long as there exists a right in any party to sue for a settlement of partnership affairs, or to enforce an executory agreement of settlement, or to obtain reimbursement for moneys paid upon a partnership debt, or as long as there remains an unadministered partnership asset, or as long as there remains a partnership debt which is enforceable against any partner anywhere within the territorial jurisdiction of the United States, it cannot be said there has been a final settlement of the partnership."

§ 59. **Partnerships as Entities.**—Partnerships (although in some respects treated as mere associations of individuals) are treated in the present Bankruptcy Act in general as distinct entities.⁶¹

In *re Sanderlin*, 6 A. B. R. 384, 109 Fed. 859 (D. C. N. Car.): "A partnership and the individuals composing it are distinct legal entities and proceedings in bankruptcy by or against one does not of necessity involve the other."

Strause v. Hooper, 5 A. B. R. 225, 105 Fed. 590 (D. C. N. C.): "It is clearly the policy of the Bankrupt Act of 1898, to treat partnerships as legal entities which may be adjudged bankrupts in voluntary or involuntary proceedings, irrespective of any adjudication of the bankruptcy of individuals who compose such partnership or firms."

In *re Pincus*, 17 A. B. R. 331, 337 (D. C. N. Y.): "The right to proceed in

⁵⁹. In *re Levy & Richman*, 2 A. B. R. 21, 95 Fed. 812 (Ref. N. Y.).

⁶⁰. In *re Webster*, 2 N. B. N. & R. 54 (Ref. N. Y.). *Contra*, obiter, In *re Altman*, 1 A. B. R. 689 (Ref. N. Y., affirmed, but this point not considered, in 2 A. B. R. 407).

⁶¹. In *re McLaren*, 11 A. B. R. 144, 125 Fed. 835 (D. C. N. Y.); In *re Stein & Co.*, 11 A. B. R. 538, 127 Fed. 547 (C. C. A. Ills.); In *re Mercur*, 10 A. B. R. 505, 122 Fed. 384 (C. C. A. Penna., affirming 8 A. B. R. 275, 116 Fed. 655); In *re Bardon*, 4 A. B. R. 31, 101 Fed. 553 (D. C. N. C.); In *re Meyer*, 3 A. B. R. 559, 98 Fed. 976 (C. C. A. N. Y.); In *re Hale*, 6 A. B. R. 35, 107 Fed. 432 (D. C. N. C.); In *re Corcoran*, 12 A. B. R. 285 (Ref. Ohio); *Vaccaro v. Security Bank*, 4 A. B. R. 474, 103 Fed. 436 (C. C. A. Tenn.); *McMurtrey v. Smith*, 15 A. B. R. 430 (D. C. Tex.); In *re Farley & Co.*, 8 A. B. R. 267, 115 Fed. 359 (D. C. Va.).

bankruptcy against a partnership as a 'legal entity' is new, and before the Act of 1898 unheard of."

In *re Perley & Hays*, 15 A. B. R. 54, 138 Fed. 927 (D. C. Mo.): "It is, I think, well settled that a partnership under the existing bankrupt law, is a distinct legal entity, which may be adjudged a bankrupt by voluntary or involuntary proceedings, irrespective of any adjudication of the individual partners as bankrupts."

But see *In re Carleton*, 8 A. B. R. 274, 115 Fed. 246 (D. C. Mass.): "A partnership can be treated neither as an entity altogether separate from the partners, nor as merely the sum of them."

But also see *In re Forbes*, 11 A. B. R. 787, 128 Fed. 137 (D. C. Mass.): "To decide the present case, the general nature of partnership proceedings in bankruptcy must be considered, since there lies the origin of the confusion. For some purposes a partnership has been treated as an entity apart from the partners; for other purposes it has been treated as a congeries of partners. Some courts have suggested that the Act of 1898 has adopted for bankruptcy the theory of an entity separate from the partners. Sections 1 (19), 5a; In *re Meyer*, 3 Am. B. R. 559, 98 Fed. 976; In *re Mercur*, 11 A. B. R. 505, 122 Fed. 384. Yet this treatment of a partnership is irreconcilable with other provisions of the statute. Section 5h of the act provides that the partnership property (except in case of consent) shall not be administered in bankruptcy unless all the partners are adjudged bankrupt. This is, in effect, a provision that the partnership shall not be made bankrupt except by an adjudication of all its partners. Adjudication without accompanying distribution of the bankrupt estate would be worse than a vain form, for it would confuse inextricably questions of preference, lien, attachment, and the like. The remedy given by clause 'h' to the trustee is, in substance, the equitable remedy found so unsatisfactory in the days of Lord Eldon. See *In re Wilcox* (D. C.), 2 Am. B. R. 117, 94 Fed. 84, 95. The negative provision of clause 'h' is more definite than the affirmative provision in clause 'a' which does not declare under what circumstances the adjudication of a partnership shall be made, or what shall be its form or effect. Section 5b contemplates that the adjudication under a joint petition shall be both joint and several. If the adjudication were joint only, there would be no object in providing that the joint creditors alone shall elect the trustee. Still again, § 5c gives to the court which has jurisdiction of one partner 'jurisdiction of all the partners,' and says nothing about jurisdiction of the partnership as an entity. Read as a whole, Form No. 2 agrees with § 5h, and not with the theory of entity. It is in terms the petition of individuals. It sets out that 'they' owe debts which they 'cannot pay and that they' desire the benefits of the Bankrupt Act. The joint debts are styled 'the debts of said partners,' not the debts of the firm, and the joint assets 'the property, real and personal, of the said partners.' It is true that the last paragraph of the petition contains a prayer that 'the firm may be adjudged by a decree of the court to be bankrupts,' but the use of the plural shows that the word 'firm' is there a collective noun as further appears from the fact that the prayer is obviously intended to cover a separate as well as a joint adjudication."

Even the wording of the first clause of section 5 shows the tendency towards the treatment of partnerships as entities. It speaks of adjudging "a partnership," not merely "partners;" and of adjudging a partnership to be "a" bankrupt, not of adjudging partners to be bankrupts. As a consequence, it would seem that none of the restrictions as to what natural

persons and as to what corporations may be thrown into bankruptcy, would apply to partnerships—all partnerships are subject to being proceeded against in involuntary bankruptcy.⁶²

§ 60. **When Is a Partnership Insolvent?**—However, a partnership is not held to be insolvent unless the total of its assets and the total of the assets of all its individual members (in excess of their respective individual indebtedness), together, are insufficient to pay its debts.⁶³

In *re* Perley & Hays, 15 A. B. R. 54, 138 Fed. 927 (D. C. Mo.): "The question arises as to whether or not the properties of individual members of a firm are to be taken into consideration when the issue of insolvency is raised of the partnership of which they are members. * * * The real question is whether or not the bankrupts were insolvent within the meaning of the present Bankrupt Law, or, to state it in another way, whether or not the individual properties of the partners are to be considered in determining the question of insolvency. It has been held, in a number of cases that the individual properties must be considered, and I find no case to the contrary."

§ 61. **Adjudication in Firm Name.**—Adjudication may be had in the firm name alone, without mention of the individual names of the members of the partnership.⁶⁴

Likewise, the partnership may be adjudicated bankrupt without adjudication of its individual members.

In *re* Meyers, 3 A. B. R. 559, 98 Fed. 977 (C. C. A. N. Y.): "We are of the opinion that it is the scheme of these provisions to treat the partnership as an entity which may be adjudged a bankrupt by voluntary or involuntary proceeding, irrespective of any adjudication of the individual partners as bankrupt, and upon an adjudication to draw to the administration the individual estates of the partners as well as the partnership estate, and marshal and distribute them according to equity."

Contra, obiter, In *re* Forbes, 11 A. B. R. 790, 128 Fed. 137 (D. C. Mass.): "But the rule that there can be no bankruptcy of a partnership without bankruptcy of all the partners (save exceptional cases, such as In *re* Dunnigan (D. C.), 2 A. B. R. 628, 95 Fed. 428 and the like) is based, not so much upon a nice examination of the words of the particular statute, as upon general principles

62. [1867] In *re* Winkens, 2 N. B. Reg. 349, Fed. Cas. 17,875; [1867] In *re* Shepard, 3 Ben. 347, Fed. Cas. 12,754; [1867] Crompton *v.* Conkling, 9 Ben. 225, Fed. Cas. 3,407; Nutting *v.* Ashcroft, 101 Mass. 300.

63. In *re* Forbes, 11 A. B. R. 787, 128 Fed. 137 (D. C. Mass.). Obiter, In *re* Wing Yick Co., 13 A. B. R. 757 (D. C. Hawaii); Vaccaro *v.* Security Bank, 4 A. B. R. 474, 103 Fed. 436 (C. C. A. Tenn.). Obiter, In *re* Blair, 3 A. B. R. 588, 99 Fed. 76 (D. C. N. Y.); Davis *v.* Stevens, 4 A. B. R. 763, 104 Fed. 242 (D. C. S. Dak.). Apparently contra, obiter, In *re* Sanderlin, 6 A. B. R. 386 (D. C. N. C.). Apparently contra, McMurtrey *v.* Smith, 15 A. B. R. 427 (Spec. Master affirmed by D. C.). But in this case it does not appear that the individual debts of the partner were first deducted, and only the excess of assets over and above his debts and exemptions added to the firm's assets.

64. See analogously, In *re* Livingston, 13 A. B. R. 357 (D. C. Hawaii). Implicitly, contra, In *re* Forbes, 11 A. B. R. 787, 128 Fed. 137 (D. C. Mass.). But, undoubtedly, the rule of In *re* Forbes would be modified where the names of the individuals were not known.

of law. The equal and equitable distribution of the estates of insolvents and their discharge from the obligation of their debts are the ends sought by proceedings in bankruptcy. Bankruptcy, without insolvency, actual or presumed, is almost inconceivable. Bankruptcy without discharge for the honest debtor is a contradiction in terms. It is impossible to declare a partnership insolvent so long as the partners are able to pay its debts and theirs, whether out of joint or separate estate, and so the courts have generally held that a partnership is not insolvent unless by the insolvency of all its partners. See *Vaccaro v. Bank of Memphis*, 4 Am. B. R. 474, 103 Fed. 436, 43 C. C. A. 279; *In re Blair* (D. C.), 3 Am. B. R. 568, 99 Fed. 76; *Davis v. Stevens* (D. C.), 4 Am. B. R. 763, 104 Fed. 235. Not the insolvency of any imaginary entity, as in the case of a corporation, but the insolvency of its human component parts, lies at the foundation of the bankruptcy of a partnership. Those who bring an involuntary joint petition must certainly prove this, and by the principles of sound pleading and the analogy of Form No. 2 they must allege it. As the bankruptcy of a partnership begins with an inquiry into the condition of its individual partners, the end of the proceedings is normally their discharge. So far as I know, the discharge of a partnership as an entity has never been suggested, and what would be the effect of such a discharge can hardly be imagined. Herein appears the difference between a partnership and a corporation. Under an adjudication merely joint, it is impossible to discharge the partners as individuals, even from their joint debts, for every joint debt of the partnership is also a separate debt of each partner, and separate debts can be discharged only after an individual adjudication operating upon the separate estate. For these reasons, this court of bankruptcy has consistently refused to make the adjudication of a partnership, unless all the partners be adjudged bankrupts at the same time. The confusion which inevitably results from any other rule is abundantly illustrated by the reports. Whether an adjudication of all the partners upon separate petitions carries an administration of the partnership estate need not be decided here. This may be implied from section 5h, but the implication is not strong. See *In re Mercur*, 11 A. B. R. 505, 122 Fed. 384, 58 C. C. A. 472."

§ 62. Adjudication in Name of Ostensible Partner.—A partnership may be adjudged bankrupt in the name of an ostensible partner where such name is the name under which the firm did business.⁶⁵

§ 63. Only "Actual" Partnership Subject to Adjudication.—Only an actual partnership may be adjudicated bankrupt as a partnership, not one by "holding out." The creditor must be left to assert by action any rights he may have by virtue of the "holding out."⁶⁶

65. *In re Harris*, 4 A. B. R. 132, 108 Fed. 517 (Ref. Ohio, affirmed by D. C.).

66. Compare, *Jones v. Burnham, Williams & Co.*, 15 A. B. R. 85, 138 Fed. 986 (C. C. A. Pa., reversing *In re Beckwith*, 12 A. B. R. 453, 130 Fed. 475, but on the facts and not on the law): However, this was rather an attempt to prove an actual partnership by means of admissions than to prove an estoppel to deny partnership, which latter is the true partnership "by holding out." See *In re Kenney*, 3 A. B. R. 353, 97 Fed. 554 (D. C. N. Y., affirmed by C. C. A., 5 A. B. R. 355). Compare, *In re Clark*, 7 A. B. R. 96, 111 Fed. 893 (D. C. Pa., reversed on facts, but not on law, sub. nom. *Rush v. Lake*, 10 A. B. R. 455, 122 Fed. 561). Compare, *Lott v. Young*, 6 A. B. R. 436, 109 Fed. 798 (C. C. A. Mont.).

In re Beckwith & Co., 12 A. B. R. 453, 130 Fed. 475 (D. C. Penna., reversed on the facts, but not on the law, in *Jones v. Burnham, Williams & Co.*, 15 A. B. R. 85, 138 Fed. 986, C. C. A. Pa.): "To maintain the proceedings as to Jones a partnership in fact must be shown, and not a mere holding out, by which he may have become liable to creditors. * * * Otherwise the proceedings might be good as to some creditors, with respect to whom this was true, and not as to others, as to whom it was not. And we should also have instances where there was no joint estate to administer, nor any assets other than the personal liability of the individuals who had made themselves answerable, a condition which plainly is not contemplated by the Bankrupt Act. But the existence of a partnership may be deduced from facts and circumstances and does not have to be established by proof of an express agreement, either oral or written."

And it must be proved to be a copartnership.⁶⁷

Compare, In re McLaren, 11 A. B. R. 141, 125 Fed. 835 (D. C. N. Y.): "Ordinarily an infant cannot be a copartner, and especially is this true in the absence of an agreement. It should seem improper to adjudicate a copartnership bankrupt because two of the alleged members admit its existence, and that they are members, all the other members denying any connection with it and denying the acts of bankruptcy."

And the burden of proof of the partnership rests on the petitioning creditors.⁶⁸

§ 64. Individual Members Joinable with Partnership, in either Voluntary or Involuntary Proceedings.—The individual members of the partnership may be joined with the partnership itself in either voluntary or involuntary bankruptcy proceedings, and may be adjudged bankrupts as individuals along with the partnership.⁶⁹

^{67.} Evidence sufficient to prove partnership. *Rush v. Lake*, 10 A. B. R. 455, 122 Fed. 561 (C. C. A., reversing In re Clark, 7 A. B. R. 96, 111 Fed. 893); In re Beckwith & Co., 12 A. B. R. 453, 130 Fed. 475 (D. C. Penn., reversed, sub. nom. *Jones v. Burnham, Williams & Co.*, 15 A. B. R. 85, 138 Fed. 986, C. C. A. Pa.); *Buckingham Trustee v. First Nat. Bk.*, 12 A. B. R. 465, 131 Fed. 192 (C. C. A. Tenn.); *Lott v. Young*, 6 A. B. R. 436, 109 Fed. 798 (C. C. A. Mont.); In re Hudson Clothing Co., 17 A. B. R. 826, 148 Fed. 305 (D. C. Me.).

^{68.} *Jones v. Burnham, Williams & Co.*, 15 A. B. R. 85, 138 Fed. 986 (C. C. A. Pa., reversing In re Beckwith, 12 A. B. R. 453).

^{69.} In re Grant Bros., 5 A. B. R. 838, 106 Fed. 497 (D. C. N. Y.); *Bank v. Craig Bros.*, 6 A. B. R. 381 (D. C. Ky.). See further, post, §§ 70, 71, et seq. In re Meyer, 3 A. B. R. 559, 98 Fed. 976 (C. C. A. N. Y., affirming *Bank v. Meyer*, 1 A. B. R. 565, 92 Fed. 896); In re Forbes, 11 A. B. R. 787, 128 Fed. 137 (D. C. Mass.). But compare, query, In re Stokes, 6 A. B. R. 262, 106 Fed. 312 (D. C. Pa.).

Also compare In re Farley & Co., 8 A. B. R. 266, 115 Fed. 359 (D. C. Va.): "The conclusion that I reach is, that when the members of a firm, which files a voluntary petition, desire to be adjudicated bankrupts individually, i. e., as against their individual creditors as well as against the firm creditors, they should each file an individual petition. And that in a case, such as the present, where there are two partners each desiring an individual discharge, there should be three orders of adjudication, and of reference, and that in all other proceedings the idea of three separate 'cases' should be carried out, certainly three separate estates are to be administered, and in strictness three discharges are sought."

In cases of voluntary bankruptcies, of course, no difficulty can be experienced, for no act of bankruptcy is necessary in voluntary bankruptcies, and so the partnership and its individual members can come into the same proceedings without difficulty.

In cases of involuntary bankruptcies, however, some theoretical difficulties arise, from the fact that in order to have the individual members adjudicated bankrupt as individuals there must have been some act of bankruptcy committed by them in their individual capacity.⁷⁰

In *re Meyer*, 3 A. B. R. 559, 98 Fed. 976 (C. C. A. N. Y., affirming *Chem. Nat. Bk. v. Meyer*, 1 A. B. R. 565): "But, as the commission of an act of bankruptcy is indispensable to jurisdiction in an involuntary proceeding, the individual members cannot be adjudged bankrupts in such a proceeding who have not committed, or been participants in committing, one of the enumerated acts." This was the case of the assignment of a firm, the court holding that the partner who was the author of the assignment participated individually in the act.

Impliedly, In *re Sanderlin*, 6 A. B. R. 384, 109 Fed. 857 (D. C. N. Car.): "A partnership and the individuals composing it are distinct legal entities, and proceedings in bankruptcy by or against one does not of necessity involve the other." This case was reversed, but upon other grounds, in *McNair v. McIntyre*, 7 A. B. R. 638, 113 Fed. 113 (C. C. A.).

Bank v. Craig Bros., 6 A. B. R. 381 (D. C. Ky.): "At the hearing, the evidence showed that on the 23d day of July, 1901, A. J. Craig and John Craig, individually and as the persons composing the firm of Craig Bros., both joined in making a general assignment to James D. Canfield of all their property, individual and partnership alike, for the benefit of all their creditors, and it inevitably results from these admitted facts, whatever may be the truth upon the other issues involved, that there must, upon that ground, be an adjudication both against the firm and the individual members composing it. The proper rule seems to be that where both the partnership and each of the individuals who compose it make the assignment, the act of bankruptcy is committed by all of them. The adjudication should, therefore, embrace both the firm and the individual members."

But also compare, In *re Forbes*, 11 A. B. R. 791, 128 Fed. 137 (D. C. Mass.): "If A & B, two partners, are insolvent, and A, by his voluntary petition or otherwise, commits an act of bankruptcy in connection with the firm, there is no reason, in the nature of things, that the joint adjudication should not be accompanied by an individual adjudication against him, and his individual assets and debts may thus properly be brought under the administration of the court of bankruptcy. Furthermore, if A has committed an act of bankruptcy which involves the firm, there is no substantial reason of justice that B, the nonassenting partner, insolvent by the terms of the supposition (a partnership not being insolvent unless all its members are insolvent), and bound as to the joint debts and assets by A's act of bankruptcy, should not also be adjudged bankrupt individually as well as jointly. The joint adjudication is thus made to draw after it the separate adjudication of both partners. This is the rule

70. *Chem. Nat. Bk. v. Meyer*, 1 A. B. R. 565, 92 Fed. 896 (D. C. N. Y., affirmed by In *re Meyer*, 3 A. B. R. 559, 98 Fed. 976. Obiter, In *re Hale*, 6 A. B. R. 35, 107 Fed. 432 (D. C. N. Car.). Also compare, inferentially and analogously, In *re Lehigh Lumber Co.*, 4 A. B. R. 221, 101 Fed. 216 (D. C. Penn.).

required by convenience, and it is not contrary to justice. On the other hand, justice requires, and convenience does not forbid, that the nonassenting partner have the right to contest the issue of insolvency, substantially tendered by the petition."

§ 65. Where Firm, Alone, Adjudicated, Nevertheless Individual Estates brought in for Administration.—Where only the firm is adjudicated bankrupt and not the individual members also, yet the estates of the individual members are involved and should be administered in bankruptcy.⁷¹

In *re Meyer*, 3 A. B. R. 561, 562, 98 Fed. 975 (C. C. A. N. Y.): "We are of the opinion that it is the scheme of these provisions to treat the partnership as an entity which may be adjudged a bankrupt by voluntary or involuntary proceeding, irrespective of any adjudication of the individual partners as bankrupt, and upon an adjudication to draw to the administration the individual estates of the partners as well as the partnership estates, and marshal and distribute them according to equity. The assets of the individual estates and the debts provable against them can be ascertained without adjudicating the individual partners bankrupt. The language does not require such an adjudication. The section is silent respecting a discharge of the partners individually. It does not, by terms or by implication, preclude an adjudication of the individual partners as bankrupt in the partnership proceeding; and, if there is such an adjudication, there is nothing to prevent the partners from receiving a discharge individually, if they are otherwise entitled to it under the act."

Dickas v. Barnes, Tr., 15 A. B. R. 569, 140 Fed. 849 (C. C. A. Ohio): "For the appellants, it is contended that the court, having refused to declare them bankrupts, had no authority to treat them and their property as if they were bankrupts. Although there are several assignments of error on each appeal, they all rest on this contention. The argument is that not being bankrupts they are not subject to the jurisdiction of the bankruptcy court; that the refusal to declare them bankrupts put an end to the authority of the court to retain control of their property for the purpose of the bankruptcy proceedings; and it is complained that the court by its order in effect denied to them the immunity to which they were entitled by reason of the provisions of the Bankruptcy Act. By § 4b wage earners and tillers of the soil are excepted from those who may be adjudged involuntary bankrupts. And for our present purpose we think the other appellants, who committed no act of bankruptcy, might be regarded as standing on the same footing as those who by reason of their

71. *Obiter*, In *re Farley*, 8 A. B. R. 268, 115 Fed. 359 (D. C. Va.).

Summary Orders on Nonbankrupt Partner and on Assignee of Partner.—In partnership bankruptcies it has been held that a summary order would lie upon the assignee of one of the members, to turn over individual assets, although the member was not himself a bankrupt. In *re Stokes*, 6 A. B. R. 262, 106 Fed. 312 (D. C. Penna.). But this decision seems to carry the rule beyond proper limits. While it might properly be conceded that a summary order would lie on the nonadjudicated partner to turn over assets, it would hardly seem that such an order would lie upon his assignee since the avoidance of assignments only follows by virtue of the bankruptcy of the identical person making the assignment. An individual bankruptcy of a member of a partnership not itself bankrupt, a summary order on the assignee of the partnership will be refused. In *re Mercur*, 10 A. B. R. 505, 116 Fed. 655 (C. C. A.).

occupation were exempt from an adjudication of bankruptcy. It may be conceded that but for the relation of these parties to the partnership, the contention they make would be supported by perfectly adequate reasons. But account of that relation other conditions exist. One who combines with others in a partnership enterprise becomes bound for the payment of the partnership debts. As partner, he shares the fortunes of the partnership. In certain circumstances it may become subject to the exercise of the powers of a court of bankruptcy where its resources will be gathered in to satisfy the claims of creditors. One of those resources is the liability of the partner, for which individual property stands charged. It is true that by virtue of the rule of equity, as well as in bankruptcy, for the marshaling and distribution of assets, his individual property is first applicable to the payment of his private debts, if there be any; the surplus then becomes assets for the payment of the partnership creditors. These consequences of partnership are not derived from the Bankrupt Act, but from the general law; and a partner is not relieved from his liability by his exemption from an adjudication of bankruptcy. If bankruptcy does not supervene, they would be worked out by a court of general jurisdiction, and the partner would be a party, a necessary party, to the record so that his liability for the firm debts could be enforced. In the bankruptcy court the partner may be brought before the court for the same purposes. In order to reach his property for the payment of the firm debts, it must be ascertained what surplus there will be after paying his private debts. It is said, however, that this must be done in a state court. But however this might be if he were a stranger, the partner is not to be regarded as a stranger, but as a party to the bankruptcy proceedings (Loveland on Bankruptcy, 2d Ed. 251, and cases in n. 42); and the court had authority to take such proceedings as were necessary to ascertain what assets were available and to subject them to the requirements of the case before it."

In *re Wing Yick Co.*, 13 A. B. R. 757 (D. C. Hawaii): "Although a partnership may be adjudged bankrupt without adjudging the partners bankrupt, in the case of the bankruptcy of partnership, both the partnership property and the individual property of the partners are administered by the trustee, each partner being liable for all of the debts of the firm, and the assets of the partnership and of the individual partners are marshaled so as to prevent preferences, and secure the equitable distribution of the property of the several estates."

And this is so notwithstanding one of the partners is a wage earner, farmer, and belongs to a class exempted from the operation of the bankruptcy act. Such was the holding of the Circuit of Appeals in *Dickas Barnes*, quoted *supra*.

§ 66. Act Need Not Be Actually Committed by All Partners.—The act of bankruptcy alleged in an involuntary petition need not be actually committed by all the partners.

In *re Forbes*, 11 A. B. R. 791, 128 Fed. 137 (D. C. Mass.): "Even their privilege is not essential. An act by one member of a firm, within the scope of his authority, in relation to joint property or joint debts, such as giving a preference, making a fraudulent transfer, should be imputed to all the members of the firm, as in all other civil cases."

§ 67. **But All Partners to Be Made Parties.**—But all the partners must be made parties: a petition will not lie for less than all.⁷²

§ 68. **Nonconsenting Partner Not Made Party, No Adjudication on Voluntary Partnership Petition.**—And a voluntary petition by less than all, where the nonconsenting partners are not made parties in any way, is irregular and will not warrant adjudication of the partnership, and cannot be cured by subsequent consent of the nonconsenting partners through their attorneys.⁷³

§ 69. **Individual Petitions Not Amendable to Include Partnership.**—Individual bankruptcy proceedings against persons who are also members of a partnership cannot be amended so as to include the partnership. There is nothing in the record by which to amend, the right to amend going no further than to bring forward and make effective that which in some shape is already there.⁷⁴

In re Mercur, 10 A. B. R. 505, 122 Fed. 384 (C. C. A. Penna., affirming 8 A. B. R. 275, 116 Fed. 655, distinguished in In re Kaufman, 14 A. B. R. 397, 136 Fed. 262): "The general right to amend, regardless of the time which has elapsed, is abundantly sustained by the authorities. * * * But to do so it is plain there must be in the record as it stands the substance of that which is asked for; the right to amend can go no further than to bring forward and make effective that which is in some shape already there. * * * "It is plain from this review of the proceedings that, while begun at the same time and carried on together side by side, they have from the outstart been individual in character, directed against the two parties who were the subject of them severally, and not because or by virtue of the partnership relations. The fact that it existed could not be obscured, but it has not been made the basis of any action taken, the references to it being incidental only and usually with the suggestion that it was not in any way involved. It is now proposed, however, to change this, and by a so-called amendment to recant and transform all that has been so far done. Instead of two distinct cases against each of the parties severally, we are to have practically one, which shall be effective against the partnership to which they happen to belong, the same as though it had been directed against it from the beginning. It is contended as a justification that both the partners having been brought into court of necessity the partnership has been also. If this be true, the amendment is proper, but otherwise not. All the authorities agree that in contemplation of the statute a partnership is a distinct entity, which requires a petition specifically directed against it, alleging an act of bankruptcy in which it is expressly involved, and resulting in an adjudication of the partnership itself, irrespective of and in addition to any that may be made against the individual

72. In re Winters, 3 A. B. R. 90 (D. C. Iowa); In re Altman, 2 A. B. R. 407, 95 Fed. 263 (D. C. N. Y., affirming 1 A. B. R. 680).

73. In re Altman, 2 A. B. R. 407, 95 Fed. 263 (D. C. N. Y., affirming 1 A. B. R. 680; In re Winters, 3 A. B. R. 90 (D. C. Iowa); In re Russell, 3 A. B. R. 91, 97 Fed. 32 (D. C. Iowa). Notice to the nonconsenting partner may be given by publication, where personal service cannot be given. Obiter, In re Winters, 3 A. B. R. 90 (D. C. Iowa).

74. Compare, to same general effect, Royston v. Weis, 7 A. B. R. 584, 112 Fed. 962 (C. C. A. Tex.).

members. This is carried so far that without it, as it is held, there can be no effective discharge from the firm obligations, and, by some courts, that the proceedings against the partnership and the individual members are distinct cases, in which separate fees must be paid. * * *

"If this be so, whatever proceedings are instituted should disclose from the outset the character which is proposed for them, and should maintain it to the close. If a partnership is intended to be reached, the petition and the proceedings under it should be appropriate to that end; if only the individual members, they should be governed by that circumstance. This is something more than a mere matter of form. It goes to the substance of the proceedings, involving, as it does, the question of notice and the rights of the parties to be affected."

Mahoney v. Ward, 3 A. B. R. 773, 100 Fed. 278 (D. C. N. Car.): "The fact that he happened to be a partner with Jones in one firm and with Cawthorn in another would not necessarily draw into the proceeding the two commercial firms, or justify each member of such firms to come into court, save themselves from complying with the law by paying cost, and being adjudged bankrupts even by a consent order."

Nor may a *nunc pro tunc* entry of adjudication of the partnership be made therein to revert to the time of the adjudication of the several individuals composing it as members.⁷⁵ But a joint voluntary petition of two persons who also compose a partnership, if it fairly appears that they were seeking to have the firm adjudged bankrupt, may be amended to specifically pray therefor.⁷⁶

§ 70. **Secret or Silent Partners, on Discovery, Brought in.**—But secret or silent partners may, on discovery, be brought in.⁷⁷

§ 71. **Petition by One Partner or Several Partners, Where Remaining Partners Do Not Join.**—A petition may be filed by one partner or several of the partners, for adjudication of the partnership, where some of the remaining partners do not join.⁷⁸

§ 72. **Remaining Partners Not Joining, Petition Treated as Involuntary as to Nonconsenting Partner but Voluntary as to Creditors.**—Where one or more partners less than all file a voluntary partnership petition to have the partnership, as such, adjudged bankrupt and the other partner, or some of the other partners, after notifica-

75. In re *Mercur*, 10 A. B. R. 505, 122 Fed. 384 (C. C. A. Penn., affirming 8 A. B. R. 275, 116 Fed. 655). Compare, *Ludowici Roofing Tile Co. v. Penn. Inst.*, 8 A. B. R. 739, 116 Fed. 661, involving the *Mercur* bankruptcy. Compare, analogously, In re *Altman*, 1 A. B. R. 689 (Ref. N. Y., affirmed in 2 A. B. R. 407).

76. In re *Meyers*, 3 A. B. R. 260, 97 Fed. 753 (D. C. N. Y.).

77. Compare, In re *Harris*, 4 A. B. R. 132, 108 Fed. 517 (Ref. Ohio, affirmed by D. C.). Evidence as to whether one is a secret partner or not. *Rush v. Lake*, 10 A. B. R. 455, 122 Fed. 561 (C. C. A., reversing 7 A. B. R. 96). Evidence as to whether one is a silent partner. In re *Clark*, 7 A. B. R. 96, 111 Fed. 893 (D. C. Wash.).

78. See cases cited in succeeding paragraphs.

tion, do not join with him therein, the petition is treated as an involuntary petition as to the nonconsenting partner, but as a voluntary petition so far as creditors are concerned.

In *re Carleton*, 8 A. B. R. 270, 115 Fed. 246 (D. C. Mass.): "The history in the United States of voluntary petitions filed by one partner with intent to put the firm into bankruptcy appear to be this: Section 14 of the act of 1841, provided:

"That where two or more persons, who are partners in trade, become insolvent, an order may be made in the manner provided in this act either on the petition of such partners, or any one of them or on the petition of any creditor of the partners; upon which order all the joint stock and property of the company, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as are herein exempted.' 5 Stat. 448.

"This enabled one partner to put all the members of his firm into bankruptcy, provided all were insolvent. No specific provision was made for proceedings in which one partner asserted and the other denied insolvency; but, so far as outsiders were concerned, the petition was treated as a voluntary one. See *Chandler*, *Bankr. Law*, pp. 9, 64; *Ex parte Hall*, Fed. Cas. No. 5,919; *Ex parte Hull*, Fed. Cas. No. 6,856; *Bank v. Johnson*, Fed. Cas. No. 133; *Ex parte Galbraith*, Fed. Cas. No. 5,187.

"Section 36 of the act of 1867, provided: 'That where two or more persons who are partners in trade shall be adjudged bankrupt, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners, a warrant shall issue in the manner provided by this act, upon which all the joint stock and property of the copartnership, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as are hereinbefore excepted.'

"This section, though much resembling section 14 of the act of 1841, yet differed from it in this: Instead of authorizing one partner to put all the members of the firm into bankruptcy by a voluntary petition, it provided what should happen after all had been adjudged bankrupt upon the petition of one partner or of a creditor.

"General order 18 dealt with the matter further, and provided, substantially, as in the existing general order 8, that:

"In case one or more members of a copartnership refuse to join in a petition to have the firm declared bankrupt, the parties refusing shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the copartnership is not insolvent, or has not committed an act of bankruptcy, and to take all other defenses which any debtor proceeded against is entitled to take by the provisions of the Act.'

"Under this act and general order it was held by many courts that a petition by one partner to put the firm into bankruptcy need not allege an act of bankruptcy; an allegation of insolvency, as in the case of a voluntary petition, was sufficient. In *re Stowers*, Fed. Cas. No. 13,516; In *re Noonan*, Fed. Cas. No. 10,292; In *re Hathorn*, Fed. Cas. No. 6,214; In *re Penn*, Fed. Cas. No. 10,927. This was said in *re Gorham*, Fed. Cas. No. 5,624; and in *In re*

Grady, Fed. Cas. No. 5,654. It was assumed, more or less distinctly, In re Bennett, Fed. Cas. No. 1,314; Id. 1,315; Re Prankard, Fed. Cas. No. 11,36; Re Moore, Fed. Cas. No. 9,750; Re Little, Fed. Cas. No. 8,390; Re Smi (D. C.); 6 Fed. 465. An examination of the files shows that this was t firmly-settled practice in this court under the act of 1867, and that to th extent the petition of one partner was deemed a voluntary proceeding, ev as against a nonjoining partner. In some other respects the proceedin were treated as voluntary. In re Wilson, 2 Low. 453, Fed. Cas. No. 17,7; Yet in *Metsker v. Bonebrake*, 108 U. S. 66, 2 Sup. Ct. 351, 27 L. Ed. 654, t Supreme Court held that a case in which one partner petitioned and the oth partner came in and confessed himself bankrupt was a case of 'compulso or involuntary bankruptcy,' within the provisions of St. 1874, ch. 390, § (18 Stat. 180), and Rev. St., § 5128, dealing with preferences. Mr. Justi Miller said:

"We do not doubt that *Metsker's* was a case of involuntary or cor pulsory bankruptcy within the meaning of this amendment. The distincti intended by this language is clearly between the cases in which the ban rupt himself and of his own volition initiates proceedings in bankruptcy ar those in which they are commenced by some one else against him. In tl one case it is voluntary, and in the other compulsory. It is not a volunta bankruptcy if the man is forced into it against his will by his partner, ar more than by any one else; and it is compulsory and involuntary if he refus to join in such case, and is forced into it, as much as in any other enforce bankruptcy.' Pages 70, 71, 108 U. S., page 353, 2 Sup. Ct., 27 L. Ed. 654.

"Section 5 of the act of 1898 provides that 'a partnership, during the co tinuation of the partnership business, or after its dissolution and before tl final settlement thereof, may be adjudged a bankrupt.' Nothing is said in tl act concerning the method or methods by which a partnership may be a judged either by voluntary or involuntary petition. For direction in th matter, we must turn to general order 8, which is, in substance, general ord 18 of the act of 1867. Taking the act and the general order and form No. together, it appears to me safest to assume that the law regarding partnersh petitions is substantially the same as it was under the act of 1867. Notwit standing the decision of the Supreme Court in *Metsker v. Bonebrake*, appears to me that this court is not compelled to hold, either under the a of 1867, and general order 18, or under the act of 1898 and general order that this petition is so far involuntary as to permit a creditor of the firm t intervene in order to resist adjudication. See In re Murray (D. C.), 3 Ar B. R. 601, 96 Fed. 600. As to the petitioner, these proceedings are pure voluntary. As to him a creditor has no more right to intervene than in tl case of any other voluntary petition. As to the nonjoining partner, the pr ceedings are in some sense involuntary. As to intervention by a creditor, is most convenient, and most consistent with justice and the general schen of the act, to hold that the right 'to make all defenses which any debtor pr ceeded against has a right to make' is confined to the nonjoining partner. he makes no objection, then, so far as adjudication is concerned, the petitio is to be treated generally as if it were altogether voluntary. Had this bee an ordinary voluntary petition by both partners, the creditor could not hav intervened to contest the adjudication. If partners are willing to be adjudg bankrupt, whether on the petition of one or on that of all of them, they a to have their way.

"Difficulties may arise in construing either act. For example, the court ma have to consider what defenses are now open to the nonjoining partner. Unde

the act of 1867, as has just been stated, the petition needed to allege no more than insolvency, and the nonjoining partner might take issue on the alleged insolvency. Under § 11 of the act of 1867, insolvency was necessary to support a voluntary petition. There is no such requirement in the act of 1898, though forms Nos. 1 and 2 both require the voluntary bankrupt to set out his inability to pay his debts. This inability may, perhaps, be taken to represent insolvency, though inability to pay debts is not the precise equivalent of insolvency as defined in § 1 of the act of 1898. Under the act of 1867 it was suggested in some cases that one partner might put the firm into bankruptcy by a petition alleging either insolvency without an act of bankruptcy or an act of bankruptcy without insolvency. It would be somewhat difficult to apply this theory to the act of 1898, and the matter is stated here only to show that the difficulties involved in the conclusion here reached have not been overlooked."

Again, *In re Carleton*, 12 A. B. R. 475, 131 Fed. 146 (D. C. Mass.): "But so far as the present bankrupt (the partner filing the petition) is concerned, the partnership proceedings must be deemed voluntary."

In re Murray, 3 A. B. R. 601, 96 Fed. 600 (D. C. Iowa): "When a petition on behalf of part of the members of the firm is filed in the clerk's office, it must then be classed as a voluntary proceeding, and in the absence of the judge from the district or division, the clerk must refer the case to the proper referee. If, however, the nonjoining partner or partners, upon notification, should make defense to the petition, then the proceeding would become as to him an involuntary one."

And, if the other partner or partners upon notification, do come in and join, then the petition remains as a voluntary petition and adjudication can at once be made, either by the judge, or, in the judge's absence, by the referee, upon reference.⁷⁹

§ 73. No Act of Bankruptcy Requisite, Even Where Not All Join.—But no act of bankruptcy need be alleged where the petition is filed by one or more, less than all, and all do not join.⁸⁰

Or perhaps the act of bankruptcy is to be considered to be the filing of the bankruptcy petition on the part of the firm itself or the written admission contained therein that the partnership is unable to pay its debts and is therefore willing to be adjudged bankrupt.⁸¹

Compare, *National Bank v. Moyses*, 8 A. B. R. 10, 186 U. S. 181: "And he has committed an act of bankruptcy in filing the petition."

§ 74. Not All Defenses Available, but only Insolvency; Though Entitled to Jury on That Issue.—The nonjoining partners may not make all defenses which would have been available against a petitioning

⁷⁹. *In re Murray*, 3 A. B. R. 601, 96 Fed. 600 (D. C. Iowa).

⁸⁰. *Obiter*, *In re Carleton*, 8 A. B. R. 270, 115 Fed. 246 (D. C. Mass.); *In re Forbes*, 11 A. B. R. 787, 128 Fed. 137 (D. C. Mass.).

⁸¹. *Blake v. Valentine*, 1 A. B. R. 375, 89 Fed. 691 (D. C. Calif.); *In re Forbes*, 11 A. B. R. 787, on page 791, 128 Fed. 137 (D. C. Mass.).

creditor, but are confined to the single issue of insolvency notwithstanding the Supreme Court's General Order, No. VIII.⁸²

In *re Forbes*, 11 A. B. R. 787, 128 Fed. 137 (D. C. Mass.): "A nonassenting partner cannot set up the want of an act of bankruptcy as a defense to a petition brought by his partner against the firm and partners, but (that) he may set up the defense of solvency. * * * The nonassenting partner is entitled to trial by jury upon the issue of insolvency and upon that issue only. Upon the issue of partnership he is entitled to a trial by the court."

But nonjoining partners are entitled to a jury to try the issue of insolvency.⁸³

§ 75. Whether Partner May File Ordinary Involuntary Petition.—It seems that a partner may not file a regular involuntary petition against the partnership of which he is a member, but that his only method of bringing his firm into bankruptcy is as above indicated.⁸⁴

§ 76. Creditors May Not Intervene.—Creditors may not intervene to resist the adjudication upon a petition filed by one partner.⁸⁵

§ 77. Unincorporated Companies.—Unincorporated companies may be adjudged bankrupt.⁸⁶

82. Gen. Ord., No. VIII: "Any member of a partnership, who refuses to join in a petition to have the partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the partnership is not insolvent or has not committed an act of bankruptcy, and to make all defenses which any debtor proceeded against is entitled to take by the provisions of the act; and in case an adjudication of bankruptcy is made upon the petition, such partner shall be required to file a schedule of his debts and an inventory of his property in the same manner as is required by the act in cases of debtors against whom adjudication of bankruptcy shall be made."

83. In *re Forbes*, 11 A. B. R. 787, 128 Fed. 137 (D. C. Mass.); In *re Murray*, 3 A. B. R. 601, 96 Fed. 600 (D. C. Iowa).

84. Compare, obiter, In *re Schenkein & Coney*, 7 A. B. R. 162, 113 Fed. 421 (Ref. N. Y.).

85. See ante, § 43. Obiter, In *re Carleton*, 8 A. B. R. 270, 115 Fed. 246 (D. C. Mass.). The petition of one partner for adjudication of the firm should show clearly that it is the petition of one partner against the firm and that the other partners have not joined. In *re Russell*, 3 A. B. R. 91, 97 Fed. 32 (D. C. Iowa). And that he seeks discharge from firm as well as individual debts. In *re Russell*, 3 A. B. R. 91, 97 Fed. 32 (D. C. Iowa). Insanity of one partner, even if it began before the commission of the act of bankruptcy, will not defeat the subsequent adjudication of the partnership as bankrupt as we have heretofore seen. In *re Stein & Co.*, 11 A. B. R. 536, 127 Fed. 547 (C. C. A. Ills.). A partnership may be adjudged bankrupt after the death of a partner upon an act of bankruptcy committed by the surviving partner. Obiter, In *re Stein & Co.*, 11 A. B. R. 536, 127 Fed. 547 (C. C. A. Ills.). As to deposit of costs in partnership cases, see post, § 289. As to service of process upon non-joining partner, see post, § 310.

86. Bankr. Act, § 4; *Burkhardt v. Germ. Am. Bk.*, 14 A. B. R. 222, 137 Fed. 958 (D. C. Ohio); In *re Seaboard Fire Underwriters*, 13 A. B. R. 722, 137 Fed. 987 (D. C. N. Y.).

§ 78. **Definition of Unincorporated Company.**—It is generally understood to be a body or association occupying middle ground between partnership and stock corporations, possessing some of the powers and privileges of both.⁸⁷

§ 79. **Private Bankers.**—Private bankers may be adjudged bankrupt.⁸⁸

And a partnership may be a private banker. But a corporation cannot be a "private banker" within the meaning of the Act.⁸⁹

Burkhart v. Germ. Am. Bk., 14 A. B. R. 222, 137 Fed. 958 (D. C. Ohio): "And it is urged that this bank, having some of the powers and privileges of a private corporation not possessed by individuals or partnerships, is a corporation, and not a partnership, and that therefore the petition must be dismissed. * * * This bank is an unincorporated company, and under the laws of Ohio and for general purposes is a partnership, and for the purpose of banking is a private banker, but the contention is that it must be deemed to be a corporation for the purpose of administering its assets in bankruptcy, and it is urged, that to hold otherwise would nullify the provisions of clause 6, § 1. The broad terms of clause 6, § 1, are, however, limited by §§ 4 and 5 in relation to who may become bankrupts. In this respect §§ 4 and 5 distinguish unincorporated companies and private bankers and ordinary partnerships from corporations. It is difficult to conceive of an unincorporated company (as distinguished from a corporation and an ordinary partnership) without any of the powers and privileges of a private corporation, for without any of these powers and privileges it would be an ordinary partnership. It is generally understood to be a body or association occupying middle ground between partnerships and stock corporations, possessing some of the powers and privileges of both, and is generally so recognized by the courts; and § 4 may have contemplated such an unincorporated company, thereby limiting the definition of 'corporations', at least for the purpose of adjudications in bankruptcy, to bodies organized under laws making the capital subscribed alone responsible for their debts. Clause 6, as construed by counsel for the respondents, would conflict with § 5, and deprive creditors of the right to have the individual property of the partners administered for their benefit by the bankrupt courts. It would be reasonable to treat as corporations bodies whose subscribed capital stock is alone responsible for their debts, but it would be contrary to the spirit and purpose of the Bankrupt Act to deprive creditors of the right to have the individual property of partners administered for their benefit by the Bankruptcy Courts simply because the partnership contract invested the partnership with authority to exercise some of the powers or privileges of a corporation. * * * This bank is a partnership, formed for the purpose of carrying on the business of banking as a private banker, such as is contemplated by Laning's Rev. Laws, § 4891 (Bates' Ann. St., §§ 3170-1), et seq., and as such, may be adjudged a bankrupt."

⁸⁷. *Burkhardt v. Germ. Am. Bk.*, 14 A. B. R. 222, 137 Fed. 958 (D. C. Ohio).

⁸⁸. *Bankr. Act*, § 4 (b). *Obiter, Couts v. Townsend*, 11 A. B. R. 128, 126 Fed. 249 (D. C. Ky.). Instance, *Kersten v. Kersten*, 6 A. B. R. 516, 110 Fed. 929 (D. C. Wis.).

⁸⁹. *In re Surety & Guarantee Trust Co.*, 9 A. B. R. 129, 121 Fed. 73 (C. C. A. Ills.).

SUBDIVISION "C."

CORPORATIONS.

§ 80. **Classes of Corporations Included and Excluded.**—Not all corporations may be forced into bankruptcy, but only those engaged, and engaged principally, in manufacturing, trading, printing, publishing, mining or mercantile pursuits.⁹⁰

§ 81. **Jurisdiction over Corporations More Limited under Act of 1898 than under Act of 1867.**—Jurisdiction over corporations is more limited under the present law, than under the law of 1867. Under the law of 1867, all moneyed, business or commercial corporations and stock companies were made subject to involuntary bankruptcy.⁹¹

In *re* Keystone Coal Co., 6 A. B. R. 378, 109 Fed. 872 (D. C. Penn.): "The question here involved is jurisdictional. Unless this court is vested with jurisdiction over this corporation by statutory grant, none exists, * * * Under the Bankruptcy Act of 1867, jurisdiction over corporations was conferred in broad terms: 'The provisions of this title shall apply to all moneyed business or commercial corporations and joint stock companies.'" This decision was rendered before the Amendment of 1903 had added "mining" to the corporations subject to bankruptcy.

In *re* N. Y. & Westch. Water Co., 3 A. B. R. 508 (D. C. N. Y.), 98 Fed. 711, 714: "The Act of 1898 is much more limited in its application to corporations than the Act of 1867. By the latter Act it was declared to 'apply to all moneyed, business or commercial corporations and joint stock companies.' The present Act is restricted to corporations 'engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits.'"

"The intention of Congress greatly to restrict the application of the present act appears manifest, not only from comparison of the phraseology of the two acts, but also from the report of the Congressional conference committee upon this point, showing that at least railroad and transportation corporations and banks were intended to be omitted and left to be dealt with under the State Laws."

Butt v. Construction Co., 15 A. B. R. 517, 140 Fed. 840 (C. C. A. Va.), quotes Hughes on Federal Procedure, page 86, as follows: "As to the corporations against whom involuntary proceedings may be taken, the policy of the present law is very different from that of the Act of March 2, 1867. That Act allowed the proceeding against all moneyed, business and commercial corporations and joint stock companies. The language of the present Act, as seen above, is entirely different, and therefore the decisions construing the old Act must be but cautiously used in construing the present one. The intent of Congress evidently was to limit very largely the corporations against whom such proceedings can be taken, probably for the reason that other rem-

90. This limitation qualifies only corporations and not natural persons. *Cleage v. Laidley*, 17 A. B. R. 598 (C. C. A. Tex.). As to definition of corporation, see § 1 (a) 6; also, *In re Hercules Atkins Co.*, 13 A. B. R. 371, 133 Fed. 813 (D. C. Pa.).

91. *In re Ice Lines*, 16 A. B. R. 832, 145 Fed. 214 (C. C. A. N. Y.). See note to *In re San Gabriel Sanatorium*, 2 A. B. R. 408, 95 Fed. 271 (D. C. Calif., disapproved in *In re Elk Park Min. & Mill Co.*, 4 A. B. R. 131, 101 Fed. 422 (D. C. Colo.).

edies for the liquidation of insolvent corporations are abundant, and the further reason that a bankrupt law is not as necessary to a corporation as to an individual. * * * In view of this patent intent of Congress to limit the range of the Bankrupt Act as to corporations, it would seem the duty of the courts to construe the language of the Act strictly in this respect, though this has not always been done."

§ 82. Commonly Accepted and Popular Meaning Given to Classes.

—The commonly accepted, ordinary and popular meaning is to be given to the different classes.⁹²

Zugalla v. Mercantile Agency, 16 A. B. R. 71, 142 Fed. 927 (C. C. A. N. J.): "The arbitrary distinctions made by the Act between the classes of corporation subject to involuntary bankruptcy would seem to require that the words descriptive of these classes must be taken in their common and ordinary meaning, and that nothing is to be included in that meaning by intendment or implication."

Inferentially, *In re Elk Park Min. & Mill. Co.*, 4 A. B. R. 131, 101 Fed. 422 (D. C. Colo.), where the court draws attention to the fact that printing and publishing corporations are in a sense engaged in trading or in mercantile pursuits yet Congress mentions them separately. From this we are to infer that Congress did not mean to have these classes interpreted in a strained sense but in accordance with the every day use of the terms.

In re United States Hotel Co., 13 A. B. R. 405, 134 Fed. 225 (C. C. A. Ohio). "In view of the fact that the popular meaning of the term 'trader' and its technical meaning, as defined by the courts prior to any statutory definition of the persons comprehended by the term 'trader', did not include one who keeps a hotel or inn, is there anything in the Act of 1898 which requires so broad a meaning as is now insisted upon? * * *

"It follows that, if any importance is to be attached to the meaning of the word 'tradesman' under the prior bankrupt laws by reason of judicial construction of the term by the inferior courts, the great weight of authority was in favor of a construction which accorded with the popular meaning of the term and with the opinion of the English judges prior to the British Act of 1825, which specifically prescribed the occupations embraced under the term 'trader.' The Congress has not seen fit to define the occupations which are meant to be included under the description of corporations 'engaged principally in trading.'

"In view of the manifest intention of Congress to restrict the operation of this law in respect of its application to involuntary proceedings against corporations, and to the fact that the word 'trading' is used in contradistinction to the words descriptive of other occupations, we conclude that the term 'trading' is used in its well-defined, limited sense as understood before the English Parliamentary Act of 1825, and that a corporation engaged in keeping an inn or hotel is not a corporation principally engaged in trading or mercantile pursuits."

But where the terms have an established meaning in law, such meaning is to be preserved in bankruptcy.⁹³

⁹². Inferentially, *obiter*, *Flickinger v. Nat'l Bk.*, 16 A. B. R. 678, 682, 145 Fed. 162 (C. C. A. Ohio).

⁹³. *In re United States Hotel Co.*, 13 A. B. R. 405, 134 Fed. 225 (C. C. A. Ohio); *In re N. Y. & N. J. Ice Lines*, 14 A. B. R. 61, 147 Fed. 214 (Ref. N. Y., affirmed by D. C.).

In *re Surety & Guaranty Trust Co.*, 9 A. B. R. 129, 121 Fed. 73 (C. C. A. Ills.): "The term having received such settled and definite meaning at the time of the Bankruptcy Act, Congress must be assumed to have used the term in that sense, no other or different meaning being stated. * * *

"Is the buying and selling of stocks, bonds and other securities a 'trade pursuit' within the meaning of the Bankruptcy Act? In a popular sense trade comprehends every species of exchange or dealing. It is, however, chiefly used to denote barter by purchase and sale of goods, wares and merchandise, either at wholesale or at retail. A trader is 'one who makes it his business to buy merchandise or goods and chattels and to sell the same for the purpose of making profit.' Bouvier, vol. 2, p. 741. The opinion in the case *In re New York and Westchester Water Co.*, 3 Am. B. R. 508, 98 Fed. 711 (affirmed, on appeal, sub. nom., *In re Morris*, 43 C. C. A. 91), contains an able and lucid review of the definition of the term as known to the law, and declares that 'the business of a trader includes both buying and selling either goods or merchandise, or other goods ordinarily the subject of traffic;' and that the term 'mercantile pursuits' means 'the buying and selling of goods or merchandise or dealing in the purchase and sale of commodities.' The term 'goods' means 'articles of trade, commodities, wares, merchandise. Under the bankruptcy law of England it was ruled that dealing in shares in joint stock companies was not trading within the meaning of the law. In *re Cleland*, L. R., 2 Ch. App. 465. And so likewise it was held under the National Bankruptcy Act of 1867. In *re Woodward*, 8 Ben. 563. * * * We are inclined to hold that Congress employed the words 'trader' and 'mercantile pursuits' in the technical sense by which they were known to the law. If it be desirable that the provisions of the act should be extended to include the business of dealing in stocks and bonds, which now engages the time of many people, it must come about by legislative action, and not by the act of the court in enlarging the technical meaning of a term long known to and well defined in the law."

The terms are to be construed as having a restricted meaning in accordance with long established common use, and are not to be so broadened by fine spun philosophizing as to cover the whole field of commerce;⁹⁴ and the question is not whether some one or more of the dictionary meanings of the words "trading" or "mercantile" may be broad enough to embrace the particular business in question.⁹⁵

§ 83. **Definitions of "Trading" and "Mercantile Pursuits."**—A trader is one who makes it his business to buy merchandise, goods or chattels and to sell the same for the purpose of making profit.⁹⁶ To be a trader one must both buy and sell and not merely gather and sell the products of one's own land.⁹⁷ Moreover, he must deal in commodities

^{94.} In *re Phila. & Lewes Transp. Co.*, 7 A. B. R. 707, 114 Fed. 403 (D. C. Penn.).

^{95.} In *re Phila. & Lewes Transp. Co.*, 7 A. B. R. 707, 114 Fed. 403 (D. C. Penn.). Impliedly, *Zugalla v. Mercantile Agency*, 16 A. B. R. 71, 142 Fed. 927 (C. C. A. N. J.).

^{96.} In *re U. S. Hotel Co.*, 13 A. B. R. 405, 134 Fed. 225 (C. C. A. Ohio); In *re N. Y. & N. J. Ice Lines*, 14 A. B. R. 61 (Ref. N. Y., affirmed by D. C.); *Zugalla v. Mercantile Agency*, 16 A. B. R. 71, 142 Fed. 927 (C. C. A. N. J.).

^{97.} In *re N. Y. & N. J. Ice Lines*, 14 A. B. R. 62, 147 Fed. 214 (Ref. N. Y., affirmed by D. C.); In *re New York Water Co.*, 3 A. B. R. 508, 98 Fed. 711 (D. C. N. Y.); *First Nat. Bk. v. Ice Co.*, 14 A. B. R. 449, 136 Fed. 466 (D. C. Penna.).

commonly accepted as subject of trade. Thus, buying and selling stocks, bonds and other securities is not such "trading."⁹⁸

It is to be noted that the words "trading" and "mercantile pursuits" are used somewhat interchangeably in bankruptcy law; although undoubtedly they were originally meant to distinguish the small tradesman, with his store, from the more dignified merchant, engaged in extensive business ventures, having ships at sea or cargoes at risk, distinguishing the retailer, so to speak, from the wholesaler, the small trader from the large one.⁹⁹

To be sure, the court in *In re N. Y. Westch. Water Co.*, 3 A. B. R. 508, 98 Fed. 711, in an opinion approved for its lucidity and correctness by the Circuit Court in *In re Surety & Guaranty Co.*, 9 A. B. R. 129, apparently starts out to make a distinction, saying: "The words 'mercantile pursuits' may have a little broader signification than 'trading,'" but thereupon, without in fact drawing any distinction, the court concludes by saying, "'Mercantile' signifies for the most part the same thing as the word 'trading;' and by 'mercantile pursuits' is meant the buying and selling of goods or merchandise or dealing in the purchase and sale of commodities, and that, too, not occasionally or incidentally, but habitually as a business."

§ 84. **Definitions of "Manufacturing."**—By manufacture is meant, not the creation of anything, but the change of its form by human agency.¹⁰⁰

The process of manufacture is supposed to produce some new article by the application of skill and labor to the raw material.¹⁰¹

Butt v. Construction Co., 15 A. B. R. 517, 140 Fed. 840 (C. C. A. Va.): "It was held, in the case of *In re Capital Pub. Co.*, 3 MacArthur 405, 40 Am. Rep. 446, in construing the bankrupt statute, that the word 'manufacture' should be construed to mean where raw materials, etc., are wrought by hand or art or machinery into the commodities for use. In discussing the question the court says:

"There can be no doubt that the word 'manufacture' was used in the statute in the limited sense in which it is commonly understood. * * * The industries to which the dictionaries and the writers on political economy limit this term are where the raw materials or natural substances are wrought by hand, art, or machinery into commodities for use; and the examples given are cloths, iron, shoes, cabinet work, glass, cotton and silk goods, etc. This limitation of the term 'manufacture' is to be adopted as the true meaning of the bankruptcy law."

"Manufacturing," however, is to be distinguished from merely "con-

98. *In re Surety & Guaranty Trust Co.*, 9 A. B. R. 129, 121 Fed. 73 (C. C. A. Calif.), quoted, ante, § 82.

99. *In re United States Hotel Co.*, 13 A. B. R. 403, 134 Fed. 225 (C. C. A. Ohio).

100. *In re Tecopa Min. & Smelt Co.*, 6 A. B. R. 253, 110 Fed. 120 (Ref. Calif.). Compare, *In re Keystone Coal Co.*, 6 A. B. R. 377, 109 Fed. 872 (D. C. Penn.).

101. *In re Niagara Contracting Co.*, 11 A. B. R. 644, 127 Fed. 782 (D. C. N. Y.).

structing," and a corporation engaged in structural work is not necessarily engaged in manufacturing.¹⁰²

Butt v. MacNichol Construction Co., 15 A. B. R. 517, 140 Fed. 840 (C. C. A. Va., affirming *In re MacNichol Con. Co.*, 14 A. B. R. 188, 134 Fed. 979, D. C. Va.): "If we should construe the Act in question as applicable to a corporation which builds bridges, wharves, bulkheads, and drives piles for foundations for buildings, it would necessarily follow that a corporation which engages in the business of erecting a house or building a barn is a manufacturer within the meaning of the statute. It is commonly understood that corporations engaged in erecting houses and other buildings which require the raw material to be sawed, planed, fitted, and put together are construction and not manufacturing companies. The appellee had no principal place of business, nor was it engaged in manufacturing bridges to be placed upon the market, as such, but was simply engaged in constructing bridges, wharves, and bulkheads on the premises of those who employed it, and driving piles for foundations for buildings under contract."

But compare, *In re First Nat'l Bk. of Belle Fourche*, 18 A. B. R. 269 (C. C. A.): "The word 'manufacturing' is a generic term of broad significance, advisedly used by Congress to include many species of corporations, and its comprehensive meaning ought not to be whittled away by fine distinctions. Derivatively meaning making with the hand, its ordinary significance is producing a new article of use or ornament by the application of skill and labor to the raw materials of which it is composed. Pin makers, pen makers, shoe makers, furniture makers, lumber makers, steel makers, boot makers, rail makers, engine makers, cement makers, are undoubtedly engaged in manufacturing, and the cogency of the argument that a corporation which makes a pin is manufacturing, while one which makes a bridge is not, fails to appeal to our judgment with convincing force. The latter may make the cement or the steel it uses in its structure. If so, it is engaged in manufacturing the cement or the steel, and, whether it makes them or not, it produces a new and useful article, a bridge, when by the application of skill and labor to the materials of which it is composed it constructs it."

§ 85. Must Be "Principally" So Engaged.—It must not only be engaged in one of these occupations, but such occupation must be that in which it is "principally" engaged.¹⁰³ Merely incidental occupation therein will not suffice.¹⁰⁴

^{102.} *In re MacNichol Construction Co.*, 14 A. B. R. 188, 134 Fed. 979 (D. C. Va.); *In re Hill Co.*, 17 A. B. R. 519 (C. C. A. Ills.).

^{103.} *In re Quimby Freight Forwarding Co.*, 10 A. B. R. 424, 121 Fed. 139 (D. C. Mass., affirmed in 11 A. B. R. 205, Sub. Nom., *Philpot v. O'Brien*, 11 A. B. R. 205, 126 Fed. 167); *McNamara v. Helena Coal Co.*, 5 A. B. R. 48 (D. C. Ala.). Mining corporation (amendment of 1903 included such corporations among those subject to bankruptcy) incidentally keeping supply store. *Obiter*, *In re Elmira Steel Co.*, 5 A. B. R. 484, 109 Fed. 456 (Ref. N. Y.); *In re N. Y. & Westch. Water Co.*, 3 A. B. R. 508, 98 Fed. 711 (D. C. N. Y.); *In re N. Y. & N. J. Ice Lines*, 14 A. B. R. 61, 147 Fed. 214 (Ref. N. Y., affirmed by D. C.).

^{104.} *In re N. Y. & Westch. Water Co.*, 3 A. B. R. 508, 98 Fed. 711 (D. C. N. Y.); *In re Chicago-Joplin Lead & Zinc Co.*, 4 A. B. R. 712, 104 Fed. 67 (C. C. A. Mo.).

§ 86. **How, if Engaged in Different Occupations, Some within and Others without the Classes.**—But where a corporation is engaged in several different occupations, some of which are within the classes subject to bankruptcy and others are outside, it is not necessary that any single one be that in which it is “principally” engaged; the aggregate of business done in the classes within the law is to be compared with the aggregate done in the classes outside.

In *re Slate Co.*, 16 A. B. R. 407 (C. C. A. Mass., affirming 16 A. B. R. 350): “We find it unnecessary to determine whether the corporation was principally engaged in manufacturing, principally engaged in mining or principally engaged in mercantile pursuits for we think it clear that a corporation engaged in a business consisting of manufacturing, mining, and mercantile pursuits, which in the aggregate exceed business of a kind not within the statute, is within the Bankruptcy Act. In such a case it is not necessary to determine in which one of the enumerated operations or pursuits the corporation is principally engaged.”

§ 87. **Actual Occupation Governs.**—It is the actual occupation and not the charter provisions as to occupation that will govern. The authority conferred by the charter alone is not sufficient.¹⁰⁵

In *re Chic. Joplin Lead & Zinc Co.*, 4 A. B. R. 712, 104 Fed. 67 (D. C. Mo.): “What a corporation is in fact doing is the principal business which characterizes it as a trader or merchant, rather than what it might have done within the provisions of its articles or association.”

In *re Tontine Surety Co.*, 8 A. B. R. 421, 116 Fed. 400 (D. C. N. J.): “I am of the opinion that this company is not within the provisions of the Bankrupt Act; for, whatever may be its powers under its charter, it is admitted by the stipulation that it never did, in fact, buy, own, or deliver merchandise of any kind. As has been said before, to be a trader or to be engaged in a mercantile pursuit, one must both buy and sell.”

But the charter provisions, if indicating that the corporation is not one of those named in the Act, may throw the burden of proof upon the petitioning creditors to show that it is actually engaged, and engaged principally, in an occupation bringing it within the Act.

Philpott v. O'Brien, 11 A. B. R. 206, 126 Fed. 167 (C. C. A. Mass.): “Of course, in view of the charter, the burden rests on them.”

It has been held, that the corporation will be subject to involuntary proceedings although it has not actually started in the work if it can be said to be engaged in the “pursuit:” it need not yet have done any manu-

¹⁰⁵. *Obiter*, In *re Moench*, 12 A. B. R. 240, 130 Fed. 685 (C. C. A. N. Y., affirming 10 A. B. R. 656); *McNamara v. Helena Coal Co.*, 5 A. B. R. 48 (D. C. Ala.); In *re N. Y. & Westch. Water Co.*, 3 A. B. R. 508 (D. C. N. Y.), 98 Fed. 711-714; In *re N. Y. & N. J. Ice Lines*, 14 A. B. R. 62, 147 Fed. 214 (Ref. N. Y., affirmed by D. C.). Inferentially, *Philpott v. O'Brien*, 11 A. B. R. 205, 126 Fed. 167 (C. C. A. Mass.). Compare analogous rulings as to place of business, residence or domicile. ante. § 31.

facturing, mining, etc. If it was preparing to do so as its principal business, it was nevertheless actually "engaged" in the pursuit.¹⁰⁶

And it has been held, that where the principal business is in connection with the manufacture of certain articles, although the corporation be independent and be also engaged in performing work not embraced in manufacturing nor trading, the corporation is principally engaged in manufacture and is subject to bankruptcy.¹⁰⁷

§ 88. Decree of Dissolution of Corporation.—As to the effect of a decree of dissolution of a corporation after the filing of the petition, or before its filing and after the commission of the act of bankruptcy, see post, subd. D, "Change of Debtor's Class."

§ 89. Quasi Public Corporations.—And, in general, quasi public corporations, clothed with the power of eminent domain and subject to corresponding duties, should not, on grounds of public policy, be subject to bankruptcy.¹⁰⁸

§ 90. Manufacturing Corporations.—Manufacturing corporations are subject to bankruptcy. Thus, shipbuilding corporations are so subject.¹⁰⁹ Likewise, bridge manufacturing and building corporations are subject to bankruptcy if engaged in making the parts of the bridges as well as in constructing the bridges themselves;¹¹⁰ but not where their business is simply that of constructing, with material purchased from others, already manufactured.¹¹¹ Paper making corporations are manufacturing corporations and are subject to bankruptcy.¹¹² Likewise, ore smelting

^{106.} In re White Mountain Paper Co., 11 A. B. R. 633 (C. C. A. N. H., 127 Fed. 643, affirming 11 A. B. R. 491). In which a corporation formed to manufacture paper pulp had not yet actually manufactured, but had simply bought large tracts of timber in preparation therefor. Compare reference to this case in In re Troy Steam Laundering Co., 13 A. B. R. 97, 132 Fed. 266 (D. C. N. Y.).

^{107.} In re Troy Steam Laundry Co., 13 A. B. R. 97, 132 Fed. 266 (D. C. N. Y.).

^{108.} In re Bay City Irrigation Co., 14 A. B. R. 370, 135 Fed. 850 (D. C. Tex.).

^{109.} Columbia Iron Works v. National Lead Co., 11 A. B. R. 340, 127 Fed. 102 (C. C. A. Mich. Dist. in In re Construction Co., 14 A. B. R. 190); In re Marine Construction & Dry Dock Co., 11 A. B. R. 640, 130 Fed. 446 (C. C. A. N. Y.).

^{110.} In re Niagara Contracting Co., 11 A. B. R. 643, 127 Fed. 782 (D. C. N. Y. Dist., in In re MacNichol Construction Co., 14 A. B. R. 188); In re First Nat'l Bk. of Belle Fourche, 18 A. B. R. 269 (C. C. A.).

^{111.} In re MacNichol Construction Co., 14 A. B. R. 188, 134 Fed. 979 (D. C. Va., affirmed, sub. nom., Butt v. Construction Co., 15 A. B. R. 515); In re Hill Co., 17 A. B. R. 517 (C. C. A. Ills.); Butt v. MacNichol Construction Co., 15 A. B. R. 515, 140 Fed. 840 (C. C. A. Va., affirming In re MacNichol Construction Co., 14 A. B. R. 188). But compare, In re First Nat'l Bk. of Belle Fourche, 18 A. B. R. 269 (C. C. A.).

^{112.} In re White Mountain Paper Co., 11 A. B. R. 491 (D. C. N. H., affirmed in 11 A. B. R. 633); White Mountain Paper Co. v. Morse, 11 A. B. R. 633, 127 Fed. 644 (C. C. A. N. H.).

corporations are subject thereto.¹¹³ And so are corporations engaged in quarrying from their own quarries and dressing, carving and cutting the product.¹¹⁴

§ 91. Trading Corporations and Those Engaged in Mercantile Pursuits.—Trading corporations and those engaged in mercantile pursuits are subject to bankruptcy. Thus, a stockbrokerage corporation which buys and sells grain and other commodities as well as securities, is subject to bankruptcy.¹¹⁵ And an ice company which buys ice as well as sells it is likewise a "trader."¹¹⁶ A private hospital conducted for profit and not for charity has been held, but wrongly, to be engaged in a mercantile pursuit.¹¹⁷

§ 92. Printing and Publishing Corporations.—Printing and publishing corporations are subject to bankruptcy.

Mercantile agencies have been held to be subject to involuntary bankruptcy.¹¹⁸ But such holding is erroneous.

§ 93. Mining Corporations.—Mining corporations are subject to bankruptcy.

And mining includes quarrying corporations.¹¹⁹

§ 94. Corporations Not within Statutory Classes Exempt.—Corporations that do not come within any of the six classes enumerated in the Act, are not subject to bankruptcy.

¹¹³. In re Tecopa Min. & Smelting Co., 6 A. B. R. 250, 110 Fed. 120 (D. C. Calif., disapproving of obiter in In re Rollins Gold & Silver Min. Co., 4 A. B. R. 327, 102 Fed. 983).

¹¹⁴. In re Quincy Granite Quarries Co., 16 A. B. R. 823, 147 Fed. 279 (D. C. Mass.).

¹¹⁵. In re Leighton & Co., 17 A. B. R. 275, 147 Fed. 313 (D. C. W. Va.).

¹¹⁶. First Nat'l Bk. v. Ice Co., 14 A. B. R. 448, 136 Fed. 466 (D. C. Pa.). But compare, In re Ice Lines, 16 A. B. R. 832, 147 Fed. 214 (C. C. A. N. Y., affirming 14 A. B. R. 61).

¹¹⁷. See San Gabriel Sanatorium, 2 A. B. R. 408, 95 Fed. 271 (D. C. Calif.).

¹¹⁸. In re Mutual Mercantile Agency, 6 A. B. R. 607, 111 Fed. 152 (D. C. N. Y.); In re International Mercantile Agency, 13 A. B. R. 725 (D. C. N. J., reversed, sub. nom., Zugalla v. Mercantile Agency, 16 A. B. R. 67, 142 Fed. 927, C. C. A. N. J.). Contra, Zugalla v. Mercantile Agency, 16 A. B. R. 67, 142 Fed. 927 (C. C. A. N. J., reversing In re Mutual Mercantile Agency, 6 A. B. R. 607, 11 Fed. 152, D. C. N. Y.).

¹¹⁹. In re Slate Co., 16 A. B. R. 407, 144 Fed. 738 (C. C. A. Mass., affirming 16 A. B. R. 350). Perhaps, In re Quincy Granite Quarries Co., 16 A. B. R. 823 (D. C. Mass.). Before the amendment of 1903, mining corporations were not subject to bankruptcy. In re Keystone Coal Co., 6 A. B. R. 377, 109 Fed. 872 (D. C. Penn., reversing 5 A. B. R. 389); McNamara v. Helena Coal Co., 5 A. B. R. 48 (D. C. Ala.); In re Woodside Coal Co., 5 A. B. R. 186, 105 Fed. 56 (D. C. Pa.); In re Rollins Gold & Silver Min. Co., 4 A. B. R. 327, 102 Fed. 982 (D. C. N. Y.); In re Elk Park Min. & Mill Co., 4 A. B. R. 131, 101 Fed. 422 (D. C. Colo.); In re Chicago-Joplin Lead & Zinc Co., 4 A. B. R. 712, 104 Fed. 67 (D. C. Mo.).

Thus, a theatrical corporation cannot be forced into involuntary bankruptcy, for it is engaged neither in trading nor in manufacturing, mining, publishing, printing, nor in a mercantile pursuit.¹²⁰ Thus, incorporated social clubs are exempt.¹²¹ And laundry companies are, in general, exempt;¹²² but, where a laundry corporation's principal business is the laundering of collars, cuffs, and shirts for the manufacturers of those articles as a prerequisite to their being put upon the market for sale, it is in fact engaged in a part of the process of the manufacture thereof and is subject to bankruptcy proceedings, although also engaged to some extent in laundering for customers.¹²³

Thus, livery and boarding stables are exempt. But, contrary to the weight of authority and in a decision, the reasoning of which was subsequently in several cases expressly disapproved, the court in *In re Morton Boarding Stables*, 5 A. B. R. 763, held a boarding stable corporation to be one engaged chiefly in trading and to be subject to involuntary bankruptcy. This was held upon the precedent of a case decided under the old law of 1867 in the same district, which the present court felt constrained to follow although doubting its propriety as an original proposition. The theory of the case seems to have been that the stable keeper was a trader because he bought oats and hay and sold them again by feeding them to the horses for pay. The reasoning of this case was criticised as unsound by the Circuit Court of Appeals in the case of *The Surety & Guaranty Co.*, 9 A. B. R. 132, where the court held a stock broker not to be a trader; also by the Circuit Court of Appeals in *re United States Hotel Co.*, 13 A. B. R. 405, where the court held a hotel company not to be a trader; also by a district court in the case of *In re Oyster & Fish Co.*, 7 A. B. R. 175, where the court held a restaurant keeper was not a trader. Moreover, even while the old law of 1867 was in force there was one decision, *Hall v. Cooley*, 3 N. Y. Legal Obs., 282, that had expressly held a boarding stable keeper not to be a trader within the meaning of the law. Perhaps, the origin of the heresy was in an old English case where the livery keeper did more than simply board horses; where he also sold hay and oats along with keeping his stable; which was quite a different case from that of the Morton Boarding Stable, where the only way of selling the oats and hay was by feeding them to the horses. Moreover, under the English law it was not necessary for the debtor to be "principally" so engaged, as it is under our present law.

Thus, common carriers, transportation companies, railroads, telephone companies, water companies, etc., are not engaged either in manufacturing,

120. *In re Oriental Society*, 5 A. B. R. 219, 104 Fed. 975 (D. C. Pa.).

121. *In re Fulton Club*, 7 A. B. R. 670, 113 Fed. 997 (D. C. Ga.).

122. *In re White Star Laundry Co.*, 9 A. B. R. 30, 117 Fed. 570 (D. C. Wis.).

123. *In re Troy Steam Laundering Co.*, 13 A. B. R. 97, 132 Fed. 266 (D. C. N. Y.).

mining, printing, publishing, trading nor in mercantile pursuits, so they may not be proceeded against in involuntary bankruptcy.¹²⁴

In *re Bay City Irrigation Co.*, 14 A. B. R. 370, 135 Fed. 850 (Ref. Tex.): "In the case at bar, the defendant company cannot be called a trader. It buys nothing which it sells to others, but only charges a reasonable compensation for its labor, skill and time in furnishing water to others for irrigation purposes; which compensation is paid in rice, and that rice is afterwards by the company converted into money."

Thus, building and loan associations are exempt.¹²⁵ Corporations engaged in soliciting advertisements and then placing them in newspapers at rates previously furnished, are not "traders" and are exempt.¹²⁶

Whether real estate corporations engaged in buying and selling real estate are subject to bankruptcy does not appear to have been decided under the present law. They could hardly be termed "traders" because that term is applied commonly to those solely who buy and sell commodities.¹²⁷

Insurance corporations are not subject to bankruptcy.¹²⁸ Warehouse corporations, even though issuing warehouse receipts that, on negotiation, operate as transfers of title, are, nevertheless, not "trading" corporations and may not be adjudged bankrupt.¹²⁹ Stockbrokerage corporations are not subject to bankruptcy proceedings. Although they "buy and sell," yet they do not deal in "commodities,"¹³⁰ but where they not only buy and sell securities, but also buy grain and other commodities, they are subject thereto.¹³¹ Circulating library corporations are not subject to involuntary bankruptcy.¹³²

Hotel corporations are not subject to bankruptcy;¹³³ although, where the furnishing of lodging and meals is merely incidental and the receipts from the cafe and barroom, that is to say, from those not guests, is greatly in excess of those from guests, such hotel has been held to be principally engaged in trading.

124. See *Quimby Freight Forwarding Co.*, 10 A. B. R. 424, 121 Fed. 139 (D. C. Mass., affirmed in 11 A. B. R. 205, sub. nom., *Philpot v. O'Brien*); In *re Phila. & Lewes Transp. Co.*, 7 A. B. R. 707, 114 Fed. 403 (D. C. Pa.); In *re N. Y. & Westchester Water Co.*, 3 A. B. R. 508, 98 Fed. 711 (D. C. N. Y.).

125. In *re New York Building & Loan Banking Co.*, 11 A. B. R. 51, 127 Fed. 471 (D. C.).

126. In *re Snyder & Johnson Co.*, 13 A. B. R. 325, 133 Fed. 806 (D. C. Ill.).

127. Compare, In *re Columbia Real Estate Co.*, 4 A. B. R. 411, 101 Fed. 965 (D. C. Ind.).

128. In *re Cameron Town Insurance Co.*, 2 A. B. R. 372, 96 Fed. 756 (D. C. Mo.). Obiter, In *re Fire Lloyds Underwriters*, 13 A. B. R. 722, 724 (D. C. N. Y.).

129. In *re Pacific Coast Warehouse Co.*, 10 A. B. R. 474, 123 Fed. 749 (D. C. Calif.).

130. In *re Surety Guaranty & Trust Co.*, 9 A. B. R. 129, 121 Fed. 73 (C. C. A. Ill.).

131. In *re Leighton & Co.*, 17 A. B. R. 275, 147 Fed. 313 (D. C. W. Va.).

132. In *re Parmelee Library*, 9 A. B. R. 568, 120 Fed. 235 (C. C. A. Ill.).

133. In *re United States Hotel Co.*, 13 A. B. R. 403, 134 Fed. 225 (C. C. A. Ohio), quoted ante, § 65.

In *re Barton Hotel Co.*, 12 A. B. R. 335 (Sup. Ct. D. C.): "It is said to have some seventy rooms—more than enough to entitle it, under the laws of the District of Columbia, to a bar license. It appears to have been engaged in the saloon business, and in the sale of tobacco and cigars, not only to its guests, but to the public in general. During this summer, and during other summers, it seems that its business has been restricted to the business of a saloon and the rental of its rooms. It is evident that the facts may be conceived to be such as to show the business of the company to be largely, or almost entirely, restricted to the business carried on in the saloon. If it should come to that, I think it should be held that the business of buying liquors and tobacco and cigars at wholesale, to be retailed from the counter in the saloon, is a trading and mercantile business, and that a corporation properly engaged in that business is liable to be adjudged a bankrupt."

Private hospitals, even though conducted not for charity but for profit, are, nevertheless, not subject to involuntary bankruptcy.¹³⁴ Ice harvesting corporations, not buying their ice, but simply gathering and selling their own ice, are not subject to involuntary bankruptcy;¹³⁵ but if they do buy a material part of the ice they sell, they are subject thereto.¹³⁶

Mercantile agency corporations, engaged in rating and reporting credit seekers, and loaning books, are not principally engaged in publishing nor in mercantile pursuits.¹³⁷

Zugalla v. International Mercantile Agency, 16 A. B. R. 67, 142 Fed. 927 (C. C. A. N. J., reversing *In re Mercantile Agency*, 13 A. B. R. 725): "The principal business of a mercantile agency, as above described, was to rate and report the credit seekers of the United States and Canada, to publish those ratings in the form of a book, and to furnish both it and special reports at a special price per hundred, to all mercantile agency users in this country and Canada. This was a special business, to which the printing and publishing of a book was an incident, and would seem a very different business from that of publishing, as commonly understood and above described. No one would think of calling one engaged in such business a 'publisher,' and expect to convey thereby, to the common understanding, a sufficient notion of his business."

Building and constructing companies are not subject to bankruptcy. They are not traders, because they do not buy and sell; nor are they manufacturers, because they do not make a commodity—they simply construct.

Thus, bridge construction companies are exempt.¹³⁸

^{134.} Contra, *In re San Gabriel Sanatorium*, 2 A. B. R. 408, 95 Fed. 271 (D. C. Calif., disapproved in *In re Min. & Mill. Co.*, 4 A. B. R. 131, D. C. Colo.).

^{135.} *In re N. Y. & N. J. Ice Lines*, 14 A. B. R. 61, 147 Fed. 214 (Ref. N. Y., affirmed by D. C. and affirmed by C. C. A., 16 A. B. R. 832); *In re Ice Lines*, 16 A. B. R. 832 (C. C. A. N. Y., affirming *In re N. Y. & N. J. Ice Lines*, 14 A. B. R. 61, 147 Fed. 214).

^{136.} *First Nat'l Bank v. Ice Co.*, 14 A. B. R. 448, 136 Fed. 466 (D. C. Pa.).

^{137.} Contra, *In re Mercantile Agency*, 13 A. B. R. 725 (D. C. N. J., reversed, sub. nom., *Zugalla v. Mercantile Agency*, 16 A. B. R. 67, 142 Fed. 927). Contra, *In re Mutual Mercantile Agency*, 6 A. B. R. 607 (D. C. N. Y.).

^{138.} *In re Hill Co.*, 17 A. B. R. 517 (C. C. A. Ill.); *Butt v. MacNichol Construction Co.*, 15 A. B. R. 515, 140 Fed. 840 (C. C. A. Va., affirming *In re Construction Co.*), quoted ante, § 84; *In re MacNichol Construction Co.* (Con-

SUBDIVISION "D".

CHANGE OF DEBTOR'S CLASS; DEATH OR INSANITY; DISSOLUTION OF CORPORATION.

§ 95. **Change of Debtor's Class after Commission of Act but before Filing of Petition.**—Of course where a person belongs to one of the exempted classes both at the time he commits the act of bankruptcy and also at the time the petition is filed against him, no question can arise; no jurisdiction exists to declare him bankrupt.¹³⁹ Likewise no question exists where he belongs to a class not exempted from bankruptcy at both times; he is undoubtedly subject thereto. Interesting questions arise, however, where a farmer or wage earner commits an act of bankruptcy and thereafter ceases to belong to one of the exempted classes, and also where one, subject to being proceeded against in bankruptcy, commits an act of bankruptcy, but, before the petition is actually filed against him, becomes a farmer or wage earner or dies or becomes insane. The law says a wage earner or farmer shall not be proceeded against. Shall the debtor thus escape and the creditors be thus frustrated? Will the court refuse to take jurisdiction because he is now a farmer or wage earner, so long as he was not a member of one of the exempted classes when he committed the act of bankruptcy? Likewise, shall his subsequent death or insanity frustrate creditors? And, on the other hand, if exempted from bankruptcy when he committed the act, will his later transfer to one of the nonexempt classes subject him thereto?

The general rule undoubtedly is that jurisdiction depends upon the state of things at the time the action is commenced.¹⁴⁰

If at the time the debtor committed the act of bankruptcy he was a farmer or wage earner or otherwise not subject to bankruptcy, but subsequently ceases to belong to an exempted class, the bankruptcy court will not, on that account, refuse jurisdiction.¹⁴¹

In *re Matson*, 10 A. B. R. 473, 123 Fed. 743 (D. C. Pa.): "No doubt the respondent, as the owner of a farm and lately engaged in its cultivation, would, in common parlance, be classed as a 'farmer.' But while he still owns his farm

struction Co.), 14 A. B. R. 188 (D. C. Va., affirmed, sub. nom., *Butt v. MacNichol Construction Co.*, 15 A. B. R. 515, 140 Fed. 840). But compare, In *re First Nat'l Bk. of Belle Fourche*, 18 A. B. R. 269 (C. C. A.): "But the more persuasive reasons and the weight of the decisions support the view, and our conclusion is, that a corporation principally engaged in constructing concrete arches and bridges and in dressing and selling stone is engaged in a manufacturing pursuit and subject to adjudication in bankruptcy upon voluntary petition."

139. In *re Pilger*, 9 A. B. R. 244, 118 Fed. 206 (D. C. Wis.).

140. *Mollan v. Torrance*, 9 Wheat 537; In *re Pilger*, 9 A. B. R. 244, 118 Fed. 206 (D. C. Wis.).

141. *Hoffschlæger Co. v. Young Nap*, 12 A. B. R. 523 (D. C. Hawaii). Compare, In *re Pilger*, 9 A. B. R. 244, 118 Fed. 206 (D. C. Wis.).

and resides upon it, he has leased it for the current year on a money rent to his son, and had at the time the petition in bankruptcy was filed against him." Obiter, *Tiffany v. Condensed Milk Co.*, 15 A. B. R. 418 (D. C. Pa.): "This is not to deny the force of those cases which hold that where a person ceases to belong to one of the excepted classes, he becomes liable according to the class in which he is found at the time proceedings are instituted."

But if at the time the debtor committed the act of bankruptcy he belonged to one of the classes of those subject to bankruptcy, the court will not refuse to take jurisdiction, although at the time the petition was filed he had come to belong to one of the privileged or exempted classes.¹⁴²

Flickinger v. Nat'l Bk., 16 A. B. R. 680, 145 Fed. 162 (C. C. A. Ohio): "A majority of the court is inclined to think that the statute should be regarded as having reference to the conditions existing at the time when the act of bankruptcy is committed."

Obiter, *In re Mackey*, 6 A. B. R. 577, 110 Fed. 355 (D. C. Del.): "No construction of the Bankruptcy Act is admissible which would permit an insolvent person, who had committed an act of bankruptcy within four months next preceding the filing of the petition, to evade the provisions of the statute, by engaging in farming after the commission of the act and before the filing of the petition."

Such also were the holdings in one case where a merchant, and in another a manufacturer, committed an act of bankruptcy, but each became a farmer before the petition was filed against him.¹⁴³

In re Luckhardt, 4 A. B. R. 307, 101 Fed. 807 (D. C. Kas.): "The right of the creditor to proceed against his debtor within the four months limited after the commission of an act of bankruptcy, cannot be defeated by the debtor within that period changing his occupation to one of those exempted from involuntary proceedings by § 4 (b)."

Compare, even broader rule, obiter, *Tiffany v. Condensed Milk Co.*, 15 A. B. R. 417 (D. C. Pa.): "The principle to be deduced from them is clear. The liability of a person, whether natural or artificial, to bankruptcy is to be judged by the character of the pursuit in which such person was engaged at the time the debts due the petitioning creditors were incurred; with respect to which it may be conceded, that, as to a corporation, its actual business is to be considered, and not that which it might possibly have undertaken by virtue of authorized but unexercised powers."

§ 96. Death or Insanity after Commission of Act but before Filing of Petition.—On the other hand, if a debtor belonging to one of the enumerated classes subject to being proceeded against commits an act of bankruptcy but dies before the petition is filed against him, the court will refuse jurisdiction.¹⁴⁴

^{142.} Obiter, *In re Pilger*, 9 A. B. R. 246, 118 Fed. 206 (D. C. Wis., citing *Everett v. Derby*, Fed. Cases, No. 4,576).

^{143.} *Flickinger v. Nat'l Bk.*, 16 A. B. R. 680, 145 Fed. 162 (C. C. A. Ohio).

^{144.} See *In re Pierce*, 4 A. B. R. 489, 102 Fed. 977 (D. C. Wash.); [1867] *Adams v. Terrell* (C. C.), 4 Fed. 796.

Obiter, *In re Hicks*, 6 A. B. R. 183, 107 Fed. 910 (D. C. Vt.): "Valid proceedings cannot be begun against the estate of a deceased person, but only against the person and property of the living."

Also if he become insane.¹⁴⁵ It must not be thought, however, that these rulings are inconsistent, for the court refuses jurisdiction in cases where the debtor dies or becomes insane before the petition is filed, simply because the court is not given jurisdiction over the estates of decedents or persons non compos mentis.¹⁴⁶ Were the bankruptcy courts given such jurisdiction, then doubtless the intervening death or insanity of the debtor would not affect the jurisdiction. Moreover, a contrary ruling would open the door to great frauds by permitting the most flagrant acts of bankruptcy to be committed by a debtor without remedy if he thereupon becomes a wage earner or farmer. The distinction seems also to be based somewhat on the fact that death and insanity are not within the debtor's control, whilst the other changes of class are more or less voluntary.

But if one of the partners of a bankrupt partnership is insane or dead at the time of the filing of the petition, the jurisdiction of the bankruptcy court over the partnership would not be defeated.¹⁴⁷

§ 97. Dissolution of Corporation, or Its Ceasing Business, after Act but before Petition.—A corporation's ceasing to do business after the commission of an act of bankruptcy does not defeat bankruptcy proceedings, as not being "principally engaged" in any business.¹⁴⁸

Logically the dissolution of a corporation after its commission of an act of bankruptcy and before the filing of the petition would defeat the jurisdiction of the bankruptcy court. Being no longer a corporation it could not be a bankrupt corporation.

However, where such dissolution is a mere incident to a winding up of the corporate affairs, and the collection and distribution of its assets, such dissolution will not defeat the jurisdiction, the fiction of corporate entity giving way to the reality of business needs.¹⁴⁹

^{145.} See *In re Funk*, 4 A. B. R. 96, 101 Fed. 244 (D. C. Iowa). Compare, *In re Stein & Co.*, 11 A. B. R. 536, 127 Fed. 547 (C. C. A. Ills.). See authorities cited in *In re Burka*, 5 A. B. R. 844, 104 Fed. 326 (D. C. Tenn.).

^{146.} *In re Eisenberg*, 8 A. B. R. 551 (D. C. N. Y.).

^{147.} *In re Steir & Co.*, 11 A. B. R. 536, 127 Fed. 547 (C. C. A. Ills.). Compare, *In re Ives*, 7 A. B. R. 692, 113 Fed. 911 (C. C. A. Mich.).

^{148.} *In re Moench & Sons Co.*, 12 A. B. R. 240, 123 Fed. 965 (C. C. A. N. Y.). Obiter, *Tiffany v. Condensed Milk Co.*, 15 A. B. R. 417 (D. C. Pa.).

^{149.} Compare, *Scheuer v. Book Co.*, 7 A. B. R. 384, 112 Fed. 407, where the intervening dissolution of a corporation was held analogous to the intervening death of a natural person, after the filing of the petition. Obiter, *Tiffany v. Condensed Milk Co.*, 15 A. B. R. 417 (D. C. Pa.). Compare, where, subsequent to the state insolvency proceedings an additional act of bankruptcy, by way of "written admission, etc.," was committed, *Coal & Coke Co. v. Stauffer*, 17 A. B. R. 573 (C. C. A. Pa., affirming *In re International Coal Min. Co.*, 16 A. B. R. 312, 143 Fed. 665, D. C. Pa.); *White Mountain Paper Co. v. Morse*, 11 A. B. R. 633, 127 Fed. 643 (C. C. A., affirming *In re White Mountain Paper Co.*, 11 A. B. R. 491).

In *re Storck Lumber Co.*, 8 A. B. R. 86, 114 Fed. 860 (D. C. Md.): "The question raised by this motion to quash is not clear of difficulty, but it seems that it must be solved by applying the broad principle that the National Bankrupt Law is to govern the administration of the estate of all insolvent debtors who are within its provisions, and supersedes all the State laws having the like object, when its provisions are invoked by the requisite creditors, and acts of bankruptcy are proven. The Maryland statute for winding up insolvent corporations is in the nature of a proceeding in insolvency. * * * The National Bankrupt Act of 1898 superseded the State insolvent laws, and now, when commercial and manufacturing corporations are so numerous, and are sometimes used, as in this case, more as a cover from individual liability than for more legitimate uses, it can scarcely be supposed, as the Bankrupt Act especially provides for proceedings against commercial corporations, that it was intended that such a corporation could commit acts of bankruptcy, and escape the provisions of the Bankrupt Act by applying to be wound up under the State statute, and thus defeat the operation of the Bankrupt Law."

In *re International Coal Min. Co.*, 16 A. B. R. 312, 143 Fed. 665 (D. C. Pa.): "To concede the contention of the respondent here, that the sale of the property of the alleged bankrupt by the sheriff of Philadelphia county on this peculiar writ worked a dissolution of the corporation so that proceedings in bankruptcy could not be instituted against it, would result in the anomalous situation that the commission of an act of bankruptcy would prevent the bankrupt act from taking effect.' But even under the act of 1870 the corporate existence does not entirely disappear upon the sale of the property and franchises upon an execution under that act, because the act 'excepts lands held in fee' from sale on the special fi. fa., 'which must be proceeded against and sold in the manner provided for in cases for the sale of real estate.' The title to this excepted real estate must remain in the corporation until sold, and a dissolution cannot take place so long as this asset exists, even under that act. But even if this were not so, the Bankrupt Act would so far control the matter of dissolution of the insolvent corporation as to prevent its legal extinction by superseding all State laws in conflict with its provisions to an extent necessary to enable creditors of insolvent corporations to have the assets of their insolvent debtor administered in accordance with its terms."

Inferentially, In *re Storm*, 4 A. B. R. 601, 102 Fed. 618 (D. C. N. Y.): "It is contended on the part of the alleged bankrupt that the voluntary proceedings for the dissolution of the corporation vacated the preference, while it is urged on the part of the petitioner that the proceedings confirmed the preference inasmuch as the lien created by the levy upon personal property would be confirmed. The levy of the execution created a lien, and the attention of the court is called to no statute providing that the voluntary proceedings should discharge the lien. The alleged bankrupt contends that voluntary proceedings taken by a corporation for dissolution extinguish the liens of all levies on executions. But it is not thought that a corporation may in such manner escape a levy upon its property. Hence it is concluded that the alleged bankrupt suffered numerous judgments to be entered against it; executions to be issued thereon, levy to be made, and property to be advertised for sale, and before the sale took proceedings calculated to continue the benefit of the levy. The act of bankruptcy was committed, and this court has jurisdiction to proceed with the administration of the estate."

§ 98. Death or Insanity after Filing of Petition, No Abatement.

—If, however, after the petition is filed, the debtor dies or becomes insane,

the Bankruptcy Court does not lose jurisdiction, but proceeds as if he were still alive and clothed with full reason.¹⁵⁰

Such would probably be the ruling in the absence of statute, but § 8 expressly provides that:

"The death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane."

And this is so, even though the subpoena has not been served.¹⁵¹

Shulte v. Patterson, 17 A. B. R. 99 (C. C. A. Iowa): "It is not denied that the provision of the Bankruptcy Act in respect of the death of the bankrupt prevents the abatement of a proceeding which has once been commenced and is pending, but it is said that it does not apply in a case which, although the petition has been filed, process has not been served upon the bankrupt. But here again we are met with the express provision of the Act that, when the petition is filed, that is the commencement of the proceedings; and when proceedings have been commenced they must be said to be pending. In actions that do not abate by the death of the defendant, and the one before us is of that character, it is not always necessary to their continuance that service of process shall have been previously made upon the defendant."

Thus, his right to a discharge will not be affected by his death;¹⁵² nor by his becoming insane;¹⁵³ but, in the latter instance, a guardian ad litem should be appointed for him.¹⁵⁴

§ 99. Rights of Widow and Children on Bankrupt's Death after Filing of Petition and before Adjudication.—If the bankrupt die, after the filing of the petition but before adjudication, his widow and children will be entitled to the usual allowances:

Proviso of § 8: "Provided, that in case of death, the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the state of the bankrupt's residence."

This section has been wrongly construed to mean that, even after adjudication of bankruptcy and after the election of a trustee and when the estate is fully launched in the process of administration, if the bankrupt die, at once the further administration is to be changed so as to allow

150. *In re Spalding*, 14 A. B. R. 129, 134, 139 Fed. 243 (C. C. A. N. Y., reversing, on other grounds, 13 A. B. R. 223, D. C. N. Y.); *In re Hicks*, 6 A. B. R. 182, 107 Fed. 910 (D. C. Vt.). No abatement of involuntary proceedings by death of bankrupt after petition filed and before adjudication. *Shulte v. Patterson*, 17 A. B. R. 99 (C. C. A. Iowa). Obiter, *In re Benedict*, 15 A. B. R. 238, 140 Fed. 55 (D. C. Wis.). *In re Risteen*, 10 A. B. R. 494, 122 Fed. 732 (D. C. Mass.). Compare, under law of 1867, *Frazier v. McDonald*, 8 N. B. R. 237, Fed. Cases, No. 5,073.

151. Compare, "Commencement of Proceedings," post, § 306, et seq.

152. Obiter, *In re Miller*, 13 A. B. R. 345 (D. C. Pa.).

153. *In re Miller*, 13 A. B. R. 345 (D. C. Pa.).

154. *In re Burka*, 5 A. B. R. 843, 107 Fed. 674 (D. C. Tenn.).

the widow and children their year's support, etc.;¹⁵⁵ provided the assets have not already been distributed.¹⁵⁶

As to dower the situation is clear, for dower is an inchoate estate or interest likely to ripen into consummation at any time, and the assets come into the bankruptcy court already burdened therewith.¹⁵⁷ Dower rights are not lost by virtue of bankruptcy proceedings;¹⁵⁸ except as to personalty allowed by statute "as part of dower," which will not be allowed if the bankrupt does not die until after adjudication.¹⁵⁹

But as to the newly arising right to the widow's allowance, as held by these decisions, much confusion results.

A logical consequence of these rulings—In re Parschen, In re Newton and In re Slack—would seem to be that both the bankrupt could have his exemptions and then, dying, his widow would have her widow's allowance, in addition to dower. Certainly, the title to exempt property never passes, so the exempt property may not be retained by the trustee even though not formally set apart until after the bankrupt's death, but must be delivered to the deceased bankrupt's representatives, for the trustee has title only *as of the date of the adjudication* and at that date the bankrupt was alive and entitled to the exemptions claimed. How these rulings can be harmonized with the usual procedure in cases of assigned estates is hard to discover. Title passes to the trustee as of the date of the adjudication. On that date the wife had inchoate dower rights but no right to allowances. Now, according to the disapproved cases, owing to the happening of this subsequent contingency of death, the title thus already conveyed to the trustee is pro tanto defeated.

Pratt v. Bothe, 12 A. B. R. 533, 130 Fed. 670 (C. C. A. Ky.): "The Bankruptcy Act makes a final and sharply defined line in respect of the power of the bankrupt over his estate and the distribution of it as of the date of the filing of the petition against him. From that time his assets are in gremio legis, and he cannot, unless he compounds with his creditors, bind his assets. He may, of course, make new contracts and incur new obligations, but they are not chargeable to the funds which have become vested in the trustee until they have subverted the purpose of the bankruptcy proceedings, when, if anything remains, he acquires it."

Subsequent death of the assignor does not accomplish so much in cases of general assignments for the benefit of creditors. Moreover, the rule would not work uniformly. In estates where the trustee had been quick in distributing the assets or the bankrupt slow in dying, the widow would

155. In re Parschen, 9 A. B. R. 389, 119 Fed. 976 (D. C. Ohio); In re Newton, 10 A. B. R. 345, 122 Fed. 103 (D. C. Conn.).

156. Inferentially, In re Slack, 7 A. B. R. 121, 111 Fed. 523 (D. C. Vt.). But, contra, see In re Seabolt, 8 A. B. R. 57, 113 Fed. 766 (D. C. N. C.).

157. In re McKenzie, 15 A. B. R. 683, 142 Fed. 383 (C. C. A. Ark.).

158. In re Slack, 7 A. B. R. 121, 111 Fed. 523 (D. C. Vt.).

159. In re McKenzie, 15 A. B. R. 227, 132 Fed. 986 (D. C. Ark.).

not get her allowance;¹⁶⁰ unless the trustee should sue the creditors, each for his pro rata share of the amount distributed. Furthermore, who is to fix the amount of the widow's allowance? Certainly not the bankruptcy court, for it has not the machinery. If it is to be fixed by the Probate or Surrogate Court, then suppose it is fixed at so high a figure that the bankruptcy trustee would not have funds enough to pay it?

All these difficulties indicate that the two decisions of *In re Parschen* and *In re Newton* do not state the true rule, even as inferentially modified by the decision *In re Slack*, 70, denying the right where all the assets have been distributed. The phrase, "the proceedings shall not abate," has reference exclusively to the pendency of a petition before adjudication, not to the administration of an estate the title to which has already irrevocably passed to creditors by virtue of the adjudication.

§ 100. Their Rights Where Death Occurs after Adjudication.—

The true rule is that, if the death of the bankrupt occur after the adjudication, the widow and children may not claim allowances out of the bankrupt estate; their only right is to go into the State Court and get their allowance there out of whatever estate the bankrupt had at the time of his death, including any unused exempt property.¹⁶¹

In re Seabolt, 8 A. B. R. 57, 113 Fed. 766 (D. C. N. C.): "The question then remaining in this regard is whether Seabolt, having died after the proceedings in bankruptcy were commenced, and after the consent of the partners was had for exemptions from the partnership effects, the allotment which he would have taken had he lived vests in his administrator. It is my opinion that it does. A creditor pursuing a debtor by execution or other legal proceeding, for the purpose of subjecting his property to the payment of his debt, does not acquire a lien upon that part of the debtor's personalty which is exempted by the law. The exemption in North Carolina is in favor of a debtor against execution for debt.

"The purpose of the law undoubtedly is to save the exempted property from sale at the hands of creditors, for the benefit of the debtor and his family. This is no doubt the humane object which the framers of our constitution and the makers of our exemption laws had in view. A statute of exemption is properly a remedial statute, evidently intended to prevent families from being stripped of their last means of support, and left to suffer, or cast as a burden upon the public, and to rescue them from the hands of unfeeling creditors. *Leavitt v. Metcalf*, 19 Am. Dec. 718. It would be a strange construction of the law, therefore, to hold that, whilst the exemption would obtain against what is known as an execution, or other final process issued for the collection of a debt, it could still be swept away by another proceeding on the part of creditors, and

¹⁶⁰. Inferentially, *In re Slack*, 7 A. B. R. 121, 111 Fed. 523 (D. C. Vt.).

¹⁶¹. Contra, *In re Newton*, 10 A. B. R. 345, 122 Fed. 103 (D. C. Conn.); also contra, *In re Parschen*, 9 A. B. R. 389, 117 Fed. 976 (D. C. Ohio). Compare, *In re Slack*, 7 A. B. R. 121, 111 Fed. 523 (D. C. Vt.), where the decision denying the allowance is based on the fact that all assets had already been distributed, and on the law of Vermont that all debts are first to be paid and the allowance to be granted only out of the surplus.

the debtor and his family thus be deprived of its benefits. The right to the exemption accrued to the debtor when the creditors instituted proceedings in bankruptcy to subject his property to the payment of his debts, and upon the appointment of a trustee in bankruptcy the title of the property reserved by the law as the debtor's exemption did not vest in such trustee, but remained in the debtor, awaiting the mere legal formality of having it appraised and set apart to him. This being the case, the exempted property which would have been set apart and allotted to Seabolt had he lived remained a part of his estate at his death, and belongs to his administrator, and not to the trustee in bankruptcy; * * * Therefore, when the administrator of Seabolt has in hand the money paid to him by the trustee for the personal exemption, so much of it as is necessary can be set apart as a year's support to the widow by a proceeding in the State court under the statute providing for such cases."

In *re McKenzie*, 15 A. B. R. 684, 142 Fed. 383 (C. C. A. Ark., affirming 13 A. B. R. 227): "Clause 5 of § 70 (a) defines the property to which the trustee in bankruptcy took title in this case and hence it is the only one that it is necessary for us to consider. * * * While she has an inchoate right of dower in the real estate of her husband while living, she has no right whatever in his personal property until his death. Her interest in the latter does not accrue until he dies, and then it attaches to the personal property of which he was seised or possessed at his death, only * * *."

"The adjudication in bankruptcy and the appointment and qualification of the trustee, disseised and dispossessed the bankrupt of all his personal estate not exempt from execution long before his death. Since at the time of his death he was neither seised nor possessed of any of it, the logical and unavoidable conclusion is that his widow had no right of dower or other interest in it under this statute, and her claim to it cannot be sustained. So are the decisions of the highest judicial tribunal of Arkansas whose construction of these statutes of that State is, upon familiar principles, controlling in this case. In cases wherein the debtor died while he was the owner and in possession of personal estate, the claim of the widow to one-third of it has been sustained by the court and declared to be superior to that of his creditors. * * *"

"But in cases where the husband died after he had parted with the title or possession of his personal property the claim of the widow to a right of dower or other interest therein under the statutes of Arkansas, superior to that of his creditors, was denied on the ground that ownership and possession at the time of the death of the husband were indispensable conditions of the maintenance of such a claim."

In *re McKenzie*, 13 A. B. R. 227 (D. C. Ark., affirmed in 15 A. B. R. 670): "But it is claimed by counsel for the widow that the Bankruptcy Act extends the right of a widow to dower to the time the personalty of the estate is actually distributed, and that in contemplation of law the bankrupt is seised and possessed of the bankrupt estate, for the purpose of the widow's dower, until the proceeds are actually distributed among the creditors."

"If this proviso were to be considered regardless of any of the other provisions of the Bankruptcy Act or the provisions of the former bankruptcy acts, there might be some reason for this contention; but it is a well settled rule of law that in construing any section of a statute the intention of the Legislature must be gathered from the entire Act, and every part of it must be taken into consideration, and comparison may also be made with statutes in *pari materia*. *Kohlsaat v. Murphy*, 96 U. S. 153, 24 L. Ed. 844."

"The Bankruptcy Act of 1841 contained a similar provision as to the rights of wives in relation to dower. Section 2 of the Act, ch. 9, 5 Stat. 442."

"In *Worcester v. Clark*, 2 Grant Cas. (Pa.) 84, the Court had held in construing that Act, that this proviso alone saved the right of dower, but this was expressly overruled by the Supreme Court in *Porter v. Lazear*, 109 U. S. 84, 89, 3 Sup. Ct. 58, 61, 27 L. Ed. 865, where the court say:

"Upon this question of construction we are not bound by the opinion of the State court, and have no hesitation in disapproving the dictum, and in holding that the proviso ruled on was not in the nature of an exception to, or restriction upon, the operative words of the act, but was a mere declaration, inserted for greater caution, of the construction which the act must have received without any such proviso, and that the omission of the proviso in the recent Bankrupt Act (referring to the Act of 1867, Bankrupt Act, March 2, 1867, ch. 176, 14 Stat. 517) does not enlarge the effect of the assignment or of the sale in bankruptcy, so as to include lawful rights which belong, not to the bankrupt, but to his wife."

"Section 70 of the present Act vests the title of the bankrupt's estate in the trustee as of the date he was adjudged a bankrupt. Under the Act of 1867 (Rev. St., § 5044), the title to the bankrupt's estate, which vested in the assignee, related back to the filing of the petition. Section 8 of the present Act (Act, July 1, 1898, ch. 541, 30 Stat. 549, U. S. Comp. St. 1901, p. 3424), provides that: 'The death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane.'

"Under the Bankruptcy Act of 1867 (Rev. St., § 5090), the proceedings in bankruptcy would abate upon the death of the insolvent if it occurred prior to the issuing of the warrant. As the bankrupt may die after the filing of the petition before there is an adjudication, and consequently before the title to the estate becomes vested in the trustee, under the provisions of § 70, and the proceedings would not abate by reason of the death, there might have been some question as to whether the widow would be entitled to dower in the personalty of her husband under a statute such as is in force in the State of Arkansas. To remove all doubts on this subject this provision was undoubtedly enacted."

§ 101. Dissolution of Corporation after Filing of Petition.—Section 8 has been held applicable, by analogy, to corporations. The dissolution of a corporation decreed by the State Court, after the filing of the petition in bankruptcy, will not abate the proceedings in bankruptcy, this being ruled in analogy to the principle of § 8.¹⁶²

¹⁶². *White Mountain Paper Co. v. Morse*, 11 A. B. R. 633, 127 Fed. 643 (C. C. A. N. H., affirming *In re White Mountain Paper Co.*, 11 A. B. R. 491).

CHAPTER IV.

ACTS OF BANKRUPTCY.

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§ 102. No Act Requisite in Voluntary Bankruptcy—Petition Itself Act of Bankruptcy.—Voluntary bankruptcy need not be based on the commission of an act of bankruptcy, or, rather, the act of bankruptcy upon which it is based is the written admission contained in the voluntary petition itself of the bankrupt's inability to pay his debts and his desire to be adjudged bankrupt for that cause, such written admission itself constituting the fifth class of acts of bankruptcy enumerated in the statute.¹

National Bk. *v.* Moyses, 8 A. B. R. 10, 186 U. S. 181: "The petition must state that 'petitioner owes debts which he is unable to pay in full' and that 'he is willing to surrender all his property for the benefit of his creditors, except such as is exempt by law.' This establishes those facts so far as a

1. See post, § 164. In *re* Fowler, Fed. Cases, No. 4,990; *Blake v. Valentine Co.*, 1 A. B. R. 372, 89 Fed. 691 (D. C. Calif.).

decree of bankruptcy is concerned, and he has committed an act of bankruptcy in filing the petition."

In *re Forbes*, 11 A. B. R. 791, 128 Fed. 137 (D. C. Mass.): "A voluntary petition is itself treated as an act of bankruptcy."

§ 103. **But Requisite in Involuntary Bankruptcy.**—But involuntary bankruptcy must be based on the commission of an act of bankruptcy, and what constitutes such act is prescribed by statute.

Not even every person nor corporation nor partnership included in the various classes heretofore considered as being subject to involuntary bankruptcy, may be forced into bankruptcy. Other conditions must also, at the same time, exist. Such person or corporation or partnership must have committed what is termed an act of bankruptcy.

The Bankruptcy Act was not intended to cover all cases of insolvency, but only such cases as are within its provisions.²

Singer v. Nat'l Bedstead Co., 11 A. B. R. 279 (N. J. Ch.): "The present 'system of bankruptcy,' which Congress saw fit to enact in 1898, does not pretend to cover the whole field of either voluntary or involuntary bankruptcy and insolvency."

Thus, the mere fact that an individual or copartnership refuses or is unable to pay his or its debts is not an act of bankruptcy, although it may be evidence of insolvency.

Davis v. Stevens, 4 A. B. R. 763, 104 Fed. 235 (D. C. S. Dak.): "It might be evidence of insolvency, but the mere fact that an individual or copartnership refuses to pay his or its debts is not an act of bankruptcy."

And the statute specifies what acts constitute acts of bankruptcy.

Bankr. Act, § 3 (a): "Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed or removed or permitted to be concealed or removed, any part of his property with intent to hinder, delay or defraud his creditors or any of them; or,

"(2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or,

"(3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged such preference; or,

"(4) made a general assignment for the benefit of his creditors, or being insolvent, applied for a receiver or trustee for his property, or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a State, of a Territory or of the United States, or,

"(5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground."

² In *re Wilmington Hosiery Co.*, 9 A. B. R. 581, 120 Fed. 179 (D. C. Del.). Also, see ante, §§ 10, 21.

DIVISION 1.

FIRST ACT OF BANKRUPTCY; TRANSFERS, CONCEALMENTS AND REMOVALS
WITH INTENT TO HINDER, DELAY AND DEFRAUD.

§ 104. **First Act of Bankruptcy—Fraudulent Transfers, Removals and Concealments.**—A debtor has committed an act of bankruptcy if within four months preceding the filing of the petition against him he has conveyed, transferred, concealed or removed or permitted to be concealed or removed any part of his property with intent to hinder, delay and defraud his creditors or any of them (such four months not expiring until four months from the date of recording or registering, where recording or registering is required or permitted, or where not so required or permitted, then from the date of taking notorious, exclusive and continuous possession).³

§ 105. **Is Historically Original Act.**—The first of these classes, namely, the class consisting of transfers, concealments and removals of property, with intent to hinder, delay or defraud creditors, is the only one that is not of comparatively modern origin. This class might, indeed, be denominated the original class, for it will be remembered that the first bankruptcy act of England, the Statute of King Henry VIII (see *Intro.*, § (g), p. 5), only mentioned as its object those "divers and sundry persons

3. Bankr. Act, §§ 3 (a) (1); 3 (b). See post, § 185. Distinction between "concealment" and "transfer." *Bank v. DePauw Co.*, 5 A. B. R. 345 (C. C. A. Ills.).

Instances of transactions held to hinder, delay and defraud creditors under the first class of acts of bankruptcy:

1. Discounted notes paid before maturity and the greater part of the debtor's property transferred to certain preferred creditors. In re T. & J. Farrell, 9 A. B. R. 341 (Ref. N. Y.).

2. Violation of sales of merchandise stock in bulk law. In re T. & J. Farrell, 9 A. B. R. 341 (Ref. N. Y.).

3. Payment of individual debt out of partnership funds. In re Gillette, 5 A. B. R. 119, 104 Fed. 769 (D. C. N. Y.).

4. Absconding debtor running away to avoid criminal prosecution and carrying with him assets not exempt from execution. In re Filer, 5 A. B. R. 332, 108 Fed. 209 (D. C. N. Y.).

5. Chattel mortgage made within the four months for a present loan to prefer certain creditors, of which purpose mortgagee had notice or reasonable grounds of inference, is in bad faith and constitutes an effort to hinder and delay creditors under § 3, 1. *Obiter*, In re Pease, 12 A. B. R. 66, 129 Fed. 446 (D. C. Mich.).

6. Assignment of individual assets of partners in bank partnership to receiver of the firm already in charge of the firm assets. In re Salmon & Salmon 16 A. B. R. 126, 143 Fed. 395 (D. C. Mo.).

Instances of transactions held not to hinder, delay or defraud under the first class:

1. Mortgage covering all debtor's property, but sufficient equity left to take care of remaining creditors. *Lansing Boiler & Eng. Wks. v. Ryerson*, 11 A. B. R. 558 (C. C. A. Mich.).

2. Evidence too vague. In re Foster, 11 A. B. R. 131, 126 Fed. 1014 (D. C. Pa.).

As to form and sufficiency of allegations under class 1 of Acts of Bankruptcy see post, "Parties and Petition in Involuntary Bankruptcy," Chap. VI.

who craftily obtaining in their hands great substance of other men's goods, do suddenly flee to parts unknown or keep their houses, not minding to pay or restore to any of their creditors their debts or duties."

§ 106. **Same as Reprobated at Common Law or by Stat. Eliz.**—Class 1 of Acts of Bankruptcy (save and except as to the four months' limitation) is also the same class reprobated at Common Law and by the Statute of Elizabeth, as being transfers, concealments or removals of property made with intent to hinder, delay or defraud creditors.⁴

Lansing Boiler Works v. Ryerson, 11 A. B. R. 558, 128 Fed. 701 (C. C. A. Mich.): "It is to be observed that subsection 1 of § 3 of the Bankrupt Act makes those conveyances, which, by the common law and the statute of Elizabeth, were held void, because fraudulent, a ground for adjudicating the grantor a bankrupt. * * * The language of subsection 1 of § 3 is the familiar language of statutes against conveyances fraudulent as against creditors, and we think there can be no doubt that Congress intended the words employed should have the same construction and effect as have for a long period of time been attributed to those words."

Some decisions erroneously speak of "frauds on the Bankruptcy Act" as being acts of bankruptcy although falling short of the ordinary definitions of what constitutes a hindering, delaying or defrauding of creditors.⁵ But the courts may not create an act of bankruptcy not specified in the statute.

The rules of law relative to what acts are comprehended within this class 1 of acts of bankruptcy, namely, as to what amount to conveyances, transfers, concealments and removals of property made with intent to hinder, delay or defraud creditors, are to be ascertained from the decisions of each state upon the subject of transfers, concealments and removals of property with intent to hinder, delay and defraud creditors, at any rate where not modified by statute from what constituted such fraud at common law. And so this class will need no further explanation here. It must not be understood from this, however, that the class is of comparative unimportance; on the contrary, this class has always been reckoned one of the gravest and most frequently occurring acts of bankruptcy, and is therefore properly placed first in the list of them.

§ 107. **Meaning of "Removed."**—Thus, the word "removed" signifies here an actual or physical change in the position or locality of the property.⁶

4. *Githens v. Shiffler*, 7 A. B. R. 453, 112 Fed. 505 (D. C. Pa.). *Obiter*, in *re Bloch*, 15 A. B. R. 751, 142 Fed. 674 (C. C. A. N. Y.). *Contra*, in *re Salmon & Salmon*, 16 A. B. R. 127, 143 Fed. 395 (D. C. Mo.); *Rumsey v. Machine Co.*, 3 A. B. R. 704, 99 Fed. 699 (D. C. Mo.).

5. *Rumsey v. Novelty Co.*, 3 A. B. R. 704, 99 Fed. 699 (D. C. Mo.).

6. In *re Wilmington Hosiery Co.*, 9 A. B. R. 581, 120 Fed. 179 (D. C. Del.).

§ 108. **Meaning of "Permit."**—Thus, also, one does not "permit" a removal who has neither power nor right to prevent it;⁷ nor where the removal was done without the debtor's knowledge or collusion.⁸

§ 109. **Actual Intent to Defraud Necessary.**—An actual intent to hinder, delay or defraud creditors, etc., must be proved.⁹

Such intent involves a purpose wrongfully or unjustifiably to prevent, obstruct, embarrass or postpone them in the collection or enforcement of their claims.¹⁰

Lansing Boiler Works v. Ryerson, 11 A. B. R. 561, 128 Fed. 701 (C. C. A. Mich.): "For it is the well settled law that a conveyance made in good faith whether for an antecedent or present consideration is not forbidden by such statute, notwithstanding the effect may be that it hinders or delays creditors by removing from their reach assets of the debtor."

Thus, an intent to avoid distribution in the bankruptcy court and to bring about a distribution in the state court is not an intent to hinder, delay or defraud.¹¹

In *re Wilmington Hosiery Co.*, 9 A. B. R. 581, 120 Fed. 179 (D. C. Del.): "Where an insolvent corporation, against which a bill was filed alleging its insolvency and praying the appointment of a receiver, made answer admitting its insolvency, and a receiver was thereupon appointed who took possession of its property, the corporation did not thereby permit its property to be removed, with intent to hinder or delay its creditors, or any of them within the meaning of section 3a (1) of the Bankruptcy Act."

Contra, In *re Salmon & Salmon*, 16 A. B. R. 127, 143 Fed. 395 (D. C. Mo.): "Again, although the conveyances in question were undoubtedly made in good faith for the purpose of paying pro rata the debts of the makers, without preference other than the laws of the State provided, and although they might not be avoided at common law for any fraud inhering therein, yet as the making of these conveyances, taken in connection with the transfer of all the property of the bank theretofore made, must inevitably result in hindering and delaying the creditors of the grantors in the collection of their debts, and as the grantors in the making of these conveyances must be presumed to have intended the natural and probable effect of their act, it must be held, as a matter of law, the makers intended thereby to hinder and delay their creditors, and the making thereof constitutes an act of bankruptcy."

Nor is an intent to use the proceeds of a cash sale of all one's property to pay certain creditors in preference to others, a fraudulent intent, although it may be a preferential intent;¹² nor is a sale made by an in-

7. In *re Wilmington Hosiery Co.*, 9 A. B. R. 581, 120 Fed. 179 (D. C. Del.).

8. *Obiter*, In *re Belknap*, 12 A. B. R. 326, 129 Fed. 646 (D. C. Pa.).

9. In *re Wilmington Hosiery Co.*, 9 A. B. R. 581, 120 Fed. 179 (D. C. Del.). Impliedly, In *re Belknap*, 12 A. B. R. 326, 129 Fed. 646 (D. C. Pa.).

10. In *re Wilmington Hosiery Co.*, 9 A. B. R. 581, 120 Fed. 179 (D. C. Del.).

11. Contra, *Rumsey v. Machine Co.*, 3 A. B. R. 704, 99 Fed. 699 (D. C. Mo.).

12. *Githens v. Shiffer*, 7 A. B. R. 453, 112 Fed. 505 (D. C. Pa.); In *re Belknap*, 12 A. B. R. 326, 129 Fed. 646 (D. C. Pa.).

solvent to raise money to pay off a creditor who is threatening criminal proceedings and who eventually does reject payment and institute criminal proceedings show such intent;¹³ nor does the removal of goods by a creditor in the bankrupt's absence without legal proceedings and without the bankrupt's collusion, constitute removal by the bankrupt with intent to defraud.¹⁴

But such intent may exist and the transfer be voidable as to creditors even though full consideration was paid.

Obiter, In *re Pease*, 12 A. B. R. 66, 129 Fed. 446 (D. C. Mich.): "Even though a present, fair consideration be paid for property transferred to the hindrance, delay of or in fraud upon creditors, it will not save the conveyance. 'A sale may be void for bad faith, though the buyer pays the full value of the property bought.' This is the consequence where his purpose is to aid the seller in perpetrating a fraud upon his creditors, and where he buys recklessly or with guilty knowledge."

And such intent must be proved as to the particular transaction impeached.¹⁵

§ 110. Proof of Intent Aided by Presumptions.—The existence or absence of intent to hinder, delay and defraud may be aided by presumptions.

§ 111. Thus, Presumption against Fraud.—Thus, the presumption is against fraud.

Davis v. Stevens, 4 A. B. R. 763, 104 Fed. 235 (D. C. S. Dak.): "In the absence of proof as to when and how assets were lost, the presumption is against fraud."

§ 112. Thus, Natural and Probable Consequences of Act Raise Presumption.—But an actual intent to defraud will be presumed when one does an act which he knows will produce that result, or the natural and necessary effect of which is to produce it.¹⁶

Bean-Chamberlain Mfg. Co. v. Standard Spoke & Nipple Co., 12 A. B. R. 610 (C. C. A. Mich.): "For the court to have complied with the request of the appellant, and instructed the jury that, ignoring the natural and necessary result of the transfers made, they should direct their attention solely to the good faith of the transaction, and, whatever the result of its conduct, acquit the appellant if they found it had acted in good faith, would have been mislead-

13. In *re Belknap*, 12 A. B. R. 326, 129 Fed. 646 (D. C. Pa.).

14. In *re Belknap*, 12 A. B. R. 326, 129 Fed. 646 (D. C. Pa.).

15. *Hoffschlaeger Co. v. Young Nap*, 12 A. B. R. 524 (D. C. Hawaii).

16. In *re Wilmington Hosiery Co.*, 9 A. B. R. 581, 120 Fed. 179 (D. C. Del.); *Hoffschlaeger Co. v. Young Nap*, 12 A. B. R. 521 (D. C. Hawaii); In *re Salmon & Salmon*, 16 A. B. R. 127, 143 Fed. 395 (D. C. Mo.); (1867) In *re Black-Secor*, 1 Nat. Bank Reg. 361. See citations under corresponding proposition relative to second act of bankruptcy, post, § 117.

ing. It was the right of the jury to determine the intent, but in doing so it was the duty of the jury to consider the testimony and the natural presumptions which flow from acts done by design. If a company in failing circumstances willfully places all its property beyond the reach of its creditors, that circumstance is a fact to be considered in determining whether it did so in good faith, without any intent to hinder, delay, or defraud its creditors."

Obiter, In re Pease, 12 A. B. R. 67, 129 Fed. 446 (D. C. Mich.): "The act of the debtor being a preference, his intent is inferable from his act."

Where proof is first made that the debtor was insolvent and was removing his property out of the jurisdiction, it then rests upon the respondent to disprove the intent by satisfactory explanation.¹⁷

But the mortgaging of all one's property to a few creditors does not alone afford conclusive and irrebuttable presumption of intent to hinder and delay creditors within the meaning of the law.

Lansing Boiler Works v. Ryerson, 11 A. B. R. 560 (C. C. A. Mich.): "The court erred in assuming that because the mortgage covered the whole property of the debtor it necessarily followed that a case was made out under subsection 1 and that no proof of good faith could prevail against that assumption. Upon the vital question of the bona fides of the mortgage it was of importance to consider among other things, what was the value of the property mortgaged when compared with the indebtedness of the company."

§ 113. Fraudulent Intent Distinguished from Preferential Intent.

—A fraudulent intent is to be distinguished from a preferential intent.¹⁸

Obiter, In re Belknap, 12 A. B. R. 329, 129 Fed. 646 (D. C. Pa.): "The intent to defraud is essential under this clause, and differs from the intent to prefer, which is essential to the act of bankruptcy described in § 3 (a) (2)."

Thus, a cash sale for full consideration by an insolvent debtor of all his property, where his intent was not to get the property away from all creditors but simply to use the proceeds in paying certain creditors in preference to all others, is not a fraudulent transfer, although the effect is to leave nothing for the remaining creditors.¹⁹

§ 114. Participation of Transferee in Fraudulent Intent Requisite.

—Participation of the transferee in the fraudulent design must be shown, in accordance with the usual rules as to fraudulent transfers.²⁰

17. *Hoffschlaeger Co. v. Young Nap*, 12 A. B. R. 517, 521 (D. C. Hawaii).

18. *Baden v. Bertenshaw*, 11 A. B. R. 308, 68 Kas. 32; In re Mingo Valley Creamery Ass'n, 4 A. B. R. 67, 100 Fed. 282 (D. C. Pa.). *Obiter*, In re Duffey, 9 A. B. R. 360, 118 Fed. 926 (D. C. Pa.). See citations in corresponding propositions under second act of bankruptcy, post, § 117.

19. *Githens v. Shiffler*, 7 A. B. R. 453, 112 Fed. 505 (D. C. Penn.): But no showing appears to have been made in *Githens v. Shiffler* that the purchaser participated in the intent, yet this fact would hardly be sufficient to distinguish the case from In re Pease, 12 A. B. R. 66 (D. C. Mich.). It might have been a preferential transfer, if not a fraudulent transfer.

20. **Declarations of Alleged Fraudulent Vendor—Whether Competent to Impeach Transfer.**—As to whether declarations of the alleged fraudulent vendor

Thus, notice to the president of a creditor bank has been held to be notice to the bank.²¹

§ 115. **Act to Be within Preceding Four Months.**—The act of fraud must have occurred within the preceding four months.²²

§ 116. **Insolvency of Debtor Not Requisite, Prima Facie.**—Insolvency of the debtor need not be shown by creditors under the first act of bankruptcy in order to make a prima facie case; but if the debtor prove solvency, it is a complete defense, by statutory provision.²³

DIVISION 2.

SECOND CLASS OF ACTS OF BANKRUPTCY—PREFERENTIAL TRANSFERS AND JUDGMENTS.

§ 117. **Second Act of Bankruptcy—Preferences.**—The second, and all the other four classes of acts of bankruptcy enumerated in the statute, are outgrowths of the wants of the business world of the present time, and are of comparatively recent development, answering to the demands of modern commercial life, whose complex and sensitive organization makes it quite as necessary to guard against the more delicate and subtle, but more common forms, of unfair dealings, as against the grosser forms condemned in the first named and original act of bankruptcy. And so, as might be expected, there is not found in them the implication of fraud and moral turpitude that is carried by the first and ruder class, although, of course, fraud and moral turpitude may in fact accompany any of them.

A debtor has committed an act of bankruptcy if (within the four

made after the transfer are competent to impeach the transfer, compare, *In re Foster*, 11 A. B. R. 133, 126 Fed. 1014 (D. C. Pa.): "It may, perhaps, be true that declarations concerning the financial relation between Frank and himself, although made after the deed was delivered, are evidence in this issue between the bankrupt and the petitioning creditors. Upon this point the referee cited *Johnson v. Wald*, 2 Am. B. R. 84; but an examination of the report will show that it has no value as an authority. Evidence of similar declarations was no doubt received at the trial of that case, but there was no dispute concerning the fact that the vendee was a creditor, and the declarations were received without objection. In the Circuit Court of Appeals only one question was raised, and that concerned a different matter. But even if such declarations are evidence in an issue like this, the value of the testimony is evidently not great, and it certainly should be scanned with much care, especially since it stands alone without corroborating testimony. A peculiar result of sustaining the referee's finding might be, that in a suit by the trustee in bankruptcy against Frank, the bankrupt's declarations made after the transfer could not be heard to affect his vendee's title, unless, perhaps, collusion were first shown (*Grimes Co. v. Malcolm*, 164 U. S. 490; *Padgett v. Lawrence*, 40 Am. Dec. 232, note, and *Horton v. Smith*, 42 Am. Dec. 632), and we should have the anomaly of a cloud upon the vendee's title that depended solely upon evidence that could not be heard."

²¹ *In re Gillette*, 5 A. B. R. 119, 104 Fed. 769 (D. C. N. Y.).

²² See post, § 182, et seq.

²³ See post, § 174, et seq.

months preceding the filing of the bankruptcy petition) he has transferred, while insolvent, any portion of his property to one or more of his creditors, with intent to prefer such creditor over his other creditors, such four months not expiring until four months from the date of recording or registering, where recording or registering is required or permitted, or where not so required or permitted, then from the date of taking notorious, exclusive and continuous possession.²³

To be sure, this act does imply something of unjust dealings; yet, in many if not in most States, until the passage of the National Bankruptcy Act, any insolvent debtor, except perhaps a corporation, was at liberty to pay in full whatsoever creditor he liked, although in so doing nothing might be left for any of the remainder of his creditors.

§ 118. Intent to Prefer and Intent to Defraud Different.—Intent to prefer is to be distinguished from intent to defraud; and a preferential transfer is different from a fraudulent transfer.²⁴

§ 119. Definition of Preference.—The question involved in a study of this second and exceedingly important class of acts of bankruptcies, voluntary preferences as they might be termed, will come up again in a more interesting and complete form later on, when the treatment accorded by the bankruptcy law to those creditors who have received preferences is under consideration, in connection with §§ 57 and 60 of the Bankruptcy Act. In order, however, to present the salient features of preferences so that we may carry an idea of what is meant by this second class of acts of bankruptcy, it is proper to note the following definition and propositions:

A preference is a transfer made or seizure by legal proceedings procured or suffered by an insolvent debtor of some part of his property, the effect of which is to enable a creditor to obtain a greater proportion of his debt than some other creditor of the same class of priority.

§ 120. All Elements of Preference Must Exist.—All the elements of a preference must exist and in addition thereto the transfer must have been made with the debtor's intent to prefer. The literal reading of the statute might leave in doubt whether a preference in fact must be proved to have resulted so long as it is proved that the insolvent has transferred "any portion of his property" "with intent to prefer;" but the intent to prefer may not be inferred from a transfer which does not in fact create

²³. Bankr. Act, § 3 (a) (2).

²⁴. *Baden v. Bertenshaw*, 11 A. B. R. 308 (Sup. Ct. Kas.); *In re Mingo Valley Creamery Ass'n*, 4 A. B. R. 67, 100 Fed. 282 (D. C. Pa.). *Obiter*, *In re Duffey*, 9 A. B. R. 360, 118 Fed. 926 (D. C. Pa.); *Githens v. Shiffler*, 7 A. B. R. 453, 112 Fed. 505 (D. C. Pa.); *In re Belknap*, 12 A. B. R. 326, 129 Fed. 646 (D. C. Pa.). See post, "Ninth Element of Voidable Preference," § 1397. Also, see ante, § 113.

an actual preference, and if no actual preference exists, the intent to prefer becomes immaterial.²⁵

§ 121. **Thus, Depletion of Insolvent Estate Implied.**—Thus, first, some portion of the debtor's property must have been appropriated by the transaction to the payment of a claim, and the insolvent estate thereby correspondingly diminished, preference implying the depletion of a trust fund.²⁶ And appropriation without depletion is not sufficient.²⁷ But the depletion may be accomplished by indirect means as well as by direct means, as, for instance, by a transfer to a third party for the benefit of the creditor.²⁸

§ 122. **Thus, Fraudulent or Fictitious Debt Not Implied.**—Thus, second, the claim upon which the preferential transfer is made, may be, and usually is, the genuine claim of a bona fide creditor, a preference implying a genuine debt and not a fraudulent or fictitious transaction.²⁹

§ 123. **Thus, Creditor's Claim Must Be Pre-Existing Debt.**—Thus, third, the creditor's claim must have been a debt, a pre-existing debt, and the transfer will not amount to a preference if made contemporaneously with the rising of the claim, preference implying a preceding credit.³⁰

Thus, agreements for liens, made at the time of the passing of the original consideration, if valid as equitable assignments as against creditors under State law, and not requiring record or registry, will be held to be equitable assignments in bankruptcy.³¹

25. Elements to be proved according to the summary, more or less complete, laid down in the case, *In re Rome Planing Mills*, 3 A. B. R. 123 (D. C. N. Y.): "In order to make out a case in an involuntary bankruptcy proceeding based on subd. 2, § 3, the petitioners must prove first, a transfer of the debtor's property to a creditor; second, the debtor's intent to prefer such creditor; third, the insolvency of the debtor at the date of the transfer."

26. *In re McGee*, 5 A. B. R. 262, 105 Fed. 895 (D. C. N. Y.), a transfer of accounts to third party to sell and raise money to retire an outstanding obligation. *Troy Wagon Works v. Vastbinder*, 12 A. B. R. 352 (D. C. Pa.), a transfer of notes taken for goods sold to creditor originally selling the same goods although original sale claimed to be a case of consignment and not of sale.

27. *Martin v. Hulen*, 17 A. B. R. 510 (C. C. A. Mo.).

28. *In re McGee*, 5 A. B. R. 262, 105 Fed. 895 (D. C. N. Y.); *Goldman v. Smith*, 1 A. B. R. 266, 93 Fed. 182 (D. C. Ky.), which was a case of transfer to pay one who guaranteed overdrafts that were used to prefer. See, further, the corresponding proposition under the subject of voidable preferences, post, § 1278, et seq.

29. Compare, *In re O'Donnell*, 12 A. B. R. 621, 131 Fed. 150 (D. C. Mass.). In this case, the court held the assignment of money due, under building contract made to secure an accommodation indorser was a preference. See, further, the corresponding proposition under the subject of voidable preferences, post, § 1279, et seq.

30. Bankr. Act, § 60 (a); *In re Flint Hill Stone & Cont'n Co.*, 18 A. B. R. 83 (D. C. N. Y.). See citations and propositions under the subject of voidable preferences, post, § 1314, et seq.

31. *Wilder v. Watts*, 15 A. B. R. 57, 138 Fed. 426 (D. C. S. C.). See post, § 1370, et seq.

Thus, where the bankrupt, in purchasing a stock of goods, gave a chattel mortgage thereon, covering all additions, and immediately consolidated therewith his old stock, it was held, to be contemporaneous, or at any rate, no depleting of the assets.³²

§ 124. Thus, "Transfer" by Debtor or Seizure with Debtor's Acquiescence Requisite.—Thus, fourth, the debtor must have made a "transfer" of property or have permitted or "suffered" the creditor to obtain the judgment whose enforcement would have operated to appropriate property of the debtor, preference implying either a change of title in the form known as a transfer, namely, by the voluntary action of the debtor, or a seizure by legal proceedings acquiesced in by the debtor.³³

The word "transfer" is used in its most comprehensive sense and is intended to include every means and manner in which property can pass from the possession and ownership of another, and includes sales and every other and different mode of disposing of or parting with property, or the possession of property absolutely or conditionally, as a payment of money, pledge, mortgage, gift or security.³⁴

§ 125. Thus, Transfer Must Have Been to Apply on Debt.—Thus, fifth, the transfer must have been made in satisfaction of a debt in whole or in part, and the property must have been sought to be applied on a debt, a preference implying a transfer to satisfy a claim.³⁵

§ 126. Thus, Debtor Must Have Been Insolvent.—Thus, sixth, the debtor must have been insolvent at the time of the appropriation of the property.

Troy Wagon Works v. Vastbinder, 12 A. B. R. 353, 130 Fed. 232 (D. C. Pa.): "But it is essential to a preference that the debtor should have been insolvent at the time, and unless this appears there is no act of bankruptcy."³⁶

§ 127. Must Be within Preceding Four Months or Notorious Possession Be Taken.—Thus, seventh, the transfer or other appropri-

³². *Martin v. Hulen*, 17 A. B. R. 510 (C. C. A. Mo.). See citations and propositions under the subject of voidable preferences, post, § 1276, et seq.

³³. *Bankr. Act*, § 60 (a); *In re Riggs Restaurant Co.*, 11 A. B. R. 508, 130 Fed. 691 (C. C. A. N. Y.). Chattel mortgage. But in *New York* an attachment is neither a "transfer nor a judgment." *In re Schenkein & Coney*, 7 A. B. R. 162 (Ref. N. Y.). See citations and propositions under the subject of voidable preferences, post, § 1328, et seq.

³⁴. *Bankr. Act*, § 1 (a) 25 of the Statute of 1898; *Carson, Pirie & Co. v. Trust Co.*, 182 U. S. 438; *Boyd v. Lemon & Gale Co.*, 8 A. B. R. 81, 114 Fed. 647; *In re Riggs Restaurant Co.*, 11 A. B. R. 508, 130 Fed. 691 (C. C. A. N. Y.), involving a chattel mortgage. *In re Edelman*, 12 A. B. R. 238, 130 Fed. 700 (C. C. A. N. Y.).

³⁵. See citations and propositions under the subject of voidable preferences, post, § 1339, et seq.

³⁶. *Bankr. Act*, § 60 (a). See citations and propositions under the subject of voidable preferences, post, § 1342, et seq.

tion must have been made within the four months preceding the filing of the bankruptcy petition, else it will not constitute an act of bankruptcy.³⁷ And if the transfer is of a kind requiring recording or registration in order to be valid against third parties, then the four months, it is provided, shall not begin to run until the date of such recording or registration or until the date the transferee shall take continuous, notorious and exclusive possession.³⁸ What constitutes "notorious, exclusive and continuous possession" depends on the character of the property. Advertisement is not necessary. All the statute requires is that there be no concealment nor effort to prevent its being known.³⁹ But if the transfer is not of a kind requiring recording or registration, it is valid without record or registry.

§ 128. Must Give Recipient Greater Percentage than Other Creditors.—Thus, eighth, the effect of the transfer or other appropriation of property must have been to give the creditor receiving it a greater percentage of his claim than some other creditor of the same class in the order of priority, preference implying advantage of one creditor over another.⁴⁰

§ 129. Debtor's Intent to Prefer Requisite.—There is a final and ninth element requisite to make a preference an act of bankruptcy—the debtor's intent to prefer.⁴¹

The preference must have been made with the intent on the debtor's part to prefer one creditor over another. If no such intent exists, it is not an act of bankruptcy, although it may be in fact a preference.

In *re Gilbert*, 8 A. B. R. 101, 112 Fed. 951 (D. C. Ore.): "To authorize an adjudication of bankruptcy it must appear that the transfers of the securities by a debtor within four months of the filing of the petition were made, with intent to prefer the creditors to whom they were made."

In *re Douglass Coal & Coke Co.*, 12 A. B. R. 539, 131 Fed. 769 (Ref. Tenn., affirmed by D. C.): "I, nevertheless, do not think that a presumption of intent to prefer should be indulged in against an insolvent debtor by his mere act of paying certain creditors small sums in the usual course of business, and apparently in the effort to keep the business going, unless there is other and further evidence showing specific intent thereby to give such creditors an undue preference over others, although such might be the effect of the payment."

37. Bankr. Act, § 60 (a). Also, see post, § 1367.

38. See Bankr. Act, § 3 B; In *re Woodward*, 2 A. B. R. 233, 95 Fed. 260 (Ref. Tex.).

39. In *re Woodward*, 2 A. B. R. 233, 95 Fed. 260 (Ref. Tex.).

40. Bankr. Act, § 60 (a); In *re Douglass Coal & Coke Co.*, 12 A. B. R. 539, 131 Fed. 769 (D. C. Tenn.). Compare analogously (but not placed on this ground), *Spike & Iron Co. v. Allen*, 17 A. B. R. 583 (C. C. A. Va.). Also, see post, § 1385, et seq.

41. In *re Rome Planing Mills*, 3 A. B. R. 123, 96 Fed. 812 (D. C. N. Y.); In *re Flint Hill Stone & Construction Co.*, 18 A. B. R. 81, 84 (D. C. N. Y.). Compare, post, discussion in §§ 1393, 1394.

§ 130. **Creditor's Intent Immaterial.**—The intent with which the creditor receives the preference is immaterial when it comes to the consideration of the preference as an act of bankruptcy, that is to say, when we come to regard the act as an act of the debtor, although as we shall see later on when we come to consider its effect upon the creditor's rights, the creditor's intent does become material. This distinction must not be lost sight of. But a voluntary preference will amount to an act of bankruptcy even though the creditor receiving it may not have known the transfer resulted in a preference at all, and even though he may have been wholly innocent. If the insolvent debtor in making the transfer had the intent to prefer the creditor receiving it over his other creditors, then he has committed an act of bankruptcy. It is the debtor's intent that is material, not the creditor's, in determining whether the preference amounts to an act of bankruptcy.⁴²

In *re Rome Planing Mills*, 3 A. B. R. 123, 99 Fed. 937 (D. C. N. Y.): "The intent which must be shown is that of the debtor. Reasonable cause on the part of the preferred creditor to believe that a preference was intended, is immaterial."

In *re Wright Lumber Co.*, 8 A. B. R. 345, 114 Fed. 1011 (D. C. Ark.): "It is not necessary, therefore, in order that the execution of this mortgage be an act of bankruptcy that the claimant, Alphin, knew, or had reasonable grounds to believe, when he accepted the mortgage that the bankrupt intended to prefer him over other creditors."

§ 131. **Proof of Intent to Prefer.**—Proof of intent to prefer involves proof of the debtor's knowledge of his own insolvent condition; for unless he knew he was insolvent he could not be presumed to have intended a preference.

Intent to prefer may be shown by circumstantial evidence. "Actions speak louder than words" in proof of intent.⁴³ But intent to prefer will not be inferred from the mere making of the transfer or giving of the security, without more.⁴⁴ Proof of other preferential transfers at about the same time is evidence of intent to prefer in the case in hand.⁴⁵ The fact that there were no other debts then due and payable does not conclusively negative an intent to prefer.⁴⁶ Testimony of the debtor himself that he had no such intent is entitled to very little weight.⁴⁷ "Intent" is

42. But see *In re Edelman*, 12 A. B. R. 238, 130 Fed. 700 (C. C. A. N. Y.), when the act pointed out as indicating the intent was not the act of the debtor at all, but merely that of the creditor—the failure to record a preferential mortgage.

43. (1867) *Traders' Bk. v. Campbell*, 14 Wall. 87, 6 B. Reg. 353.

44. (1867) *Sparhawk v. Richards*, 12 Bank Reg. 74; (1867) *Gottman v. Honea*, 12 Bank Reg. 493; (1867) *In re McKay*, 7 Bank Reg. 230; (1867) *In re Connor*, Lowell 532; (1867) *In re Perrin*, 7 Bank Reg. 283.

45. *Atkins v. Bank*, Crabbe 529.

46. (1867) *Warren v. Bank*, 10 Blatchf. 493, 7 Nat. Bank Reg. 481.

47. (1867) *Oxford Iron Co. v. Slafter*, 13 Blatchf. 455, 14 Bank Reg. 380.

different from "motive."⁴⁸ The question of the intent to prefer is for the jury to determine, where a jury has been demanded.⁴⁹ "Intent" to prefer may exist although the transfer was made under pressure of coercion, or under threat of criminal prosecution.⁵⁰

§ 132. Proof of Intent to Prefer Aided by Presumptions.—Proof of intent to prefer is aided by various presumptions.⁵¹

The debtor is presumed to know the natural and probable results of his own acts.⁵²

In *re Wright Lumber Co.*, 8 A. B. R. 345, 114 Fed. 1011 (D. C. Ark.): "If it be said that the testimony shows that the bankrupt did not intend to prefer a claimant, the answer is that he was insolvent and he knew it, and he must be held to have intended that which was the necessary consequence of his act. He cannot be heard to say that he did not intend to do a thing when the necessary and logical consequence of his act was to do that very thing."

Thus, the transfer of all one's property affords a violent if not conclusive presumption of an intent to prefer, where there are other creditors unprovided for; or, under certain circumstances, the transfer of a large part of one's property.⁵³

See *Boyd v. Lemmon, Gale & Co.*, 8 A. B. R. 81, 114 Fed. 647 (C. C. A. Miss.): Where "debtor firm, whilst insolvent took the money proceeds of the cash sale of all their property to one not a creditor and applied the same to the full payment of the debts due by them to several of their creditors, leaving others unpaid, it is sufficiently proved that they thereby made a transfer of their property while insolvent to one or more of their creditors with intent to prefer such creditors over other creditors within the meaning of § 3 (a) (2)."

⁴⁸. See note to *Johnson v. Wald*, 93 Fed. 640, 2 A. B. R. 84 (C. C. A. Ga.).

⁴⁹. In *re Bloch*, 6 A. B. R. 300, 109 Fed. 790 (C. C. A. N. Y.). See note to *Johnson v. Wald*, 93 Fed. 640, 2 A. B. R. 84 (C. C. A. Ga.). Analogously, as to fraudulent removals, etc., *Mfg. Co. v. Spoke & Nipple Co.*, 12 A. B. R. 614, 131 Fed. 215 (C. C. A. Mich.).

⁵⁰. (1867) *Clarion Bank v. Jones*, 21 Wall. 325; (1867) *Sawyer v. Turpin*, 91 U. S. 114; (1867) *Giddings v. Dodd*, 1 Dill 115; (1841) *Strain v. Gourdin*, 2 Woods 380; (1841) *Arnold v. Maynard*, 2 Story 349.

⁵¹. In *re Douglass Coal & Coke Co.*, 12 A. B. R. 547, 131 Fed. 769 (Ref. Tenn.).

⁵². In *re McGee*, 5 A. B. R. 262, 105 Fed. 895 (D. C. N. Y.); In *re Rome Planing Mills*, 3 A. B. R. 123, 96 Fed. 812 (D. C. N. Y.); *Bloch v. Farjicon*, 6 A. B. R. 300, 109 Fed. 790 (C. C. A.). Impliedly, In *re Grant*, 5 A. B. R. 837, 106 Fed. 496 (D. C. N. Y.); In *re Gilbert*, 8 A. B. R. 101, 112 Fed. 951 (D. C. Oregon); *Rex Buggy Co. v. Hearick*, 12 A. B. R. 726, 132 Fed. 310 (C. C. A. Kas.); *Johnson v. Wald*, 2 A. B. R. 84, 93 Fed. 640 (C. C. A. Ga.). Analogously and impliedly, *Plate Glass Co. v. Edwards*, 17 A. B. R. 448 (C. C. A. Iowa). See note to *Johnson v. Wald*, 2 A. B. R. 84, 93 Fed. 640 (C. C. A. Ga.); (1867) *Toof v. Martin*, 13 Wall. 40; (1867) *Wager v. Hall*, 16 Wall. 584; (1867) *Farrin v. Crawford*, Fed. Cas. 4,686; (1867) In *re Merchants' Ins. Co.*, Fed. Cas. 9,441. See citations under corresponding proposition relative to proof of intent to defraud under first act of bankruptcy, ante, § 123.

⁵³. (1867) *Wager v. Hall*, 16 Wall. 584. See citations in *re Gilbert*, 8 A. B. R. 106, 112 Fed. 951 (D. C. Oregon). Compare, In *re Bloch*, 6 A. B. R. 300, 109 Fed. 790 (C. C. A. N. Y.). Compare, *Parsons v. Topliff*, 119 Mass. 243, 249. Compare, *Toof v. Martin*, 13 Wall. 40.

Thus, payment of some creditors in full, and refusal or failure to pay others, the debtor knowing his condition of insolvency, is conclusive proof of intent to prefer.⁵⁴

Rex Buggy Co. v. Hearick, 12 A. B. R. 726, 132 Fed. 310 (C. C. A. Kas.): "If a merchant is hopelessly insolvent during the four months preceding the filing of a petition in involuntary bankruptcy against him and with knowledge of such condition of insolvency pays to certain of his creditors substantial sums of money in full satisfaction of their claims, and denies payment to others whose claims are due and equally entitled to payments, he has committed an act of bankruptcy within the meaning of § 3, subd. 'a,' ch. 2 * * *. His payment under such circumstances inevitably results in giving the creditors so favored a preference over the others. The debtor is presumed to intend the necessary result of his own intelligent acts. This doctrine is abundantly supported by authority."

But where all one's property is mortgaged to secure a few creditors, but the equity left is sufficient to provide for the rest, it is not a preference.⁵⁵

Thus, also, when a debtor, with knowledge of his insolvent condition, transfers property to some of his creditors without leaving enough to pay others a like proportion on their respective debts, an intent to prefer them will be conclusively presumed.⁵⁶

In re McGee, 5 A. B. R. 262, 105 Fed. 895 (D. C. N. Y.): "Every one is presumed to intend the legal consequences of his act, and where an insolvent debtor transfers a large portion of his property to one creditor to the exclusion of others, such transaction must be taken as conclusive of an intent to give a preference."

So, also, the debtor's intent to prefer may be presumed from a transfer, while insolvent, of a large portion of his property to a single creditor.⁵⁷

But, of course, the presumption of an intent to prefer creditors arising from the transfer of property by an insolvent debtor, is affected by the amount of such transfer and where the transfer is of a comparatively small part of the debtor's property, the presumption does not arise.⁵⁸ And the mere paying of certain creditors small sums in the usual course of business, and apparently in the effort to keep the business going, will not raise the presumption of an intent to prefer.⁵⁹

54. *Rex Buggy Co. v. Hearick*, 12 A. B. R. 726, 132 Fed. 310 (C. C. A. Kas.); *Johnson v. Wald*, 2 A. B. R. 84, 93 Fed. 640 (C. C. A. Ga.).

55. See *Lansing Boiler & Eng. Works v. Ryerson*, 11 A. B. R. 558, 128 Fed. 701 (C. C. A. Mich.).

56. *In re Gilbert*, 8 A. B. R. 102, 112 Fed. 951 (D. C. Ore.); *Obiter*, *In re Wright Lumber Co.*, 8 A. B. R. 345, 114 Fed. 1011 (D. C. Ark.).

57. *In re Rome Planing Mills*, 3 A. B. R. 123, 96 Fed. 812 (D. C. N. Y.).

58. *In re Gilbert*, 8 A. B. R. 102, 112 Fed. 951 (D. C. Ore.); *In re Douglass Coal & Coke Co.*, 12 A. B. R. 539, 131 Fed. 769 (D. C. Tenn.).

59. *In re Douglass Coal & Coke Co.*, 12 A. B. R. 539, 131 Fed. 769 (D. C. Tenn.).

The debtor's knowledge of his insolvent condition may be presumed, for the presumption is that a debtor does know his own financial condition.⁶⁰

But it is a rebuttable presumption.⁶¹

In *re Bloch*, 6 A. B. R. 300, 109 Fed. 790 (C. C. A. N. Y.): "In such a case (not a case of a transfer of all the debtor's property) evidence by the alleged bankrupt to rebut the presumption that a preference was intended should be submitted to the jury, and an instruction that an intent to prefer is conclusively presumed, is erroneous."

And if the debtor establishes his want of knowledge and his honest belief that he was solvent, he rebuts the presumption of an intent to prefer.⁶²

In *re Gilbert*, 8 A. B. R. 104, 112 Fed. 951 (D. C. Ore.): "There is a further presumption that the debtor knows his financial condition as to solvency, but this is a disputable presumption, and if the debtor honestly believes himself to be solvent, or if he establishes his want of knowledge as to his insolvency, he then rebuts the presumption of an intent to prefer which arises from the fact of actual insolvency."

In *re Rome Planing Mills*, 3 A. B. R. 123, 96 Fed. 812 (D. C. N. Y.): "When this (the transfer while insolvent of a considerable portion of his property to one creditor) is proved, the burden is upon him to show that he was ignorant of his insolvency and had reason to believe he could pay his debts in full."

Thus, where the liability, other than that to the preferred creditor, was upon an old, forgotten guaranty, still contingent at the time of the transfer, the presumption is rebutted.⁶³

The taking of unusual steps in the transaction, or the failure to take the usual steps, may indicate intent. Thus, failure to record a real estate mortgage, given within the four months' period for an antecedent debt, until several months after its execution, warrants a finding of an intent to prefer when taken in connection with facts denoting knowledge of insolvency.⁶⁴

DIVISION 3.

THIRD ACT OF BANKRUPTCY—PREFERENCES BY LEGAL PROCEEDINGS NOT VACATED NOR DISCHARGED.

§ 133. Third Act of Bankruptcy—Preferences by Legal Proceedings Not Vacated.—The third class of acts of bankruptcy is the suffer-

⁶⁰. In *re Gilbert*, 8 A. B. R. 104, 112 Fed. 951 (D. C. Ore.); In *re Jacobs*, 1 A. B. R. 518 (D. C. La.); In *re Silverman*, 4 Bank Reg. 523; *Wager v. Hall*, 16 Wall. 584.

⁶¹. In *re Gilbert*, 8 A. B. R. 104, 112 Fed. 951 (D. C. Ore.). Inferentially, *Merchants' Nat'l Bk. v. Cole*, 18 A. B. R. 48 (C. C. A. Ohio).

⁶². In *re Bloch*, 6 A. B. R. 300, 109 Fed. 790 (C. C. A. N. Y.); *Toof v. Martin*, 13 Wall. 10.

⁶³. Impliedly, *Merchants' Nat'l Bk. v. Cole*, 18 A. B. R. 48 (C. C. A. Ohio).

⁶⁴. In *re Edelman*, 12 A. B. R. 238, 13 Fed. 700 (C. C. A. N. Y.). But in this case the failure to record the mortgage, it will be observed, was not traced home to the bankrupt, yet it must be remembered that it is the bankrupt's intent and not that of the creditor that is involved in the giving and accepting of a transfer that results in a preference.

ing or permitting whilst insolvent any creditor to obtain a preference through legal proceedings and not having, at least five days before a sale or final disposition of the property affected by such preference, vacated or discharged the same.⁶⁵

In re Rome Planing Mills, 3 A. B. R. 123, 96 Fed. 812 (D. C. N. Y.): "The following are the essential elements. * * * First, That a preference was obtained by a creditor through legal proceedings. Second, That the debtor suffered or permitted the preference and did not vacate or discharge the preference at least five days before a sale, or final disposition of the property affected. Third, That the debtor was insolvent at the time the preference was obtained. The burden of proof is upon the petitioner. The debtor's intent is not an essential element. It is sufficient that the debtor obtained a preference and that the debtor has permitted it to remain undischarged."

§ 134. No Fraudulent Intent Implied.—In this act of bankruptcy no fraudulent intent is implied. On the contrary, the act rather implies helplessness on the part of the debtor; for the insolvent debtor finds it difficult to extricate himself from his dilemma where a creditor has levied an execution or attachment or otherwise obtained a hold on his property by legal proceedings. Of course, if, in fact the debtor be not insolvent, or if the levy be not upon a just debt or be not authorized, the debtor may extricate himself; but if the claim be just and the levy proper, and the debtor have no valid defense and is insolvent, he can scarcely avoid committing this act of bankruptcy, unless he can get some one to give bail for him. If he cannot procure bail and if he has no defense, then he is surely helpless and is helpless without necessarily any fraud, connivance, intent or action existing on his part at all. If he pay the claim in full and thus discharge or vacate the legal proceedings, he might avoid this third act of bankruptcy; but the payment itself would likely be held to be a preference, since he is insolvent and knows he is insolvent; and it would be thus an act of bankruptcy of the second class.⁶⁶

§ 135. Intent to Prefer Not Requisite, So Long as Actual Preference Exists.—It is the result obtained by the levying creditor and not the intent of the debtor to prefer, that is the test.⁶⁷

The leading case upon this point is *Wilson Bros. v. Nelson*, 7 A. B. R. 142, 183 U. S. 191, reversing *In re Nelson*, 1 A. B. R. 63, 98 Fed. 76 (D. C. Wis.).

⁶⁵. Bankr. Act, § 3 (a) (3). For other decisions construing this act of bankruptcy, see citations under the propositions hereinafter following.

⁶⁶. See post, §§ 136 and 141. See *In re Miller*, 5 A. B. R. 140, 104 Fed. 764 (D. C. N. Y.); *In re Meyers*, 1 A. B. R. 1 (Ref. N. Y.). See *Scheuer v. Book*, 7 A. B. R. 384 (C. C. A. Ala.).

⁶⁷. *In re Rung Furn. Co.*, 14 A. B. R. 12, 139 Fed. 526 (C. C. A. Mass.). To the same effect, see *Bradley Timber Co. v. White*, 10 A. B. R. 329, 336, 121 Fed. 779 (C. C. A. Ala., affirming *White v. Bradley Timber Co.*, 9 A. B. R. 441, 119 Fed. 989); *In re Ferguson*, 2 A. B. R. 586, 95 Fed. 429 (D. C. N. Y.); *In re Meyer*, 1 A. B. R. 1 (Ref. N. Y.); *In re Reichman*, 1 A. B. R. 17, 91 Fed. 624 (D. C. Mo.); *In re Moyer*, 1 A. B. R. 577, 93 Fed. 188 (D. C. Pa.), a judgment entered within four months on warrants to confess given before four months. In

In this case of *Wilson Bros. v. Nelson*, the Supreme Court of the United States held, that in determining what constitutes the suffering or permitting of a preference by legal proceedings the statute makes the result obtained by the creditor and not the specific intent of the debtor, the essential fact, and that no intent on the part of a debtor either to hinder, delay, or defraud his creditors or to prefer one of them over another is required by the third act of bankruptcy. This was held in a case where a cognovit judgment was taken and levy made thereunder on a note given nearly fourteen years before that time, the debtor all the time being wholly innocent of any connivance, collusion or suggestion that the creditor take judgment, and being in total ignorance that any such judgment was going to be taken. The Supreme Court held, that, nevertheless, because, after levy made, the debtor had not procured its discharge or its vacating before five days before the time set for execution sale, he had committed this act of bankruptcy, for he had suffered and permitted a preference to be obtained and retained by his nonresistance to legal proceedings.

§ 136. **"Continuing Consent."**—In cases where the lien was obtained by levies under judgments obtained upon warrants to confess judgment, there may be said to exist, theoretically, a continuing "consent." Such was the fact in the case of *Wilson v. Nelson*, discussed in the preceding paragraph; also, in *In re Thomas*, 4 A. B. R. 571, 103 Fed. 272 (D. C. Pa.). Nevertheless, "continuing" or constructive consent, as in cases of warrants to confess judgment, is not necessary.⁶⁸

Mere passivity on the debtor's part is sufficient to constitute "suffering" or "permitting." Active participation, co-operation or collusion in the legal proceedings, is not a requisite element.⁶⁹

In re Rome Planing Mills, 3 A. B. R. 123, 96 Fed. 812 (D. C. N. Y.): "It is not necessary that the debtor should have done any affirmative act. If he remains passive and supine and permits his property to be taken by one creditor at the expense of others, he has 'suffered' or 'permitted' a preference to be obtained."

Bogen & Trummell v. Protter, 12 A. B. R. 288, 129 Fed. 533 (C. C. A. Ohio): "A debtor who does not pay a lawful debt when due and stands by while his creditor secures a judgment against him and levies upon his property certainly

re Rome Planing Mills, 3 A. B. R. 123, 96 Fed. 812 (D. C. N. Y.); *In re Thomas*, 4 A. B. R. 571, 103 Fed. 272 (D. C. Pa.); *Parmenter Mfg. Co. v. Stoeve*, 3 A. B. R. 220, 97 Fed. 330 (C. C. A. Mass.). Contra, *Duncan v. Landis*, 5 A. B. R. 649, 106 Fed. 839 (C. C. A. Pa.). Nevertheless see, *In re Kersten*, 6 A. B. R. 516 (D. C. Wis.), where it seems to have been thought necessary to show some affirmative act, as, here, the debtor's appearance in State Court on creditors' application for the appointment of a receiver there and debtor's presentation of a list of names for the receivership.

⁶⁸. *In re Rung Furn. Co.*, 14 A. B. R. 12, 139 Fed. 526 (C. C. A. N. Y.).

⁶⁹. Impliedly, *Wilson v. Nelson*, 7 A. B. R. 142, 183 U. S. 191, reversing *In re Nelson*, 1 A. B. R. 63, 93 Fed. 76 (D. C. Wis.); *In re Rung Furn. Co.*, 14 A. B. R. 12, 139 Fed. 526 (C. C. A. N. Y.). Compare, contra query before decision of Supreme Court in *Wilson Bros. v. Nelson*; *In re Ogles*, 1 A. B. R. 671, 93 Fed. 426 (D. C. Tenn.). See post, "Fourth Element of a Voidable Preference," §§ 1328, 1339.

'suffers and permits' such judgment to be taken, levy made, and preference thereby obtained."

Bradley Timber Co. v. White, 10 A. B. R. 326, 121 Fed. 779 (C. C. A. Ala.): "We doubt if any of the evidence of witness Roach was relevant to the issue involved. Whether or not an insolvent makes resistance to legal proceedings of a creditor to obtain preference is not very material. It may show good faith on his part, but the act of bankruptcy declared in the law is 'suffering or permitting' a judgment which will result in a preference, and a failure to vacate the same within at least five days before a sale or disposition of the property affected by such preference. The Bankrupt Law seeks to prevent, and, if obtained by any means, to set aside, preferences obtained against an insolvent within four months; and, in order to effect an equal distribution of an insolvent's property among creditors, it contemplates a resort to the bankruptcy court in all cases of such preferences, no matter whether the bankrupt has consented thereto or opposed the same."

Upon reflection, it will become clearly evident that, by the operation of this third act of bankruptcy, almost any insolvent debtor, except the absolutely exempted ones, can ultimately be brought into the bankruptcy court and adjudged bankrupt, without any bad faith or intent on his part. He can in other words, be compelled to commit this act of bankruptcy.⁷⁰

§ 137. Debtor's Resistance to Suit without Release of Property Ineffectual.—It will make no difference that the debtor resists the suit in good faith, files answer, contends at the trial and appeals the judgment before the sale, if the execution of the judgment upon the property is not stayed or the property otherwise released.⁷¹

Bradley Timber Co. v. White, 10 A. B. R. 326, 121 Fed. 779 (C. C. A. Ala.): "Whether or not an insolvent makes resistance to legal proceedings of a creditor to obtain preference is not very material."

§ 138. Preference Must Have Been Obtained Thereby.—A preference must have been obtained thereby.⁷²

In *re Chapman*, 3 A. B. R. 607, 99 Fed. 395 (D. C. Ga.): "The difficulty arises from the fact that in the suit the plaintiff obtained a general judgment. The reply to this, however, is that, while the plaintiff has a general judgment, she is only proceeding to enforce it against the particular property on which she had the contract lien, and for that reason the proceeding to sell, whatever

70. (1867) See *Warren v. Bank*, 7 Nat. Bank Reg. 481; (1867) *Coxe v. Hale*, 8 Nat. Bank Reg. 562.

71. In *re Rung Furn. Co.*, 14 A. B. R. 12, 139 Fed. 526 (C. C. A. N. Y.): In this case the court held, that the failure of an insolvent corporation to vacate a preference resulting from a judgment, levy and sale, is an act of bankruptcy within § 3a (3), even though the judgment debtor answers the suit, goes to trial in good faith and later and before the sale duly appeals from the judgment.

72. In *re Kersten*, 6 A. B. R. 516, 110 Fed. 929 (D. C. Wis.); *Spike & Iron Co. v. Allen*, 17 A. B. R. 588, 148 Fed. 657 (C. C. A. Va.); In *re Rome Planing Mills*, 96 Fed. 812, 3 A. B. R. 123 (D. C. N. Y.).

may have been the character of the judgment, is not a preferential proceeding. The plaintiff is only seeking for the time being to enforce the judgment against the property on which she had the contract lien, and the Bankruptcy Act could never have contemplated that a person should be adjudged a bankrupt for permitting the enforcement of a lien against particular property, when the lien as to the property was in no sense a preference under any of the provisions of the act. I see no practical difference between this execution proceeding, as it now is, against the property conveyed to the plaintiff to secure the debt, and an ordinary proceeding to enforce a mortgage against the particular property on which the mortgage was given. If a levy was made on property other than that as to which the plaintiff in the judgment had a special lien, and an attempt was being made to sell the same, and the defendant failed within five days of the time of sale to vacate or discharge the judgment, then, undoubtedly, it seems, an act of bankruptcy would be committed. To constitute an act of bankruptcy, under the clause in question, it would be necessary that the debtor should suffer or permit, while insolvent, a judgment to go against him, which judgment would of itself be a preference under the act; that he would then allow execution to be issued and levied, and proceedings to sell to be instituted by the necessary advertisement, and fail, within five days of the time of sale, to vacate or discharge the judgment. The sale which the defendant, by the act, must prevent, would consummate and make effective the preference given by the judgment. This is very different from the case at bar, in which an antecedent lien, not obnoxious in any way to the act, is being enforced by legal proceedings. In the first instance practical results beneficial to the creditors would be obtained by the institution of the bankruptcy proceedings, inasmuch as the preference created by the judgment lien would be annulled and vacated, and, as a consequence, the property of the defendant equally divided. Such is evidently the intent of this act of bankruptcy—that a preference might be avoided, and an equal distribution of the debtor's property result. In the case now before the court, the institution of the bankruptcy proceedings will not affect the lien of the judgment on the land which was about to be sold. Should the bankruptcy proceedings go on, the court must either allow the plaintiff to proceed to enforce her judgment as a special lien on this property, by execution of the City Court, as she is now doing, or must allow the trustee to sell the property subject to the lien, should it be thought probable that anything could be realized for the general creditors over and above the amount of the judgment. The court would declare it to be an act of bankruptcy in Chapman not to have prevented the sale, and would then, by its own order, allow the sale to go on. This is not, in my opinion, such a case as Congress had in view in enacting the clause in question."

Thus, the debtor must have been insolvent.⁷²

Thus, the preference must have given the creditor an advantage over other creditors of the "same class." A landlord's distraint, even were it a "legal proceedings" would not be obtaining a "preference" unless there were other creditors entitled to like priority with landlords under the laws of the United States or States, under class 5, of priorities, who did not

⁷². In re Rome Planing Mills, 96 Fed. 812, 3 A. B. R. 123 (D. C. N. Y.). Inferentially, In re Rung Furn. Co., 14 A. B. R. 12 (C. C. A. N. Y.). Also, see ante. § 126.

receive like proportion; for, otherwise, the landlord is not in the "san class."⁷³

Spike & Iron Co. v. Allen, 17 A. B. R. 588, 148 Fed. 657 (C. C. A. Va.). "The law in regard to preference by legal proceeding is that the existence of the lien obtained by the proceeding shall work a preference; that is, shall enable some one of the creditors of the insolvent debtor to obtain a greater percentage of his debt than other creditors."

Likewise, suffering judgment on a priority claim of a workman would not be sufficient if there is enough to pay all labor claims in full; although if the judgment be for more than \$300 it will be a preference as to the excess.⁷⁴ Thus, again, property of the bankrupt must have been sequestrated in some form thereby.⁷⁵

Presumably, all the remaining elements of a preference are likewise requisite.⁷⁶

§ 139. Legal Proceedings Must Have Created the Preference.—The preference must have been obtained through legal proceedings.⁷⁷

In re Rome Planing Mills, 3 A. B. R. 123, 96 Fed. 812 (D. C. N. Y.). "The words 'legal proceedings' as used in subd. 3 of § 3 have reference to an proceeding in a court of justice, interlocutory or final, by which the property of the debtor is seized and diverted from his general creditors."

§ 140. Vacating of Preference, Ineffectual unless Accomplished at Least Five Days before Sale.—The preference must be discharged or vacated to avoid the charge of the act;⁷⁸ and it must have been

73. *In re Belknap*, 12 A. B. R. 326, 129 Fed. 646 (D. C. Penna.).

74. *Inferentially*, *In re Cement Co.*, 17 A. B. R. 375 (Spec. Master Mich.).

75. *Instance*, *In re Miller*, 5 A. B. R. 140, 104 Fed. 764 (D. C. N. Y.), where judgment debtor directed a levying officer to go to one owing the debtor, who thereupon paid the officer the amount owing. *Instance*, *In re Harper*, 5 A. B. R. 567, 106 Fed. 900 (D. C. Ills.), a case of garnishment in aid of execution where garnishee has the right to pay at once or at any time to the judgment creditor held, clause as to "five days" not applicable.

76. See ante, § 119 to § 129, inclusive.

77. *Spike & Iron Co. v. Allen*, 17 A. B. R. 588, 148 Fed. 657 (C. C. A. Va.). *Instance*, *In re Mather v. Coe*, 1 A. B. R. 504, 92 Fed. 333 (D. C. Ohio), receivership in State court whereby priority given to workmen that could not have been given them under the Bankruptcy Act. *Instance*, *In re Kerstén*, A. B. R. 516, 110 Fed. 929 (D. C. Wis.), receivership in State court whereby payments that would have been held preferences under the bankruptcy act and requiring surrender before further participation in dividends, would not be effected. *Instance*, *In re Miller*, 5 A. B. R. 140, 104 Fed. 764 (D. C. N. Y.), supplementary proceedings—payment by debtor's debtor to sheriff. *Instance*, held not legal proceedings, *In re Mero*, 12 A. B. R. 171, 128 Fed. 630 (D. C. Conn.), liveryman's lien. Thus, likewise a seizure under landlord's distress warrant has been held not to be a seizure by legal proceedings in *Spike & Iron Co. v. Allen*, 17 A. B. R. 588, 148 Fed. 657 (C. C. A. Va.), also in obiter, referred to, but not decided, *In re Belknap*, 12 A. B. R. 326, 129 Fed. 646 (D. C. Pa.).

78. *Wilson Bros. v. Nelson*, 7 A. B. R. 142, 183 U. S. 191; obiter, *In re Rome Planing Mills*, 3 A. B. R. 123, 96 Fed. 812 (D. C. N. Y.); *In re Vastbinder*, 11 A. B. R. 121, 126 Fed. 417 (D. C. Pa.); *In re Rung Furn. Co.*, 14 A. B. R. 113, 139 Fed. 526 (C. C. A. N. Y.).

discharged or vacated at least five days before a sale or final disposition of the property affected.⁷⁹

In *re Vastbinder*, 11 A. B. R. 121, 126 Fed. 417 (D. C. Pa.): "It is not the mere obtaining of a judgment and levying execution on the property of the debtor while insolvent that makes him liable as a bankrupt, but the failure on his part, within five days before a sale or final disposition of the property levied on, to have the same vacated or discharged."

§ 141. "**At Least Five Days before a Sale, etc.**"—**Meaning of Term.**—The term "at least five days before a sale or final disposition of the property affected" means at least five days before the time fixed for the sale and it is not necessary for creditors to wait until the sale actually has taken place and thereby possibly have their whole proceedings rendered fruitless.⁸⁰

In *re Rome Planing Mills*, 3 A. B. R. 123, 96 Fed. 812 (D. C. N. Y., cited in *In re Miller*, 5 A. B. R. 140, 104 Fed. 764, D. C. N. Y.): "It is not necessary that the creditor should wait until a sale has actually taken place. It would be a strange construction of an act designed to save and protect the debtor's estate, to hold that it can only be set in operation after the estate has been plundered and dissipated. The debtor has until five days before the day the sale is legally noticed in which to vacate or discharge the preference. If he has not done so at that time the creditor may proceed and file a petition and, upon a proper showing, may enjoin the sale. The act of bankruptcy is not consummated until the expiration of the time in which the debtor may vacate or discharge the lien, and the last day for doing this is five days before the day a sale of the property is advertised. In the case of a judgment, therefore, the petitioners must prove the entry of the judgment, the issue of an execution, the levy thereunder and the debtor's insolvency at the time of the judgment and levy. They must also prove that the property was actually sold at execution sale or that the sale was advertised for a day certain, and that the debtor had permitted the levy to stand until the sale was but five days distant."

Bogen & Trummell v. Protter, 12 A. B. R. 288, 129 Fed. 533 (C. C. A. Ohio): "The debtor still has the privilege of avoiding the act of bankruptcy, by discharging the preference at least five days before the time set for sale."

Obiter, In *re Hotel & Cafe Co.*, 15 A. B. R. 69, 138 Fed. 947 (D. C. Pa.): "It seems clear to me that it was the intention of Congress in framing this clause to fix the consummation of the act of bankruptcy at a period five days before a sale. If this were not so and the act of bankruptcy is held not to have been consummated until a sale had taken place, creditors could not file involuntary petitions in bankruptcy until after the property of the alleged bankrupt had been swept away by an execution. In other words, it seems to me that it was the intention to fix the consummation of the act of bankruptcy upon an alleged bankrupt five days before the day of sale if at that time he had failed to lift a levy on his property. A petition can then be filed before the sale and the property administered in bankruptcy for the benefit of all the creditors."

⁷⁹. *Wilson Bros. v. Nelson*, 7 A. B. R. 142, 183 U. S. 191; In *re Rome Planing Mills*, 3 A. B. R. 123, 96 Fed. 812 (D. C. N. Y.).

⁸⁰. In *re Meyers*, 1 A. B. R. 1 (Ref. N. Y.); In *re Elmira Steel Co.*, 5 A. B. R. 488, 109 Fed. 456 (Spec. Master, N. Y.).

Nevertheless, it would seem that the court must have fixed some time for the sale or other disposition of the property. Until such time is fixed it is impossible for this act of bankruptcy to be committed.⁸¹

In *re Vetterman*, 14 A. B. R. 245, 135 Fed. 443 (D. C. N. H.): "The concluding part of the clause, with reference to the sale or final disposition, is connected with what precedes, in respect to preference through legal proceedings, by the word 'and,' thus making it one act of bankruptcy, culminating five days before sale or final disposition. If it were otherwise, and the inception and the culmination of the legal proceeding were separated by the word 'or,' it might be different. In such cases there might be two acts of bankruptcy."

"I find no authority for holding that a creditors' petition in an involuntary bankruptcy proceeding, which merely alleges that an attachment has been made in a legal proceeding, sets forth an act of bankruptcy, within the meaning of the statute of 1898. * * *

"This decision in no way touches the question whether an attachment creditor acquires a valid lien, whose attachment is more than four months old when that part of clause 3 relating to the sale and the 'five days before' operate upon the situation."

But if the lien were obtained more than four months and five days before the time set for the sale, the petition could hardly be filed in time at all.

Nevertheless, if, before any sale actually has taken place and before the bankruptcy petition is filed, the execution is stayed and the lien vacated although not until within the five days before the time fixed for the sale the bankruptcy petition will be dismissed, at any rate where, before it was filed, the petitioning creditors had actual notice of the vacating of the lien.⁸²

§ 142. How Vacating Accomplished and How Not.—Vacating must not be accomplished by payment of the debt by the bankrupt or out of the bankrupt estate, else an act of bankruptcy, although not one of the third class of acts of bankruptcy, will have been committed.⁸³

Scheuer v. Book Co., 7 A. B. R. 384, 112 Fed. 407 (C. C. A. Ala.): "Such payment ought not to be considered in any just sense as the vacating or discharging of a preference within the intent and meaning of the third subdivision, § (a), of the Bankruptcy Act."

^{81.} See *Seaboard Steel Casting Co. v. Trieg*, 10 A. B. R. 594, 124 Fed. 75, 7 (D. C. Va.), where the allegation that the attachment has not "to this time been discharged" was held insufficient. But it has been held, though upon doubtful ground, that mere garnishment in proceedings in aid of execution in State where the debtor of the judgment debtor is at liberty to discharge his own debt by payment thereof at any time to the judgment creditor of his creditor, is sufficient without the fixing of any date, the law fixing the "final disposition" as any date chosen by such debtor of the judgment debtor. In *re Harper*, 5 A. B. R. 567, 105 Fed. 900 (D. C. Ills.); analogously, In *re Miller*, 5 A. B. R. 14 (D. C. N. Y.). But such holding would seem to make the issuance of an execution on a judgment equally an act of bankruptcy, in States where the debtor of the judgment debtor is at liberty likewise to apply his debt on the execution, without the institution of proceedings in aid of execution.

^{82.} In *re Doddy, Jordan & Co.*, 11 A. B. R. 344, 127 Fed. 771 (D. C. Penn.).

^{83.} But compare obiter, in syllabus, *White v. Bradley Timber Co.*, 9 A. B. R. 441, 121 Fed. 779, affirming 119 Fed. 989 (D. C. Ala.).

That there was no defense to the justness of the claim, upon which the levy was made is no excuse.⁸⁴ But there is no legal obligation upon an insolvent debtor to have himself adjudged a bankrupt.⁸⁵

A corporation cannot avoid the effect of having committed this act of bankruptcy, by subsequently going into liquidation, by proceedings for dissolution.⁸⁶

§ 143. Lien Must Have Been Obtained within Four Months—Mere Enforcement of Lien Obtained before, Insufficient.—The lien must have been obtained within the four months preceding the filing of the bankruptcy petition.⁸⁷

Owen v. Brown, 9 A. B. R. 717, 120 Fed. 812 (C. C. A. Colo.): "The contention of the appellants is that the judgment creditor obtained a preference and the act of bankruptcy was committed when the defendant's real estate was sold on execution, without regard to the date of the judgment on which the execution was issued, and regardless of the fact that the judgment was a lien on the real estate of the defendant sold on the execution from the date of its rendition. * * * This contention finds no support in the Bankrupt Act or on principle * * *.

"The 'preference through legal proceedings' mentioned in subd. 3 is a preference obtained by such means within four months next preceding the filing of the petition in bankruptcy.

"Neither the third subdivision of § 3a, nor any other provision of the Bankrupt Act, contemplates that valid judgment liens on real property acquired before the passage of the act, or more than four months before the filing of the petition in bankruptcy, shall be vacated; or that the due enforcement of such liens by execution shall constitute an illegal preference, which would be exactly tantamount to vacating or annulling the lien itself."

In *re. Ferguson*, 2 A. B. R. 586, 95 Fed. 429 (D. C. N. Y.) an execution

* 84. *Scheuer v. Book Co., etc.*, 7 A. B. R. 384, 112 Fed. 407 (C. C. A. Ala.).

85. *Spike & Iron Co. v. Allen*, 17 A. B. R. 583, 148 Fed. 657 (C. C. A. Va.); *Summers v. Abbott*, 10 A. B. R. 254, 122 Fed. 36 (C. C. A. Mo.); (1867) *Wilson v. City Bk.*, 17 Wall. 473.

86. In *re Storm*, 4 A. B. R. 601, 103 Fed. 618 (D. C. N. Y.). Compare, *White Mountain Paper Co. v. Morse*, 11 A. B. R. 632, 127 Fed. 180 (C. C. A. N. Y.). **The lien must have been obtained after the passage of the Bankruptcy Act;** the statute is not retroactive. *Owen v. Brown*, 9 A. B. R. 717, 120 Fed. 812 (C. C. A. Colo.). Perhaps in point In *re Chapman*, 3 A. B. R. 607, 99 Fed. 395 (D. C. Ga.).

87. Inferentially, In *re Chapman*, 3 A. B. R. 607, 99 Fed. 395 (D. C. Ga.). Inferentially, In *re Meyers*, 1 A. B. R. 1 (Ref. N. Y.). Inferentially, *Metcall v. Barker*, 9 A. B. R. 36, 187 U. S. 165. Contra, and that the four months' time dates from the five days before the sale or proposed sale. *Parmenter Mfg. Co. v. Stoever*, 3 A. B. R. 220, 97 Fed. 330 (C. C. A. Mass.). This case it was sought to distinguish in *re Chapman*, 3 A. B. R. 611. Also, In *re Hotel & Cafe Co.*, 15 A. B. R. 288, 129 Fed. 533 (C. C. A. Ohio). But, if the date set for the sale is more than four months and five days from the obtaining of the lien, the question arises, whether a bankruptcy petition would lie? It would seem the levy must have occurred within the four months and the proposed sale must have occurred within the four months and five days of the filing of the petition; it might be easy to avoid this act of bankruptcy by having the date for the sale set later.

levied within four months, approved in *In re Chapman*, 3 A. B. R. 607, 99 Fed. 395 (D. C. Ga.): "The act of bankruptcy referred to in subd. 3, cl. a, § 3, must, I think, be limited to such acts as by construction of law and in the view of the Bankruptcy Act, work an injury to other creditors by securing to them a preference which the Bankruptcy Law is designed to prevent. The language of this subdivision shows this intent. This cannot apply, therefore, to such levies and liens as are acquired long prior to the passage of the act, and more than four months prior to the petition, which the Bankrupt Act does not vacate or disallow. Such a lien the debtor cannot be required to satisfy or vacate."

Compare, *In re Vetterman*, 14 A. B. R. 245, 246, 135 Fed. 443 (D. C. N. H.): "This decision in no way touches the question whether an attaching creditor acquires a valid lien, whose attachment is more than four months old when that part of clause 3 relating to the sale and the 'five days before' operates upon the situation."

But the mere enforcement, within the four months period, of a lien obtained before the four months period, is valid and unaffected.⁸⁸

In re Chapman, 3 A. B. R. 607, 99 Fed. 395 (D. C. Ga.), quoted, ante, § 138. Apparently, contra, *Parmenter Mfg. Co. v. Stoeve*, 3 A. B. R. 220, 97 Fed. 330 (C. C. A. Mass.): "The act of bankruptcy dating from the sale or from the five days anterior to the sale and not from the date of the attachment."

And this is so even where a general judgment also was obtained, and the creditor is seeking to enforce the general judgment against the particular property on which he has the contract lien.⁸⁹

DIVISION 4.

FOURTH CLASS OF ACTS OF BANKRUPTCY—ASSIGNMENTS AND RECEIVERSHIPS.

§ 144. **No Implication of Fraud in Fourth Act.**—As to acts of bankruptcy embraced within the fourth class, namely, the debtor's making of a general assignment for the benefit of his creditors, or being insolvent, his applying for a receiver or trustee for his property, or because of his insolvency, the putting of a receiver or trustee in charge of his property under the laws of a State, Territory or of the United States, it may also be said that there can be no implication of fraud on the debtor's part from these acts alone and unaccompanied with any artifice or design, for these acts at worst are merely constructively fraudulent.

Randolph v. Scruggs, 190 U. S. 533, 10 A. B. R. 1: "The assignment was not illegal. It was permitted by the law of the State, and cannot be taken to have been prohibited by the bankruptcy law absolutely, in every event, whether proceedings were instituted or not. * * * It had no general fraudulent intent."

⁸⁸. *Owen v. Brown*, 9 A. B. R. 717, 120 Fed. 812 (C. C. A. Colo.). Compare, *In re Vetterman*, 14 A. B. R. 245, 135 Fed. 443 (D. C. N. H.). Also, see post, § 184. Also, see correlative subject, post, § 1444; et seq.

⁸⁹. *In re Chapman*, 3 A. B. R. 607, 99 Fed. 395 (D. C. Ga.).

Summers v. Abbott, 10 A. B. R. 254, 122 Fed. 36 (C. C. A. Mo.): "The deed of assignment covered all the property of the bankrupts. It was honestly made for the laudable purpose of applying all the property of the debtors to the payment, ratably, of all their debts. This is conceded. No claim is made that there was a secret trust reserved for the grantors' benefit, or that there was otherwise any fraud in fact in the execution and delivery of the deed. It was not made to hinder, delay, or defraud creditors, but to pay creditors. Fraud cannot be predicated of such a deed. It constituted an act of bankruptcy, which entitled the debtors' creditors, if they saw proper to do so, to have the administration of the trust transferred from the assignee to the bankrupt court, but this is no impeachment of the honesty of the transaction; and the debtors, when adjudged bankrupts, would be entitled to their discharge, precisely as though they had made no such assignment. It is also admitted that the appellant, who was named in the deed as assignee, accepted the trust in good faith, and for the purpose of executing it according to law and the terms of the deed; and that he did execute it intelligently, successfully, and honestly, is conceded. Neither fraud in fact nor in law can be imputed to such an assignee. The contention of the trustee in bankruptcy is that all assignments for the benefit of creditors since the passage of the Bankrupt Act are fraudulent, and that every assignee under such a deed is a fraudulent vendee or assignee, and hence entitled to no compensation for his services. This contention is probably grounded on the assumption that it is the legal duty of an insolvent debtor who wants to apply his property to the payment of his debts to apply to the bankrupt court to be adjudged a bankrupt, and then turn his property over to the trustee of his estate in bankruptcy. But neither in the present nor any previous Bankrupt Law this country has ever had will there be found any provision making it obligatory upon a debtor to go into court and have himself adjudged a bankrupt. The Bankrupt Act declares the making of 'a general assignment for the benefit of his creditors' shall constitute an act of bankruptcy, but it nowhere declares that when the debtor has committed an act of bankruptcy he shall go into the bankrupt court and have himself adjudged a bankrupt. Many debtors who commit acts of bankruptcy struggle on and finally pay all the debts they owe, which is much more than would have been done had they gone into the bankrupt court and had themselves adjudged bankrupts. It is open to the creditors of one who has committed an act of bankruptcy to proceed to have him adjudged a bankrupt, but it is optional and not obligatory upon his creditors to do this. As a matter of fact, thousands of debtors commit acts of bankruptcy who are never adjudged bankrupts; their creditors preferring to let their debtor administer his own estate, rather than turn it over to a bankrupt court."

Indeed, these are the only ways in which a corporation under the present statute is permitted to go into court at all of its own initiative to effect a fair distribution of its assets.

It will have been observed that there are three distinct acts embraced within this class. Their consideration will now be taken up in their order.

SUBDIVISION "A".

GENERAL ASSIGNMENTS.

§ 145. **General Assignment, Act of Bankruptcy.**—A general assignment for the benefit of creditors is an act of bankruptcy.⁹⁰

§ 146. **Assignment Must Be General.**—The assignment must be a general assignment. Thus, a direct transfer to creditors without the intervention of an assignee or trustee is not a general assignment for the benefit of creditors within the meaning of the Act.⁹¹ But it need not be by a formal deed of assignment.⁹² Thus, the confessing of judgment to one as trustee for all creditors is, in effect, an assignment for the general benefit of all creditors under the laws of Pennsylvania, and is an act of bankruptcy.⁹³ And if the transaction be such as, by the law of the State, would be held to be a general assignment, it will be an act of bankruptcy.⁹⁴

But receiverships, etc., are not to be considered as coming under this head, although they may operate, in effect, like general assignment.⁹⁵

§ 147. **Insolvency Not Requisite in Chief, Nor Competent as Defense.**—It is not necessary to prove the debtor was insolvent; the assignment itself is enough.⁹⁶

West Co. v. Lea, 2 A. B. R. 463, 174 U. S. 590, affirming *Lea Bros. v. West*, 1 A. B. R. 261, 91 Fed. 237: "The mere statement in the statute, by way of recital, that a petition may be filed 'against a person who is insolvent and who has committed an act of bankruptcy,' was not designed to superadd a further requirement to those contained in paragraph (a), § 3, as to what should constitute acts of bankruptcy. This reasoning also answers the argument based on the fact that the rules in bankruptcy promulgated by this court provide in general terms for an allegation of insolvency in the petition and a denial of such allegation in the answer. These rules were but intended to

90. *Bankr. Act*, § 3 (a) (4); *Clark v. Mfg. & Enamel Co.*, 4 A. B. R. 351, 101 Fed. 962 (C. C. A. W. Va.); *West Co. v. Lea Bros.*, 2 A. B. R. 463, 174 U. S. 590, affirming *Lea Bros. v. West*, 1 A. B. R. 261, 91 Fed. 237; *In re Romanow*, 1 A. B. R. 461, 92 Fed. 510 (D. C. Mass.). For other instances and various applications, see citations under succeeding propositions. That such assignments are voidable by the trustee, see post, §§ 1440 and 1604. *In re Hirose*, 12 A. B. R. 154 (D. C. Hawaii).

91. *Obiter*, *Iron and Supply Co. v. Rolling Mill Co.*, 11 A. B. R. 200, 125 Fed. 974 (D. C. Ala., citing *May & Tenney*, 148 U. S. 66, and *Davis v. Schwartz*, 155 U. S. 631).

92. *In re Salmon & Salmon*, 16 A. B. R. 122, 143 Fed. 395 (D. C. Mo.).

93. *In re Green & Rogers*, 5 A. B. R. 848 (D. C. Penna.).

94. *In re Salmon & Salmon*, 16 A. B. R. 122, 143 Fed. 395 (D. C. Mo.).

95. See post, subd. B, § 150. Compare, *Rumsey v. Novelty Mfg. Co.*, 3 A. B. R. 704 (D. C. Mo.). The court held this transaction not to be the equivalent of an assignment, but to be "in fraud of the Bankruptcy Act." But "Fraud on the Bankruptcy Act" is not an act of bankruptcy unless it amounts to a common law hindering, delaying or defrauding of creditors or to one of the other acts mentioned.

96. *Leidigh Carriage Co. v. Stengel*, 2 A. B. R. 383, 95 Fed. 645 (C. C. A. Ohio); *Clark v. Am. Mfg. & Enamel Co.*, 4 A. B. R. 351, 101 Fed. 962 (C. C. A. W. Va.); *Salmon & Salmon*, 16 A. B. R. 122, 143 Fed. 395 (D. C. Mo.).

execute the act, and not to add to its provisions by making that which the statute treats in some cases as immaterial a material fact in every case. Therefore, though the rules and forms in bankruptcy provide for an issue as to solvency in cases of involuntary bankruptcy, where by the statute such issue becomes irrelevant, because the particular act relied on, in a given case, conclusively imports a right to the adjudication in bankruptcy if the act be established, the allegation of insolvency in the petition becomes superfluous, or if made need not be traversed.

"Our conclusion, then, is that, as a deed of general assignment for the benefit of creditors is made by the Bankruptcy Act alone sufficient to justify an adjudication in involuntary bankruptcy against the debtor making such deed, without reference to his solvency at the time of the filing of the petition, that the denial of insolvency by way of defense to a petition based upon the making of a deed of general assignment is not warranted by the Bankruptcy Law; and, therefore, that the question certified must be answered in the negative."

Day v. Hardware Co., 8 A. B. R. 175, 114 Fed. 834 (C. C. A. Ala.): "It is not necessary to allege or prove that the defendant is insolvent."

And the debtor will not even be permitted to defend on the ground that he is willing and able to prove affirmatively that he is solvent.⁹⁷

§ 148. Intent to Defraud Not Requisite.—It is not necessary to prove intent to defraud creditors.⁹⁸

§ 149. Assignment Need Not Work Preference.—Nor is it necessary to prove that the operation of the assignment would be to prefer some creditors over others, contrary to the distribution prescribed by the bankruptcy statute.

Here it is to be noted that, although under the old law of 1867 assignments for the benefit of creditors were not expressly made acts of bankruptcy, yet they were held to be acts of bankruptcy under another provision of law, namely, as being intended to interfere with the operation of the bankruptcy law.⁹⁹

West Co. v. Lea, 2 A. B. R. 463, 174 U. S. 590, affirming *Lea Bros. v. West*, 1 A. B. R. 261, 91 Fed. 237: "Under the English bankruptcy statutes (as well that of 1869 as those upon which our earlier acts were modeled), and our own bankruptcy statutes down to and including the Act of 1867, the making of a deed of general assignment was deemed to be repugnant to the policy of

⁹⁷ *West Co. v. Lea Bros.*, 2 A. B. R. 463, 174 U. S. 590, affirming *Lea Bros. v. West*, 1 A. B. R. 261, 91 Fed. 237; *Bank v. Craig Bros.*, 6 A. B. R. 381, 110 Fed. 137 (D. C. Ky.); *Day v. Beck & Gregg Hdw. Co.*, 8 A. B. R. 175, 114 Fed. 834 (C. C. A. Ala.); *Bray v. Cobb*, 1 A. B. R. 153 (D. C. N. C.).

⁹⁸ But for cases holding that such assignments in and of themselves do operate to hinder, delay and defraud, see *In re Salmon & Salmon*, 16 A. B. R. 122, 143 Fed. 395 (D. C. Mo.); *Rumsey v. Machine Co.*, 3 A. B. R. 704, 99 Fed. 699 (D. C. Mo.).

⁹⁹ (1867) *In re Kasson*, 18 Nat. Bank Reg. 379; (1867) *Globe Ins. Co. v. Cleveland Ins. Co.*, 14 Nat. Bank Reg. 311, 10 Fed. Cas. 488; (1867) *In re Beisen-thal*, 14 Blatchf. 146; (1867) *Reed v. McIntyre*, 98 U. S. 513; (1867) *Boese v. King*, 108 U. S. 385.

the bankruptcy laws, and, as a necessary consequence, constituted an act of bankruptcy per se. This is shown by an examination of the decisions bearing upon the point, both English and American. * * * Neither, however, the Act of 1867, nor the amendments to it, contained an express provision that a deed of general assignment should be a conclusive act of bankruptcy. Such consequence was held to arise, from a deed of that description, as a legal result of the clause, in the Act of 1867, forbidding assignments with 'intent to delay, defraud, or hinder' creditors, and from the provision avoiding certain acts done to delay, defeat, or hinder the execution of the act. Rev. Stat. 5021, pars. 4, 7. Now, when it is considered that the present law, although it only retained some of the provisions of the Act of 1867, contains an express declaration that a deed of general assignment shall authorize the involuntary bankruptcy of the debtor making such a deed, all doubt as to the scope and intent of the law is removed."

Likewise in England.¹⁰⁰

SUBDIVISION "B".

RECEIVERSHIPS AND TRUSTEESHIPS

§ 150. Receivership Not Considered "Equivalent" of General Assignment.—In the present statute there was originally only this one act, the making of a general assignment for the benefit of creditors, enumerated under class 4; and there was no provision whatsoever in the law making receiverships acts of bankruptcy. Accordingly, litigants who did not wish to conduct the administration of an insolvent estate in the bankruptcy courts soon learned to have receivers appointed and thus to evade the bankruptcy court. Attempt was then made to have these receiverships declared to be acts of bankruptcy as being the "equivalent" of general assignments, as being in reality disguised assignments. This construction was frowned upon and declared improper and a torturing of plain words.¹⁰¹

Vaccaro v. Security Bk., 4 A. B. R. 474, 103 Fed. 436 (C. C. A. Tenn.): "A general assignment is the voluntary act of the debtor, whereby he transfers his property to a trustee for the benefit of creditors. Its nature and characteristics were well understood. It is not enough to say that if the same consequences ensue from the appointment of a receiver that the one act is

100. *Globe Ins. Co. v. Cleveland Ins. Co.*, 14 Nat. Bank Reg. 311; *West Co. v. Lea*, 2 A. B. R. 463, 174 U. S. 590, affirming *Lea Bros. v. West*, 1 A. B. R. 261, 91 Fed. 237.

101. *In re Empire Metallic Bedstead Co.*, 3 A. B. R. 575, 98 Fed. 981 (C. C. A. N. Y.), affirming 2 A. B. R. 329, reversing 1 A. B. R. 136; *In re Spalding*, 14 A. B. R. 131, 137 Fed. 1020 (C. C. A. N. Y.).

See also, *In re Gilbert*, 8 A. B. R. 101 (D. C. Ore.), in which case the facts were briefly these: an unfriendly suit pending against a bankrupt partnership; a stipulation therein made by one partner that a receiver might be appointed to wind up the partnership and pay creditors, and a subsequent transfer to the receiver; held, not an act of bankruptcy and not the equivalent of a general assignment.

Davis v. Stevens, 4 A. B. R. 763, 104 Fed. 235 (D. C. S. Dak.). Compare, analogously, to same effect, *Merry v. Jones*, 11 A. B. R. 625 (Sup. Ct. Ga.). Compare, analogously, to same effect, *Ex rel Strohl v. Sup. Ct. Kings Co.*, 2 A. B. R. 92 (Sup. Ct. Wash.). Compare, to same effect, *In re Baker-Ricketson Co.*, 4 A. B. R. 605, 97 Fed. 489 (D. C. Mass.).

the equivalent of the other in law. Under § 3 of the Bankrupt Act very serious consequences attach to the making of a 'general assignment.' The debtor may be ever so solvent and the act highly advantageous to his creditors, still it is technically an act of bankruptcy, and some creditors are quite likely to imagine that some advantage will accrue by an adjudication in bankruptcy.

"We are not disposed to construe the provisions of the fourth subdivision of § 3 as including anything as a general assignment unless it is clearly one of those assignments known to the common law as a general assignment.

"The mere fact that the consequences which attach to the appointment of a receiver for the purpose of winding up a partnership or a corporation are similar to those which result to creditors from a general assignment is not enough.

"If the procurement of the appointment of a receiver to wind up the affairs of an insolvent partnership be an act of bankruptcy at all, it must come under some other of the subdivisions of section 3. What we here decide is, that it is not a 'general assignment' under that section."

But it was intimated in some of the decisions that had the claim been placed on the ground that the receivership amounted to a transfer of property with intent to hinder creditors, a different conclusion might have been arrived at.¹⁰² Yet, even on this ground it was held not to be an act of bankruptcy.¹⁰³

Nevertheless, even before the amendment of 1903, receiverships were held to operate as acts of bankruptcy in certain instances, where their effect was to create liens by legal proceedings or preferences in favor of workmen or operatives under State law.¹⁰⁴ But this ground could not be urged where no showing was made that such priorities would be created in the particular case in hand.¹⁰⁵ And where the receivership was one for the dissolution of a corporation, but was procured in order to cover preferences suffered by legal proceedings in favor of certain creditors, it was held to be an act of bankruptcy;¹⁰⁶ but not where it was for dissolution of a corporation and was not a mere subterfuge.¹⁰⁷

102. See *In re Empire Metallic Bedstead Co.*, 3 A. B. R. 575, 98 Fed. 981 (C. C. A. N. Y., affirming 2 A. B. R. 329, reversing 1 A. B. R. 136).

103. *In re Burrell & Corr*, 9 A. B. R. 178, 123 Fed. 414 (D. C. N. Y., affirmed by Circuit Court of Appeals, 9 A. B. R. 625); *In re Wilmington Hosiery Co.*, 9 A. B. R. 581, 120 Fed. 179 (D. C. Del.); *In re Baker-Ricketson Co.*, 4 A. B. R. 605, 97 Fed. 489 (D. C. Mass.); *In re Zeitner Brew. Co.*, 9 A. B. R. 63, 117 Fed. 799 (D. C. N. Y.).

104. See *Mather v. Coe*, 92 Fed. 333, 1 A. B. R. 504 (D. C. Ohio). This was doubtful law in view of the fact that such priorities would be recognized in the bankruptcy distribution itself under Bankr. Act, § 64 (b) (5) as a priority given by State law, under the doctrine of the case in *In re Laird*, 6 A. B. R. 1, 109 Fed. 550 (C. C. A. Ohio).

105. *In re Baker-Ricketson Co.*, 4 A. B. R. 605, 97 Fed. 489 (D. C. Mass.).

106. *Scheuer v. Book Co.*, 7 A. B. R. 384, 112 Fed. 407 (C. C. A. Ala.). Compare, analogously, *In re Storm*, 4 A. B. R. 601, 103 Fed. 618 (D. C. N. Y.).

107. *In re Empire Metallic Bedstead Co.*, 3 A. B. R. 575, 98 Fed. 981 (C. C. A. N. Y., affirming 2 A. B. R. 329, and reversing 1 A. B. R. 136). Receiverships before amendment of 1903 made them acts of bankruptcy, were held to be such acts in *Scheuer v. Book Co.*, 7 A. B. R. 384, 112 Fed. 407 (C. C. A. Ala.). In this case the receivership was not squarely held to be the act of bankruptcy, but the act of bankruptcy was the suffering of certain preferential levies and pay-

However that may be, the difficulty was obviated by the amendment of 1903, by which the ground of receivership or trusteeship was added.

§ 151. Receiverships and Trusteeships as Acts of Bankruptcy.—So now, secondly, for a debtor, being insolvent, to apply for a receiver or trustee of his property, or, because of insolvency, to have a receiver or trustee put in charge of it, is an act of bankruptcy.¹⁰⁸

Obiter, Lowenstein v. Henry McShane Mfg. Co., 12 A. B. R. 604, 130 Fed. 1007 (D. C. Md.): "I have not considered that question, as I am of opinion that in the creditors' bill in the State court praying the appointment of receivers upon the allegation that the corporation was unable to pay its debts, and was in fact insolvent, and the answer of the corporation admitting the facts alleged in the bill, and consenting to the relief prayed, and the action of the court in granting the relief prayed and appointing receivers, who have been ever since in charge, constitutes the condition of affairs intended to be covered by the amendment of 1903, the words of which are 'or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a State,' etc."

§ 152. As to Receiverships Applied for by Debtor—Debtor Must Have Applied Therefor.—When the act alleged is the debtor's application for a receiver, it will be necessary for the petitioning creditors to prove that the debtor himself made the application.¹⁰⁹

§ 153. Debtor to Be Insolvent at Time of Application and Insolvent According to Bankruptcy Definition.—And it must be proved

ments and the subsequent receivership was held, to be a mere cover or subterfuge. Held, not to be acts of bankruptcy: *In re Empire Metallic Bedstead Co.*, 2 A. B. R. 329, 98 Fed. 981 (D. C. N. Y., affirmed in 3 A. B. R. 575); *In re Harper & Bros.*, 3 A. B. R. 804, 100 Fed. 266 (D. C. N. Y.). Collusive receivership with nothing done by the receiver, *Blue Mtn., etc., v. Portner*, 12 A. B. R. 559, 131 Fed. 57 (C. C. A. Md.). Receivership amounting to insolvency proceedings, but apparently merely incidental to foreclosure of liens, *Singer v. Nat'l Bedstead Mfg. Co.*, 11 A. B. R. 276 (N. J. Ct. Ch.). See interesting discussion, *obiter* (couched in a somewhat hostile tone, towards the entire law, however), in *Singer v. Nat'l Bedstead Mfg. Co.*, 11 A. B. R. 287 (Ch. N. J.).

Receivership Amendment Not Retroactive.—This amendment is not retroactive so as to make an act of bankruptcy out of a receivership created before the amendment, even if the petition in bankruptcy was not filed until afterwards. See *Seaboard Steel Casting Co. v. Trigg*, 10 A. B. R. 594, 124 Fed. 75 (D. C. Va.). But if the receivership were applied for after the amendment, although the suit in which the receiver was appointed was started before the amendment, nevertheless it is an act of bankruptcy. *In re Edw. G. Milbury Co.*, 11 A. B. R. 523 (D. C. N. Y.).

^{108.} *Bankr. Act*, § 3 (a) (4); *In re Bennett Shoe Co.*, 15 A. B. R. 497, 140 Fed. 687 (D. C. Conn.); *In re Hercules Atkin Co.*, 13 A. B. R. 369, 133 Fed. 813 (D. C. Pa.); *In re Spalding*, 14 A. B. R. 129, 139 Fed. 244 (C. C. A. N. Y.). See Master's Report, *In re Douglass Coal & Coke Co.*, 12 A. B. R. 543, 131 Fed. 244 (Tenn.). See Master's Report, *In re International Mercantile Agency*, 13 A. B. R. 725 (D. C. N. J.); *In re Beatty*, 17 A. B. R. 739 (C. C. A. Mass.). Instance, *In re Edw. G. Milbury Co., Ltd.*, 11 A. B. R. 523 (D. C. N. Y.), where the receiver was appointed in an action under the State statute to dissolve the corporation.

^{109.} *Obiter, In re Spalding*, 14 A. B. R. 129, 139 Fed. 244 (C. C. A. N. Y.), quoted, *post*, § 159.

that the debtor was insolvent at the time he made the application.¹¹⁰ This insolvency must be insolvency according to the bankruptcy definition; namely, that the debtor's property is not sufficient even at a fair valuation to equal his liabilities; and it will not do simply to prove that he is insolvent within the usual meaning of the term, namely, unable to pay his debts as they mature in the usual course of business.¹¹¹

§ 154. And Burden of Proof of Insolvency Not Shifted by Debtor's Failure to Produce Books and Appear for Examination at Trial.—Moreover, this proof probably must be affirmatively made by the creditors without the aid of the provisions of the later clause of this section prescribing that the burden of proof of solvency shall rest on the debtor in certain cases and in other cases that he must attend court with all his books and papers, on failure to do which the petitioning creditors will be relieved of proof of insolvency and the burden of proving solvency will shift to the debtor. This later clause was not amended to include the amended part of acts of bankruptcy and probably, therefore, the burden of proof of the insolvency will rest on the creditor without aid therefrom.

§ 155. As to Receiverships "Because of Insolvency"—Actual Insolvency Not Requisite.—On the other hand it will be observed, that where the act complained of as ground of bankruptcy is the putting of a receiver in charge because of insolvency, all that is necessary to be proved is that a receiver was put in charge of the property on the ground of insolvency, no matter whether the debtor actually was insolvent or not.¹¹²

§ 156. And "Insolvency" Alleged Need Not Be Insolvency According to Bankruptcy Definition.—And no matter what definition may have been given to the word insolvency by the court appointing the receiver.¹¹³

§ 157. But "Insolvency" Must Be Ground for Receivership by State Law, and Appointment Based on That Ground.—But if the receiver is put in charge "because of insolvency" under a

110. *Obiter*, In re Spalding, 14 A. B. R. 129, 139 Fed. 244 (C. C. A. N. Y., reversing 13 A. B. R. 223), quoted post, § 159. Compare, In re Douglass Coal & Coke Co., 12 A. B. R. 545, 546, 131 Fed. 769 (Tenn.).

111. In re Douglass Coal & Coke Co., 12 A. B. R. 545, 546, 131 Fed. 769 (Tenn.).

Insolvency—A Question for Jury.—The question of insolvency is one for the jury. *Blue Mtn., etc., v. Portner*, 12 A. B. R. 559, 131 Fed. 57 (C. C. A. Md.).

112. In re Spalding, 14 A. B. R. 129, 139 Fed. 244 (C. C. A. N. Y.). Also, see Master's Report, In re Douglass Coal & Coke Co., 12 A. B. R. 545, 546, 131 Fed. 769 (Tenn.).

113. See Master's Report, In re Douglass Coal & Coke Co., 12 A. B. R. 545, 546, 131 Fed. 769.

statutory provision, such statutory provision must provide insolvency as one of the grounds for receivership. Merely that the application alleges insolvency and the court finds insolvency will not suffice if "insolvency" is not a ground for receivership under the law of the State whose court appoints the receiver.

In *re Spalding*, 14 A. B. R. 129, 139 Fed. 245 (C. C. A. N. Y., reversing 13 A. B. R. 223): "Inasmuch as in the present case the receiver was not appointed upon the application of Spalding, it is immaterial whether Spalding was at the time insolvent. It is also immaterial that the plaintiff in the action may have alleged as one of the evidential facts of fraud that Spalding was insolvent. It suffices that the court in exercising its authority did not purport to do so upon that ground, and that the order appointing the receiver and reciting the grounds for the action of the court is conclusive to the contrary. The receiver was appointed because the court found that Spalding had disposed and was threatening to dispose of his property with intent to defraud the plaintiff in the action and other creditors, and assigned this as the only ground for its action in putting a receiver in charge of his property."

Likewise, mere temporary receivers appointed to preserve the property until the statutory inquiry to determine insolvency can be made, will not suffice.

Zugalla v. Mercantile Agency, 16 A. B. R. 75 (C. C. A. N. J.): "It will be observed that the New Jersey statute, under which this proceeding was begun, authorizes the issue of an injunction only after the court has, upon due notice, instituted an inquiry and heard proofs and allegations to satisfy itself 'that the corporation has become insolvent and is not about to resume its business in a short time,' etc. It is also to be observed that under this statute, receivers can be appointed only at the time of the issuing of the injunction, or at some time thereafter. It follows, therefore, that the receivers, with the drastic powers and authority conferred by the statute, can only be appointed after a judicial determination of the insolvency of the corporation
* * *

"It is manifest that the restraining order and the appointment of a receiver, covered by this order, are not the injunction and appointment of a receiver contemplated by the statute, after a judicial inquiry as to the alleged statutory insolvency of the corporation. The order was evidently made under the general equity powers of the Court of Chancery, and not under statutory authority. It was made, both as a restraining order and as an appointment of a receiver, to preserve in statu quo the property and assets of the corporation, in the custody of an officer of the court, until action could be taken under the statute, and the judicial inquiry contemplated by the statute and provided for in the preliminary order itself, with due notice to all parties in interest, had been completed."

§ 158. And Ground of Receivership, as Being "Insolvency" Provable Only by Record, unless Record Silent.—The fact that the receiver was put in charge on the ground of insolvency must be proved by the record of the Court that put him in charge, unless the record is silent.

In *re Spalding*, 14 A. B. R. 129, 139 Fed. 245 (C. C. A. N. Y.): "If the court had merely appointed a receiver without reciting the ground of its judgment, the record could have been referred to, or the grounds shown by

evidence aliunde. *Russell v. Place*, 94 U. S. 608; *Davis v. Brown*, 94 U. S. 428, 429. But having recited the grounds, the recitals cannot be contradicted without impeaching the record, and this is inadmissible. In *re Watts*, 190 U. S. 35, 10 A. B. R. 113."

Blue Mountain Iron & Steel Co. v. Portner, 12 A. B. R. 559, 131 Fed. 57 (C. C. A. Md.): "It does not require argument to sustain the position that the order appointing the receivers being in writing must speak for itself, and no declaration of the judge who signed it can be given grounds on which he entered the order. Public records can neither be explained nor varied by parol testimony. They are conclusive, speak for themselves, and imply absolute verity. * * *

"The best evidence of the appointment of the receivers was the record of the proceedings in equity in the court which made the appointment. It was the basis of the issue, and could have been proved in no other way. The record was competent for this purpose, and no authority is cited holding that the best evidence of a proceeding in a court of equity is not the record of the proceeding."

The papers in the case may not be used to contradict the recitals of the decree.¹¹⁴ But where the decree is silent as to the grounds, the papers in the case may be consulted or evidence aliunde be produced.¹¹⁵ Nor is the testimony of the judge as to the real grounds of the receivership competent.¹¹⁶ The allegation in the pleadings of the ground of the receivership need not allege insolvency in *hæc verbis*; the equivalent words are doubtless sufficient.¹¹⁷ The suit itself need not be brought on the ground of insolvency; it is the appointment of a receiver on that ground that is the act to be alleged.¹¹⁸ Insolvency must be one of the grounds urged and it must be a good ground in the law; but insolvency need not be the sole ground of the appointment; and the statute is to be honestly, practically and fairly construed to effect its object, and not to be strictly construed to defeat it if possible.¹¹⁹

In *re Beatty*, 17 A. B. R. 743, 150 Fed. 293 (C. C. A. Mass.): "As the statutes of bankruptcy are to have an honest and practical interpretation, we are not to inject into what we have quoted therefrom, such phraseology as would require that the cause of the receivership need be solely insolvency. If insolvency, either as a distinct ground of proceeding or as coupled with others, was one of the substantial reasons for the appointment of the receiver, the case would come within the reasonable construction of the statute. The same line of reasoning disposes of a proposition which has been strongly urged on us, to the effect that the Superior Court, under the local rules

114. In *re Spalding*, 14 A. B. R. 129, 139 Fed. 245 (C. C. A. N. Y.), 13 A. B. R. 223 (D. C. N. Y.).

115. Obiter, in *re Spalding*, 14 A. B. R. 129, 139 Fed. 245 (C. C. A. N. Y.); *Russell v. Place*, 94 U. S. 608; *Davis v. Brown*, 94 U. S. 429. Apparently, *Hooks v. Aldridge*, 16 A. B. R. 662, 145 Fed. 865 (C. C. A. Tex.).

116. *Blue Mtn., etc., v. Portner*, 12 A. B. R. 559, 131 Fed. 57 (C. C. A. Md.).
117. Impliedly, *Hooks v. Aldridge*, 16 A. B. R. 662, 145 Fed. 865 (C. C. A. Tex.).

118. In *re Spalding*, 13 A. B. R. 223 (D. C. N. Y.).

119. In *re Spalding*, 13 A. B. R. 223 (D. C. N. Y.). Instance, apparently, *Hooks v. Aldridge*, 16 A. B. R. 662, 145 Fed. 865 (C. C. A. Tex.).

administered in Massachusetts, had no jurisdiction to appoint a receiver on account of insolvency. The Superior Court is a court of general equity jurisdiction; and, if it exceeded its jurisdiction in the particular mentioned, the excess would be of the kind remediable only by appeal, and would not render its proceedings void. Such being the fact, and the statutes of bankruptcy being practical statutes, we have no doubt they are satisfied if the Superior Court did in fact appoint a receiver on the ground of insolvency, either as the sole ground of its proceeding or in a mixed case under the circumstances which we have explained."

The questions whether such receiver was appointed on the ground of insolvency and took charge of the property are for the jury.¹²⁰

§ 159. Receiver Appointed But Not on Ground of Insolvency, Not This Act of Bankruptcy.—If the receivership is applied for by others than the debtor himself and the application therefor is not made on the ground of insolvency, it is not an act of bankruptcy, although the debtor may, in fact, be insolvent.

In re Douglass Coal & Coke Co., 12 A. B. R. 539, 131 Fed. 769 (D. C. Tenn.): "There is no doubt in this case about insolvency being established, in the legal sense; but Congress has used such language as makes it necessary that a receivership in a State court, in order to constitute an act of bankruptcy, must have been established, or the receiver appointed, on the ground of the corporation's insolvency. It is very much open to doubt whether Congress has not here used language which makes necessary a result which Congress itself intended to avoid. Looking to the practical bearing of the question, there is much reason to believe that Congress intended to make the appointment of a receiver in a State court conclusive as a ground of bankruptcy, without requiring this court to inquire into the grounds on which the receivership was created; but the language of the amendatory act is perfectly plain, in requiring that the existence of a receivership in a State Court, in order to be a ground of bankruptcy, must have been on account of the insolvency of the corporation, and this leaves open in any case to inquiry by this court the grounds on which the appointment of a receiver was made, and, if the appointment was made on any other ground than that of insolvency, it does not constitute an act of bankruptcy. Now, in the case here considered, the appointment was on account of breaches of covenants—covenants like the covenant to keep down taxes, and the like—and, although these particular acts or defaults strongly tend to show insolvency, they justify the appointment of a receiver, regardless of insolvency; and it seems that, in form, at least, the receivership was established on the ground of breaches of these covenants."

Thus, the appointment of a receiver over an individual judgment debtor's property, on the creditor's application in a creditor's action to set aside an alleged fraudulent conveyance, the statute of the State, not giving "insolvency" as a ground for the appointment of a receiver over the property of an individual, is not an act of bankruptcy.

¹²⁰ Blue Mtn., etc., v. Portner, 12 A. B. R. 559, 131 Fed. 57 (C. C. A. Md.).

In *re Spalding*, 14 A. B. R. 129, 139 Fed. 245 (C. C. A. N. Y.): "Giving subd. a (4) the construction which its language demands, we are of the opinion that it does not make a receivership an act of bankruptcy unless it was procured upon the application of the insolvent himself and while insolvent, and does not make the putting a receiver in charge of the property of an insolvent an act of bankruptcy unless this was done because of insolvency; and if the latter provision applies to any case where the trustee has not been put in charge pursuant to some statute of the State, or a receiver put in charge by a court acting under statutory authority, it certainly applies only when this has been done because of insolvency. In most of the States statutory provisions exist conferring jurisdiction upon designated courts for the appointment of receivers. The statutes of New York authorize the appointments of receivers of corporations in cases of insolvency, but there is no statute authorizing the appointment by any court of a receiver of the property of an individual merely upon the ground of his insolvency. The appointment in the present case was doubtless made pursuant to section 713 of the Code of Civil Procedure, which authorizes the appointment of a receiver of 'the property which is the subject of the action,' upon the application of a party who establishes an 'apparent right to or interest in the property, where it is in the possession of an adverse party,' and when its custody by a receiver becomes expedient."

"Inasmuch as in the present case the receiver was not appointed upon the application of Spalding, it is immaterial whether Spalding was at the time insolvent. It is also immaterial that the plaintiff in the action may have alleged as one of the evidential facts of fraud that Spalding was insolvent. It suffices that the court in exercising its authority did not purport to do so under that ground, and that the order appointing the receiver and reciting the ground for the action of the court is conclusive to the contrary. The receiver was appointed because the court found that Spalding had disposed and was threatening to dispose of his property with intent to defraud the plaintiff in the action and other creditors, and assigned this as the only ground for its action in putting a receiver in charge of his property."

And where the surviving partner of an insolvent partnership joins with the administrator of the deceased partner in statutory proceedings for the appointment of a receiver in the probate court to wind up insolvent partnerships on the death of a partner, an act of bankruptcy has not been committed.

National Bank v. Arend, 16 A. B. R. 867, 146 Fed. 351 (C. C. A. Ohio): "It is conceded that this was not a case where 'because of insolvency a receiver has been put in charge of property,' because clearly the receiver was not appointed because of insolvency, but because of the death of a partner and to wind up the partnership. * * * But it is submitted that, since the firm and the surviving partner were insolvent and the latter joined in the application, he 'being insolvent applied for a receiver or trustee for his property,' and therefore committed an act of bankruptcy."

"But, as held by the court below, the surviving partner never really applied for a receiver. He had no power under the Ohio statute to apply for a receiver. He had the option of taking the interest of the deceased partner at the appraisalment. He had thirty days in which to exercise this option. He did not want the interest at the appraisalment, so he waived the thirty days and immediately declared his intention of not exercising the

option. When he had done this, he had exhausted the power conferred upon him by the statute. It then became the positive duty of the administrator to apply for the appointment of a receiver to wind up the business."

§ 160. Appointment of Trustee as Act of Bankruptcy Not Necessarily Appointment by Court.—The trustee need not have been put in charge by any court proceedings.¹²¹

Thus, this act of bankruptcy may be committed by the dissolution and winding up of corporations and other companies under statutes without court proceedings.¹²²

And it has been intimated, that a statutory proceeding to wind up an insolvent corporation on petition of creditors, where no receiver nor trustee is expressly designated, but merely the sheriff sells the property and distributes the proceedings among creditors, is this act of bankruptcy.

In *re International Coal Min. Co.*, 16 A. B. R. 311, 143 Fed. 665 (D. C. Pa.): "It is made an act of bankruptcy to put a receiver or trustee in charge of the property of a corporation under State laws by § 3, subd. 4, and the substitution of the sheriff to effect the same result will not defeat the provisions of the act."

"In this proceeding, the property of the insolvent corporation is not placed in the hands of a receiver or trustee by that name, but it is so in effect, because the sheriff, after a sale of the property on execution, is required to distribute the net proceeds among the creditors of the corporation according to the rules established in cases of insolvency of individuals, and the same as a receiver or trustee would have been required to do under the law relating to insolvent debtors in the state." Subsequently, in this case, the corporation committed an additional act of bankruptcy, by admitting, in writing, its insolvency and its willingness to be adjudged bankrupt. See *Coal & Coke Co. v. Stauffer*, 17 A. B. R. 573, 148 Fed. 981 (C. C. A. Pa.).

DIVISION 5.

FIFTH CLASS OF ACTS OF BANKRUPTCY—WRITTEN ADMISSION OF INABILITY TO PAY DEBTS AND WILLINGNESS TO BE ADJUDGED BANKRUPT THEREFOR.

§ 161. Fifth Class of Acts of Bankruptcy.—The debtor commits an act of bankruptcy if he admits in writing his inability to pay his debts and his willingness to be adjudged bankrupt on that ground.¹²³

§ 162. No Fraud Implied.—As to the fifth and last class of acts of bankruptcy, it is also to be said no fraud is implied; the act is wholly innocent. Indeed, nothing shows more clearly than do the last four statutory classes of acts for throwing a debtor into bankruptcy, how different

¹²¹. In *re Hercules Atkin Co.*, 13 A. B. R. 369, 133 Fed. 813 (D. C. Pa.).

¹²². In *re Hercules Atkin Co.*, 13 A. B. R. 369, 133 Fed. 813 (D. C. Pa.); In *re Bennett Shoe Co.*, 15 A. B. R. 497, 140 Fed. 687 (D. C. Conn.)

¹²³. Bankr. Act, § 3 (a) (5).

the theory of bankruptcy law is nowadays from what it was in the time of King Henry VIII, when bankruptcy was felony, or ~~from~~ what it was even as late as King James' times, when it was still a felony and the bankrupt was specifically declared to be a felon by the statute itself, with all that the word felon implied in those days.

§ 163. **Purpose of Act.**—The purpose of creating this act of bankruptcy seems at first hard to discover. It would seem that a debtor who had gone thus far would probably be willing to go further and voluntarily file a petition in bankruptcy, and at much less cost and ceremony, too. Whatever its original purpose may have been, it has come to subserve several most useful purposes; for instance, a corporation, though forbidden to go voluntarily into bankruptcy, may, by this act, admit in writing its inability to pay its debts and its willingness to be adjudged a bankrupt on that ground, and thus be easily adjudged bankrupt. So, in practice, owing to the creation of this act of bankruptcy, the prohibition upon a corporation going voluntarily into bankruptcy amounts merely to this: that it must have the co-operation or consent of some of its creditors.

In *re Moench*, 12 A. B. R. 243, 130 Fed. 685 (C. C. A. N. Y.): "It is no doubt true that by committing either the fourth or fifth acts of bankruptcy, when three creditors stand ready at once to take advantage of it by filing a petition, the corporation achieves the object which the act forbids it to secure by its own voluntary petition, but its doing so is not such a 'fraud upon the act' as to prevent the application of the plain language of the act to the facts presented."

§ 164. **Voluntary Petition Itself a Commission of Fifth Act of Bankruptcy.**—In theory, at least, it is this act of bankruptcy which is committed by every voluntary bankrupt in filing his petition for adjudication, for the petition expressly admits in writing the debtor's inability to pay his debts and his willingness and desire to be adjudged bankrupt because of it.¹²³

National Bk. v. Moyses, 8 A. B. R. 10, 186 U. S. 181: "The petition must state that 'petitioner owes debts which he is unable to pay in full' and that 'he is willing to surrender all his property for the benefit of his creditors, except such as is exempt by law.' This establishes those facts so far as a decree of bankruptcy is concerned, and he has committed an act of bankruptcy in filing the petition."

In *re Forbes*, 11 A. B. R. 791, 128 Fed. 137 (D. C. Mass.): "A voluntary petition is itself treated as an act of bankruptcy."

§ 165. **Admission to Be Unqualified.**—The admission must be unqualified, and must be made before the involuntary petition is filed.

¹²³. *Blake v. Valentine Co.*, 1 A. B. R. 372, 89 Fed. 691 (D. C. Calif.); In *re Fowler*, Fed. Cases, No. 4,998.

In *re Baker-Ricketson Co.*, 4 A. B. R. 606, 97 Fed. 489 (D. C. Mass.): "The vote of the corporation was not an act of bankruptcy, within the meaning of the statute, because it was not in itself a written admission, but merely authorized one of its officers to make that admission if a petition in bankruptcy was filed. This is not such an unqualified admission as is required by the statute. The paper signed by Mr. Ricketson does not support the allegations of the petition. Even if the petition be again amended so as to include his paper, it is hard to see how an admission, made after the petition has been filed, constitutes an act of bankruptcy of which the petitioner can avail himself."

Thus, an answer admitting insolvency, accompanied with a consent to the appointment of a receiver, is not equivalent to a written admission and willingness under this 5th act of bankruptcy.¹²⁴

§ 166. Mere Admission of Insolvency Insufficient.—Mere admission of insolvency, although made in writing, is insufficient. There must be also a written admission of willingness to be adjudged bankrupt on that ground.¹²⁵

In *re Wilmington Hosiery Co.*, 9 A. B. R. 579, 120 Fed. 179 (D. C. Del.): "A written admission of insolvency and consent to have a receiver appointed by the Chancellor cannot be regarded as a written admission of inability to pay debts and willingness to be adjudged bankrupt. No doctrine of equivalency is applicable in this connection." But there was an additional reason in this case, it would seem, namely, that the act was not alleged in the petition nor did it occur before the petition was filed, there being, moreover, no amendment to cover it.

Or perhaps willingness to be adjudged insolvent under the insolvency laws of the state, if they are in effect bankrupt laws.¹²⁶

§ 167. Admissions by Boards of Directors of Corporations.—The decisions seem to be somewhat in conflict as to whether or not it is within the proper function of the board of directors of a corporation to pass a resolution and have the same spread upon its records, admitting the inability of the corporation to pay its debts and its willingness to be adjudged a bankrupt upon that ground. But the true rule seems to be that it is within their power, where it is not forbidden to them by statute, either expressly or by necessary implication, nor by a by-law of the corporation itself.

¹²⁴ In *re Wilmington Hosiery Co.*, 9 A. B. R. 579, 120 Fed. 179 (D. C. Del.). But that the willingness to be adjudged a bankrupt on the ground of insolvency may be inferred from the admission of insolvency contained in the answer, see *Brinkley v. Smithwick*, 11 A. B. R. 500, 126 Fed. 686 (D. C. N. C.).

¹²⁵ Inferentially, obiter, In *re Empire Metallic Bedstead Co.*, 1 A. B. R. 136, 98 Fed. 981 (Ref. N. Y.). This case was reversed, on other grounds, in 2 A. B. R. 329 and 11 A. B. R. 674.

¹²⁶ Compare, inferentially, In *re Storck Lumber Co.*, 8 A. B. R. 86, 114 Fed., 360 (D. C. Md.).

Thus, it is held, that it is within their power, where not forbidden by statute or by-law.¹²⁶

In *re Moench*, 12 A. B. R. 240, 130 Fed. 685 (C. C. A. N. Y.): "There is nothing in the Bankruptcy Act to indicate that the making of a general assignment for the benefit of creditors—which is the fourth of the specified acts of bankruptcy—may not be taken to be an act of bankruptcy when it is made by a corporation, and, if the corporation can commit the one act, there seems no sound reason for holding that it could not commit the other. Where, by statute, the making of such a general assignment is forbidden to a corporation, some question might be raised as to whether the corporation could commit the fifth act; but we need not now pass upon any such question, because since the passage of the Stock Corporation Law of 1890, and the amendments of chapter 688, p. 1824, Laws, 1892, the old prohibition in this State against the making by a corporation of a general assignment for the benefit of creditors has been done away with. * * * It would also seem to be reasonable to hold that the power to make the admission in writing could be exercised by the same officers who have the power to make a general assignment, and, in the absence of the statute or by-law regulating the subject, such power resides in the directors."

And that it is within their power, even where the directors are holding over and are merely *de facto* directors.

In *re Riley, Talbott & Hunt*, 15 A. B. R. 159 (Ref. Mich. affirmed by D. C.): "Where there has been a failure to hold a meeting of stockholders for the purpose of electing directors of a corporation, the previously elected directors hold over and become *de facto* directors whose actions cannot be attacked in a collateral proceeding, and such *de facto* officers have the power at a legally convened meeting to admit in writing the inability of their corporation to pay its debts and its willingness to be adjudged bankrupt under § 3a (5) of the Bankruptcy Act, 1898."

And that the assent of the stockholders is not required.¹²⁷ Also, that it is within their power though three nominal directors were not notified, they being out of the jurisdiction and hostile, prosecuting attachment suits against the corporation.¹²⁸

But it is also held, that it is not within their power where, by the laws

^{126.} *Obiter*, In *re Rollins Gold & Silver Min. Co.*, 4 A. B. R. 327, 102 Fed. 982 (Ref. N. Y.); In *re Moench*, 10 A. B. R. 656, 123 Fed. 965 (D. C. N. Y., affirmed in 12 A. B. R. 240, 130 Fed. 685). Inferentially, In *re Imperial Corp.*, 13 A. B. R. 199, 133 Fed. 73 (D. C. N. Y.).

^{127.} In *re Mutual Mercantile Agency*, 6 A. B. R. 607, 111 Fed. 152, and cases cited therein; In *re Machine & Conveyor Co.*, 91 Fed. 630, 1 A. B. R. 421 (D. C. N. Y.); In *re Kelly Dry Goods Co.*, 4 A. B. R. 528, 102 Fed. 748 (D. C. Wis.). *Obiter*, In *re Rollins Gold & Silver Min. Co.*, 4 A. B. R. 327, 102 Fed. 979, 985. *Obiter*, In *re Peter Paul Book Co.*, 5 A. B. R. 105, 104 Fed. 788 (D. C. N. Y.).

^{128.} In *re Marine Machine & Conveyor Co.*, 91 Fed. 630, 1 A. B. R. 421 (D. C. N. Y.).

of the State, the powers of directors are so defined and limited as necessarily to exclude this power.¹²⁹ And, of course, it is not within the power of the board of directors to make the admission, and their act in so doing cannot be subsequently ratified by stockholders, where the statute permits only stockholders to do such act.¹³⁰

§ 168. Such Written Admissions Not Contrary to Prohibition against Voluntary Bankruptcy of Corporation.—The contention that the passing of such a resolution by the board of directors amounts to the same thing as a voluntary petition, and therefore is within the rule against voluntary bankruptcies by corporations, is held not to be well taken.¹³¹

It is not forbidden even where the directors solicit the creditors to take the action, the creditors being bona fide creditors.¹³² Nor is the bankrupt's solicitation of such action by creditors, such collusion as will defeat adjudication.¹³³

In *re Duplex Radiator Co.*, 15 A. B. R. 324 (D. C. N. Y.): "The mere fact that a corporation admits in writing its inability to pay its debts and its willingness to be adjudged a bankrupt on that ground, and thereupon requests certain creditors to file an involuntary petition, constitutes no ground of defense to the proceedings by a creditor who opposes the adjudication."

Nor does the fact that the property of the corporation has already been sequestrated under state insolvency proceedings, incapacitate the corporation to make such admission subsequently.

Coal & Coke Co. v. Stauffer, 17 A. B. R. 573, 148 Fed. 981 (C. C. A. Pa., affirming *In re International Coal Min. Co.*, 16 A. B. R. 309, 143 Fed. 665): "It is true, that the law already referred to provides that the property and franchises of the corporation, sold under this special fi. fa., shall pass to the purchaser, thus, in effect, terminating the existence of the old corporation. If, however, the proceeding by which this property and franchises were sold,

^{129.} In *re Bates Machine Co.*, 1 A. B. R. 129, 91 Fed. 625 (D. C. Mass., distinguished in *In re Moench*, 12 A. B. R. 242; also, *In re Riley*, 15 A. B. R. 163).

^{130.} In *re Bates Machine Co.*, 1 A. B. R. 129, 91 Fed. 625 (D. C. Mass., distinguished in *In re Moench*, 12 A. B. R. 242; also, in *In re Riley*, 15 A. B. R. 163). To same effect, analogously, *In re Independent Thread Co.*, 7 A. B. R. 704, 113 Fed. 938 (D. C. N. J.).

^{131.} In *re Kelly Dry Goods Co.*, 4 A. B. R. 528, 102 Fed. 748 (D. C. Wis.). Obiter, contra, *In re Bates Machine Co.*, 1 A. B. R. 129, 91 Fed. 625 (D. C. Mass.); *In re Moench*, 12 A. B. R. 242, 130 Fed. 685 (C. C. A. N. Y.), quoted, ante, § 163.

^{132.} In *re Moench*, 10 A. B. R. 656, 130 Fed. 685 (D. C. N. Y., affirmed in 12 A. B. R. 240, 130 Fed. 685). Impliedly, *In re Duplex Radiator Co.*, 15 A. B. R. 324, 142 Fed. 906 (D. C. N. Y.). Contra, obiter, *In re Bates Machine Co.*, 1 A. B. R. 129, 91 Fed. 625 (D. C. Mass.).

^{133.} In *re Moench*, 10 A. B. R. 656, 130 Fed. 685 (D. C. N. Y., affirmed in 12 A. B. R. 240, 130 Fed. 685).

was an act of bankruptcy, it was void and of no effect. If it were not, still the existence of the corporation is not terminated in every respect by this requirement of the State law. It has often been held that, even where a charter expires by time, its existence will be considered as being extended for the purpose of winding up its affairs, securing creditors and satisfying the ends of justice, even without special statutory authority for that purpose, and we think that the paramount authority of the Federal Bankrupt Law is sufficient to keep alive the corporation in this case for the purposes of the bankrupt jurisdiction created by the said act, and to give efficacy to the admission made by the directors of the insolvent corporation as an act of bankruptcy."

§ 169. **Admissions by Partners.**—Again, this fifth class of acts of bankruptcy affords a means for one partner to put the partnership into bankruptcy without the other partner joining; for the written admissions in the petition itself and prayer for adjudication are an act of bankruptcy themselves under this fifth class, and being presumptively made with the consent of the other partners, are binding on the partnership unless expressly repudiated.¹³⁴ And where the other partner afterwards stands by without protest, authority in one partner to make such a written admission will be presumed.¹³⁵ Adjudication may be made against the partners on such admission, both individually and collectively.¹³⁶

§ 170. **Insolvency Not Requisite, nor Is Solvency Competent as Defense.**—It is not necessary to prove the debtor to be in fact insolvent. All that is necessary is to prove that he admitted his inability to pay his debts; that he declared his willingness to be adjudged a bankrupt, the willingness of course being for adjudication on the ground of his inability to pay his debts; and that these admissions and declarations were in writing.

In re Duplex Radiator Co., 15 A. B. R. 324 (D. C. N. Y.): "When the act of bankruptcy alleged is an admission in writing of inability to pay debts and willingness to be adjudged a bankrupt on that ground, the question of insolvency is immaterial."

And evidence of solvency is inadmissible in defense.¹³⁷

^{134.} In re Kersten, 6 A. B. R. 516, 110 Fed. 929 (D. C. Wis.).

^{135.} In re Kersten, 6 A. B. R. 516, 110 Fed. 929 (D. C. Wis.).

^{136.} In re Kersten, 6 A. B. R. 516, 110 Fed. 929 (D. C. Wis.).

^{137.} In re Moench, 12 A. B. R. 240 (C. C. A. N. Y., affirming 10 A. B. R. 656); In re Duplex Radiator Co., 15 A. B. R. 324 (D. C. N. Y.); In re Riley, Talbott, etc., 15 A. B. R. 164 (D. C. Mich.).

DIVISION 6.

GENERAL OBSERVATIONS APPLICABLE TO THE VARIOUS ACTS OF BANKRUPTCY—ACTS COMMITTED IN DIFFERENT CAPACITY—BURDEN OF PROOF OF COMMISSION OF ACT—PROOF OF INSOLVENCY—PROOF OF INTENT—TIME OF COMMISSION OF ACT.

§ 171. Imputed Acts of Bankruptcy—Agents of Corporations and Partners.—The act of bankruptcy may be imputed, but when imputed must be shown to have been committed by the person in a capacity binding the debtor sought to be thrown into bankruptcy.

Thus, corporate and firm acts of bankruptcy must have been committed in the capacity of agent of the corporation or of the firm. In case it is a partnership or corporation that is the defendant, it must be proved that the act was an act of the partnership or of the corporation itself and not merely the individual act of some one connected therewith. The individual must have been acting for the corporation or partnership, in order to bind the corporation or partnership.¹³⁸

Davis v. Stevens, 4 A. B. R. 763, 104 Fed. 235, 242 (D. C. S. Dak.): "The fact that one partner of a copartnership embezzles the funds thereof and absconds and conceals himself constitutes no act of bankruptcy of that copartnership."

Hartman v. Peters, 17 A. B. R. 62 (D. C. Pa.): "This cannot be sustained. The act relied on was individual and single, being simply the conveyance by John Peters of his farm to secure certain of the firm debts. The circumstances attending the transaction, and the parties benefited thereby may justify the conclusion that it was fraudulently intended; or if not that, that it at least effected a preference of the firm creditors secured. But with this the firm itself, so far as appears, had nothing whatever to do; nor had Earl Peters, the other member of it, who could not be affected, nor could his partnership interest, by the separate and distinct act of his copartner, dealing, not with the firm property, but with his own. The petition should have been directed against John Peters, and not, as it is, against the firm; and must therefore be dismissed. There are other questions in the record; but this is decisive, and they will not be considered."

Obiter, Spike & Iron Co. v. Allen, 17 A. B. R. 590, 148 Fed. 657 (C. C. A. Va.): "If the property sold was, as is contended, covered by the deed in trust,

¹³⁸. Instance, *Strellow v. Schloss*, 17 A. B. R. 881, 149 Fed. 907 (D. C. Pa.), department store conducted in manager's name, but manager not real owner. Also, inferentially, *In re Sanderlin*, 6 A. B. R. 384, 109 Fed. 857 (D. C. N. C.). This case was reversed, but upon other grounds, in *McNair v. McIntyre*, 7 A. B. R. 638, 113 Fed. 113 (C. C. A. N. C.). Compare, *In re Wing Yick Co.*, 13 A. B. R. 755 (D. C. Hawaii), in which case the judgment, the failure to vacate which was the act of bankruptcy complained of, did not run against the firm expressly but merely jointly against the individuals, yet shown to be on a firm obligation. Inferentially, *Bank v. Craig Bros.*, 6 A. B. R. 381, 110 Fed. 137 (D. C. Ky.). Compare, inferentially and analogously, *In re Lehigh Lumber Co.*, 4 A. B. R. 221, 101 Fed. 216 (D. C. Pa.). Compare, analogously, *In re Schultze*, 6 A. B. R. 91, 109 Fed. 264 (D. C. N. Y.), where the frauds of one partner towards his copartner as well as towards creditors were held not to be imputable to the partnership.

Warwick, the president, had no right to sell it, and his act was wrongful. There is no evidence that he sold it by authority of the company, or that the company ratified his action; nor are we advised that it was within the scope of the president's power to sell the property which composed the plant and operating machinery of the company. * * * If it be true that Warwick, without authority, disposed of property which was subject to the lien of the bondholders, this would be his act, for which he would be individually liable, but the company cannot be held responsible."

Inferentially, but obiter, *In re Perley & Hays*, 15 A. B. R. 56, 138 Fed. 927 (D. C. Mo.): "That case (*In re Meyers*, 3 A. B. R. 559, 98 Fed. 976) seems to indicate that, in order to put a firm into bankruptcy, the act of bankruptcy complained of must have been committed by the firm."

(1867) *In re Redmond*, Fed. Cas. 11,632, 9 N. B. Reg. 408: "It seems too clear to admit of argument, that in order to maintain proceedings in bankruptcy against partners as such, it must be alleged and proven, that the firm has committed an act of bankruptcy; and that when the act charged is the fraudulent conveyance of property, it must be of partnership property." "A conveyance by one partner of his individual property, although an act of bankruptcy as against him, will not sustain a proceeding in bankruptcy as against the firm, even though such conveyance was made with intent to hinder, delay or defraud firm creditors, or with a view of giving preference to a firm creditor. In such case the proceeding must be against such partner alone."

But a written admission by one partner that the partnership is unable to pay its debts and is willing to be adjudged bankrupt on that ground, has been held to warrant an adjudication both against the firm and its members individually.¹³⁹

Of course the act of a partner whilst engaged in the partnership business, or of an officer of a corporation whilst engaged in the corporate business, would be the act of the partnership and of the corporation respectively; and, indeed, only thus could a partnership or corporation commit an act of bankruptcy. Section 1 of the Statute, which, as we have seen, is taken up with definitions, sets forth in clause 19 that:

"'Persons' shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations."¹⁴⁰

So the act of a partner may be imputed to his partnership where the partner has participated in the partnership act of bankruptcy; but where he was acting solely as an individual, it would be questionable whether the partnership should be charged with the particular act of bankruptcy even

¹³⁹. *In re Kersten*, 6 A. B. R. 516, 110 Fed. 929 (D. C. Wis.). Inferentially, *In re Forbes*, 11 A. B. R. 787, 128 Fed. 137 (D. C. Mass.).

¹⁴⁰. Compare, *U. S. v. Lake*, 12 A. B. R. 270, 129 Fed. 499 (D. C. Ark.). Compare, *In re Meyer*, 3 A. B. R. 559, 98 Fed. 976 (C. C. A.).

though the partner may have been using partnership funds. Thus, where, without the knowledge or connivance of the other partners, one partner converts some of the partnership funds to his own use and absconds, it is not the act of the partnership and the partnership should not be adjudged bankrupt on the allegation that it has removed part of its property with intent to hinder, delay and defraud creditors. Even if it would not be difficult to put such a partnership into bankruptcy on other grounds, this particular act could not be charged against the partnership, because it was not the act of the partnership but of an individual member, acting solely for himself. But if the act be connived at by the other members of the partnership, it would be a partnership act of bankruptcy.¹⁴¹

Likewise, individual members of a partnership may not be adjudicated individually bankrupt along with the partnership unless proof be made of their commission of individual acts of bankruptcy or of their participation as individuals in a firm act.¹⁴²

§ 172. Burden of Proof in Prosecuting Bankruptcy Petition on Creditors.—The burden of proof is on the creditors, except for the contingency provided for in paragraph d, § 3 of the Act.¹⁴³

The petitioning creditors must prove the allegations of their petition, and the burden rests upon them to do so. However, since the meaning of "insolvency" under the Act of 1898 requires proof of the existence and value of the assets and of the amount of liabilities, it would be almost a prohibitory requirement to place upon the petitioning creditors the burden of proof of insolvency, were it not for the right of discovery furnished by § 3 (d), requiring the bankrupt, in cases where the act of bankruptcy involves proof of insolvency, to produce books, documents and papers to explain his business and himself to appear and submit to examination at the time of trial. In thus requiring such production of evidence and testimony at the time of trial, the statute enables the petitioning creditors to maintain the burden of proof of insolvency; so, even as to insolvency, the burden of proof rests on the petitioning creditors, subject to excuse in case the bankrupt fail to comply with the requirements as to discovery.

§ 173. Intent Necessary Only in First Two Acts.—Intent is not a necessary element and need not be proved except in the first two classes of acts of bankruptcy, namely, transfers, concealments and removals of property with intent to hinder, delay or defraud creditors and transfers of property with intent to prefer one creditor over another, as to which acts of bankruptcy proof of the debtors intent is necessary.¹⁴⁴

¹⁴¹. In re Gillette, 5 A. B. R. 119, 104 Fed. 769 (D. C. N. Y.).

¹⁴². See ante, § 64.

¹⁴³. In re Rome Planing Mills, 3 A. B. R. 123, 96 Fed. 812 (D. C. N. Y.).

¹⁴⁴. In re Rome Planing Mills, 3 A. B. R. 123, 96 Fed. 812 (D. C. N. Y.). See ante, §§ 109 and 129.

In the proof of any of the other acts of bankruptcy no regard need be given to the debtor's intent in doing or failing to do the act alleged. And the burden of proof of the intent (where intent must be proved) is on the creditors.¹⁴⁵

§ 174. **Insolvency Requisite in All Instances, Except "Fraudulent Transfers," "Assignments," Receiverships "Because of" Insolvency, and "Written Admissions."**—Insolvency must be proved in all instances except, 1st, where the act complained of is a transfer, removal, etc., with intent to hinder, delay and defraud creditors; or 2d, is a general assignment by the debtor; or 3d, is the putting of a receiver in charge on the ground of insolvency; or, 4th, is the admission in writing of one's inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.¹⁴⁶

^{145.} In re Bloch, 6 A. B. R. 300, 109 Fed. 790 (C. C. A. N. Y.); Merchants' Nat'l Bk. v. Cole, 18 A. B. R. 49, 149 Fed. 708 (C. C. A. Ohio).

^{146.} Insolvency is a question of fact for the jury. In re Blue Mtn., etc., v. Portner, 12 A. B. R. 559 (C. C. A. Mo.). Admissions of insolvency by the bankrupt are competent to prove insolvency; but they must amount to admissions of insolvency as defined by the Bankrupt Act, namely, inadequacy of assets to meet liabilities, and not as meant at Common Law, else they will be insufficient to make complete proof of insolvency. In re Doscher, 9 A. B. R. 555, 120 Fed. 408 (D. C. N. Y.).

Instances of Proof of Insolvency under Petitions for Adjudication.—Offer of thirty cents on dollar as a composition to creditors is sufficient prima facie evidence of insolvency not to be overcome by mere estimates as to the value of his lease, good will and fixtures. In re Lange, 3 A. B. R. 231, 97 Fed. 197 (D. C. N. Y.); McGowan v. Knittel, 15 A. B. R. 1, 134 Fed. 498 (C. C. A. Pa.).

Judgment records not admissible if reopened generally and not specially to let bankrupt make whatever defense he desired. McGowan v. Knittel, 15 A. B. R. 1, 134 Fed. 498 (C. C. A.), reversing Knittel v. McGowan, 14 A. B. R. 209, 134 Fed. 498, D. C. Penn.).

Record of judgment entered more than four months preceding commission of alleged act of bankruptcy admissible, Knittel v. McGowan, 14 A. B. R. 209 (D. C. Penn.), reversed in McGowan v. Knittel, 15 A. B. R. 1, 134 Fed. 498, C. C. A.).

Memorandum from books subsequently produced; witnesses testifying from memoranda taken from books not then, but subsequently produced; the alleged bankrupt is not prejudiced, Knittel v. McGowan, 14 A. B. R. 209 (D. C. Penn., reversed, on other grounds, in McGowan v. Knittel, 15 A. B. R. 1, 134 Fed. 498, C. C. A.).

Claims on unmatured notes are admissible, Knittel v. McGowan, 14 A. B. R. 209 (D. C. Penn., reversed, on other grounds, in McGowan v. Knittel, 15 A. B. R. 1, 134 Fed. 498, C. C. A.).

Oral evidence, to prove bankrupt's reversionary interest in land conveyed, offered by bankrupt, rejected, Knittel v. McGowan, 14 A. B. R. 209 (D. C. Penn., reversed, on other grounds, in McGowan v. Knittel, 15 A. B. R. 1, 134 Fed. 498, C. C. A.).

Expense of preserving the estate pending adjudication of bankruptcy may be proper item of liability. Thus, the amount paid by a receiver to renew a hotel license has been held to be a proper item of liability, Knittel v. McGowan, 14 A. B. R. 209 (D. C. Penn., reversed, on other grounds, in McGowan v. Knittel, 15 A. B. R. 1, 134 Fed. 498, C. C. A.).

An instruction that the bankrupt's liquor license is an asset is not improper. Knittel v. McGowan, 14 A. B. R. 209 (D. C. Penn., reversed, on other grounds, in McGowan v. Knittel, 15 A. B. R. 1, 134 Fed. 498, C. C. A.).

Complaint that findings based on "wrecker's" values, or on "serap values," Motor Vehicle Co. v. Oak Leather Co., 15 A. B. R. 808, 141 Fed. 518 (C. C. A. Ills.).

That is not quite the same as saying that insolvency need not be proved in the first class nor in any of the cases of the fourth class nor in the fifth; for it will be observed that in one instance, in class four, namely, where the debtor himself applies for a receiver, it must be proved that he was in fact insolvent.

Insolvency need not be proved in classes one, four and five; except that, as to class four, in cases of receiverships and trusteeships applied for by the debtor while insolvent, insolvency must be proved.

Whilst insolvency is not a necessary element of the first act of bankruptcy, solvency of the debtor is made by statute a defense to such charge.¹⁴⁶

§ 175. When Creditors to Prove Insolvency in Chief It Must Be Insolvency at Time Act Committed.—The insolvency to be proved, wherever its proof is required to be made by creditors, as part of their case in chief, is insolvency at the time the act was committed.

In *re Rome Planing Mills*, 3 A. B. R. 123, 96 Fed. 812 (D. C. N. Y.): "In order to succeed under this subdivision [subd. 2, § 3a] the petitioners must prove * * * Third, the insolvency of the debtor at the date of the transfer."

But compare, evidently careless statement in syllabus to *Knittel v. McGowan*, 14 A. B. R. 209, 134 Fed. 498 (D. C. Pa.): "The evidence produced to show the indebtedness of an alleged bankrupt must be such as to satisfy the jury of its existence and that it is more than the value of his assets at the time the petition is filed."

§ 176. When Insolvency Not Part of Creditors' Case but Solvency Available as Affirmative Defense, Date of Solvency, Date of Petition.—But in the case of the first class of acts of bankruptcy, namely, transfers and concealments made with intent to hinder, delay and defraud creditors, while insolvency is not an element for the petitioners to prove, yet the statute makes it a complete defense for the debtor or for creditors opposing the petition to allege and prove that the party proceeded against was not insolvent as defined in the Bankruptcy Act, at the time of the filing of the petition against him.¹⁴⁷

§ 177. Insolvency Not Necessary Element of Creditors' Case under First Act, but Solvency Complete Bar, in Defense.—Insolvency need not be shown by the petitioning creditors under Act One of acts of bankruptcy unless so far as it may be involved as an evidential fact in the proof of "fraudulent intent" or "good faith."¹⁴⁸

In *re Pease*, 12 A. B. R. 66, 129 Fed. 446 (D. C. Mich.): "The giving of the mortgage, therefore, was an act of bankruptcy under subd. 1 of § 3 without

¹⁴⁶. See post, § 177.

¹⁴⁷. Bankr. Act, § 3 (1) (c). Also, see *Elliott v. Teoppner*, 9 A. B. R. 50, 187 U. S. 327.

¹⁴⁸. Analogously, compare, *In re Steininger*, 6 A. B. R. 68, 108 Fed. 591 (C. C. A. Ga.).

regard to Pease's financial condition at the time. Insolvency of the debtor is not an element of that subdivision."

Inferentially, *Lansing Boiler Works v. Ryerson*, 11 A. B. R. 558, 128 Fed. 701 (C. C. A. Mich.): "No question of solvency or insolvency or of preference arises under this subsection except as they bear upon the issue of good faith in making the conveyance, saying nothing now of the provisions of Clause 2 of subsection 5 of section 3 which relieves the consequences of subsection 1 if the respondent can prove that at the date of filing the petition he was solvent." This case is distinguished by the same court in *Mfg. Co. v. Spoke & Nipple Co.*, 12 A. B. R. 613.

Since, as noted (ante, § 106), this first class of acts of bankruptcy comprehends precisely those acts which, by the established decisions, have been held to constitute acts done with intent to hinder, delay and defraud creditors, proof of insolvency is not necessary so long as the actual intent to defraud is otherwise proved.

But the special provisions of the Bankruptcy Act of 1898, § 3 (c), permit proof of solvency as a defense, and proof of solvency is a complete rebuttal.¹⁴⁹

Obiter, In re West, 5 A. B. R. 734, 108 Fed. 940 (C. C. A. N. Y.): "It is not necessary for the petitioning creditors to prove the insolvency of the bankrupt when the alleged act of bankruptcy is that contained in subdivision 1 of § 3, which is in substance the conveyance of property with intent to delay or hinder his creditors, for by paragraph 'c' of the same section, solvency at the time of filing the petition is made a defense to proceedings in bankruptcy instituted under subdivision 1, and the burden of proving solvency is on the bankrupt. This burden devolved upon the opposing creditor."

And creditors opposing the debtor's adjudication have the same burden of proving solvency thrust upon them that the debtor himself would have had.¹⁵⁰

§ 178. Burden of Proof of Insolvency under Second and Third Acts on Petitioning Creditors.—As to classes two and three of acts of bankruptcy, namely, transfers with intent to prefer one creditor over another, and permitting a creditor to obtain a preference by legal proceedings the burden of proof rests, to be sure, on the creditor.¹⁵¹

^{149.} Sec. 3 (c) (2): "It shall be a complete defense to any proceeding in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this Act at the time of the filing of the petition against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed, and under said subdivision one the burden of proving solvency shall be on the alleged bankrupt."

Lansing Boiler Works v. Ryerson, 11 A. B. R. 558, 128 Fed. 701 (C. C. A. Mich.). *Obiter*, *Lea Bros. v. West*, 1 A. B. R. 261, 91 Fed. 237; In re Schenkein v. Coney, 7 A. B. R. 162 (Ref. N. Y.). See Master's Report, In re Douglass Coal & Coke Co., 12 A. B. R. 542, 131 Fed. 769 (Tenn.). *Obiter* and inferentially, *West Co. v. Lea*, 2 A. B. R. 463, 174 U. S. 590.

^{150.} In re West, 5 A. B. R. 734, 108 Fed. 940 (C. C. A. N. Y.).

^{151.} *Knittel v. McGowan*, 14 A. B. R. 209, 134 Fed. 498 (D. C. Penna., reversed on other grounds in *McGowan v. Knittel*, 15 A. B. R. 1, C. C. A. Pa.).

§ 179. **But Debtor to Appear and Also Produce Books at Trial, to Afford Discovery.**—But as to classes two and three of acts of bankruptcy, the debtor must appear at the trial with all his papers and books and make a complete exposure of all facts regarding his solvency, and if he does not attend and submit to examination, the burden of proving his solvency shifts over on to him.¹⁵²

Bogen & Trummell v. Protter, 12 A. B. R. 288, 129 Fed. 533 (C. C. A. Ohio): "If he submits to examination and produces his books, and his insolvency does not appear, the burden is upon the petitioner to make the proof, but if he fails to appear for examination, or fails to produce his books, the burden is upon him to prove his solvency."

McGowan v. Knittel, 15 A. B. R. 2, 137 Fed. 453 (C. C. A. Pa.): "As the alleged bankrupt appeared in court with his books, etc. (§ 3), the burden of proving that his property would not suffice to pay his debts rested upon the plaintiffs."

It is one thing to make a debtor prove his own solvency and quite a different thing to make the creditor prove the debtor's insolvency. From their very nature, the facts as to his solvency lie more within the debtor's knowledge than within that of creditors; and it is only fair that the debtor produce the data and furnish explanation to aid the petitioning creditors to make proof of insolvency, and that in case he fail to do so the petitioning creditors be excused from the proof, and the burden of proving solvency be cast upon the debtor and upon creditors intervening to oppose the petition.

§ 180. **Destruction or Loss of Adequate Books, or failure to Keep Them, No Excuse.**—That the requisite books or records have been lost or destroyed, is no excuse; if the debtor fails to appear with books and records sufficient to determine the question of his solvency or insolvency, the burden of proof is upon him to prove his solvency.

Bogan & Trummell v. Protter, 12 A. B. R. 288, 129 Fed. 533 (C. C. A. Ohio): "With these books missing, it was impossible to ascertain Protter's financial condition. The law expects a merchant charged with bankruptcy, to support his statements by his books, which speak for themselves. * * * In this

152. Sec. 3 (d): "Whenever a person against whom a petition has been filed as hereinbefore provided under the second and third subdivisions of this section takes issue with and denies the allegation of his insolvency, it shall be his duty to appear in court on the hearing, with his books, papers, and accounts, and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency, and in case of his failure to so attend and submit to examination the burden of proving his solvency shall rest upon him."

In *re Bloch*, 6 A. B. R. 300, 109 Fed. 790 (C. C. A. N. Y.). Obiter, *Bray v. Cobb*, 1 A. B. R. 153, 91 Fed. 102 (D. C. N. C., reversed, on other grounds, in *Cobb v. Overman*, 6 A. B. R. 324, 109 Fed. 65). See In *re Edelman*, 12 A. B. R. 238, 130 Fed. 700 (C. C. A. N. Y.). Also, see In *re Coddington*, 9 A. B. R. 243, 118 Fed. 281 (D. C. Penn.).

case, the testimony showed the salesbook for 1902 was on hand just before the fire. It disappeared after the fire, although it was not burned up. So with the other books. No satisfactory explanation of their disappearance was furnished. It is not sufficient for an alleged bankrupt, when called upon to produce his books, to say, 'I don't know where they are.' It is his business to know where they are. They are the only proper proof of his financial condition. He must not only keep proper books of account, but preserve them, and produce them when called upon. He fails to do so at his peril. The court should have held that, under the circumstances, the burden of proving his solvency rested upon Protter."

That the debtor did not keep the requisite books or records is also no defense.¹⁵³

§ 181. Query, whether Requirement of Production of Account Books at Time of Trial, etc., Applies to Receiverships as Acts of Bankruptcy.—Owing to the failure to make any corresponding amendment to § 3 (d), when class four of acts of bankruptcy was amended in 1903 to include receiverships, it is a question whether in cases of receiverships as acts of bankruptcy the burden of proving the debtor's insolvency, which rests on the creditors, is aided by the right to require production of account books, etc., at the time of trial, as in cases of preference; and whether the failure of the debtor to bring in his books and to submit to examination shifts the burden of proving solvency over to the debtor. Of course, if the debtor defaults and files no pleading against the petition, the creditor may have adjudication, for § 4b says the debtor may be adjudged bankrupt "upon default or an impartial trial." If he does not default and yet absents himself from the court room and does not produce his books, his insolvency would be difficult to prove and creditors would likely not be aided by § 3 (d).¹⁵⁴

¹⁵³. *Obiter*, inferentially, *Bogen & Trummell v. Protter*, 12 A. B. R. 288, 129 Fed. 533 (C. C. A. Ohio).

¹⁵⁴. Of course creditors may call him and cross-examine him as to his solvency, at any rate where the act of bankruptcy alleged is one of those where the bankrupt is required to attend with all his books and submit to examination. In re Coddington, 9 A. B. R. 243, 118 Fed. 281 (D. C. Penn.).

It is held, in one case, that the evidence produced to show the indebtedness of an alleged bankrupt must be such as to satisfy the jury of its existence. *Knittel v. McGowan*, 14 A. B. R. 209 (D. C. Pa.), but it is to be feared that this case lays down too exacting a rule: "satisfying" evidence is a high degree of proof and its requirement is next to the requirement of proof beyond reasonable doubt, and would hardly seem proper in bankruptcy cases, at least in this branch of bankruptcy law.

Bankrupt cannot complain of error in court instructing jury that something was an asset which was not such. *Knittel v. McGowan*, 14 A. B. R. 209, 134 Fed. 498 (D. C. Penn., reversed, on other grounds, in *McGowan v. Knittel*, 15 A. B. R. 1, C. C. A. Pa.).

What Constitutes Insolvency.—Under this Bankruptcy Law, the meaning of insolvency differs from its ordinary meaning. See post for discussion of general subject under heads of "Preferences," "Sixth Element of a Preference," § 1342, et seq.

DIVISION 7.

FOUR MONTHS TIME FOR FILING OF PETITION.

§ 182. **Four Months Time for Filing of Petition.**—None of these acts are available as grounds for adjudging a debtor an involuntary bankrupt, unless the petition against him is filed within four months after the commission of the act.¹⁵⁴

Thus, under the first act of bankruptcy, the act of fraud must be alleged and proved to have occurred within the four months.¹⁵⁵

§ 183. **Continuing Concealments.**—Where fraudulent concealment of property is the act alleged, in order to be a continuing concealment such as to bring the transaction within the four months period, there must be something more than the merely incidental concealment accompanying the ordinary fraudulent transfer.¹⁵⁶

§ 184. **Date of Levy Controls Where Preference by Legal Proceedings.**—Where the act of bankruptcy complained of is the suffering a creditor to obtain a preference by legal proceedings, as in case of an attachment, the four months does not begin to run until the levy of attachment, no matter how long the main case itself in which the attachment was issued, has been pending. It is the seizure of the property that creates the preference.¹⁵⁷

But the due enforcement by execution within the four months period of judgment liens, obtained before the four months period, is not within the statute.¹⁵⁸

§ 185. **"Four Months," to Date from Recording, etc., Where Such Requisite; or from Notorious Possession, Where Not.**—In order to remove all incentive from the dishonest debtor of secretly committing an act of bankruptcy and keeping it quiet in the hopes that

154. Bankr. Act, § 3 (b): "A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act. Such time shall not expire until four months after (1) the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment."

155. *Davis v. Stevens*, 4 A. B. R. 763, 104 Fed. 435 (D. C. S. Dak.).

156. *Bank v. DePauw Co.*, 5 A. B. R. 345, 105 Fed. 926 (C. C. A. Ind.).

157. *In re Higgins*, 3 A. B. R. 364, 97 Fed. 775 (D. C. Ky.).

158. See ante, § 143.

the four months period for beginning proceedings that will result in setting it aside shall elapse without action being taken, the statute provides in clause B, § 3, as above noted, that the four months period:

"Shall not expire until four months after the date of the recording or registering of the transfer or assignment (when the act consists in having made a transfer of any of his property with intent to hinder, delay or defraud creditors, or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of creditors) if by law such recording or registering is required or permitted, or, if it is not, then from the date the beneficiary takes notorious, exclusive or continuous possession of the property, unless the petitioning creditors have received actual notice of such transfer or assignment."

Thus, where the act complained of is a preferential transfer, such transfer will date only from the date of recording or registry, if recording or registry is required by law; and if not so required, then only from the date of actual notice to the petitioning creditors or of the taking of actual, notorious, exclusive and continuous possession by the beneficiary.¹⁵⁹ Acts which took place more than four months before the filing of the bankruptcy petition cannot form the basis upon which to make adjudication of bankruptcy; except in cases where record or registry is requisite and the petitioning creditors were without notice and neither public record was made nor notorious possession taken.¹⁶⁰

A case well illustrating this point is *In re Mingo Valley Creamery Association*, 4 A. B. R. 67, 100 Fed. 282 (D. C. Pa.), where an insolvent corporation sold all its real estate and used the proceeds to pay up some creditors in full, to the exclusion of all the rest. The petition was not filed until after four months from the payment, but within four months from the time the deed was filed for record. This was held to be too late, for the act of bankruptcy was not the sale, nor deeding of the real estate, but the payments to the few creditors to the exclusion of the rest; and these payments had been made more than four months before.

§ 186. Either Record, etc., or Notice, or Notorious Possession, Suffices.—If (where recording or registering is requisite) either public record is made, or actual and notorious, exclusive and continuous possession taken, it will suffice;¹⁶¹ or if the petitioning creditors have had actual notice.

¹⁵⁹. Bankr. Act, § 3 (b). Compare, *Little v. Hardware Co.*, 13 A. B. R. 422, 133 Fed. 874 (C. C. A. Tex.).

¹⁶⁰. *In re Girard Glazed Kid Co.*, 12 A. B. R. 295, 129 Fed. 841 (D. C. Penn.).

¹⁶¹. *In re Bogen*, 13 A. B. R. 529, 134 Fed. 1019 (D. C. Ohio); *In re Woodward*, 2 A. B. R. 233, 95 Fed. 260 (Ref. Tex.).

§ 187. **Only Such Notorious Possession Requisite as Property Susceptible of.**—But only such notorious possession is required as the property from its nature is susceptible of.¹⁶²

§ 188. **Date of Filing Petition, Not Issuance nor Service of Subpoena, Controls.**—Delay in issuing the subpoena upon the respondent beyond the four months period will not make the proceedings too late, for it is the filing of the petition, not the issuance of the subpoena that determines the four months limit.¹⁶³

§ 189. **Computation of Time of Four Months Period.**—The four months period is computed by excluding the day the act was committed and including the day the petition was filed.¹⁶⁴

Fractions of a day are not to be considered.¹⁶⁵ Where the last day falls on Sunday, the petition is in time if filed on Monday.¹⁶⁶

162. In re Bogen, 13 A. B. R. 529, 134 Fed. 1019 (D. C. Ohio); In re Woodward, 2 A. B. R. 233, 95 Fed. 260 (Ref. Tex.).

163. In re Lewis, 91 Fed. 632, 1 A. B. R. 458 (D. C. N. Y.).

164. Bankr. Act, § 31 (a): "Whenever time is enumerated by days in this act, or in any proceeding in bankruptcy, the number of days shall be computed by excluding the first and including the last, unless the last fall on a Sunday or holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday."

In re Stevenson, 2 A. B. R. 66, 94 Fed. 110 (D. C. Del.); In re Dupree, 97 Fed. 28; Dutcher v. Wright, 94 U. S. 553; In re Tonawanda Street Planing Mill Co., 6 A. B. R. 38 (Ref. N. Y.). Instance, In re Hill, 15 A. B. R. 499, 140 Fed. 984 (D. C. Calif.); In re Warner, 16 A. B. R. 519, 144 Fed. 987 (D. C. Conn.).

165. In re Tonawanda Street Planing Mill Co., 6 A. B. R. 38 (Ref. N. Y.). Analogously, Jones v. Stevens, 5 A. B. R. 571 (Sup. Jud. Ct. Me.). Apparently, In re Hill, 15 A. B. R. 499, 140 Fed. 984 (D. C. Calif.). Analogously, In re Warner, 16 A. B. R. 519, 144 Fed. 987 (D. C. Conn.).

166. In re Stevenson, 2 A. B. R. 66, 94 Fed. 110 (D. C. Del.).

PART II.

PROCEDURE IN PUTTING THE DEBTOR INTO BANKRUPTCY.

CHAPTER V.

PETITION IN VOLUNTARY BANKRUPTCY.

Synopsis of Chapter.

- § 190. Points of Difference between Voluntary and Involuntary Petition—Duplicate Petitions—Schedules.
- § 191. Voluntary Petition to Show Residence, etc., and Existence of Debt.
- § 192. Need Show No Act of Bankruptcy Other than Debts Unable to Pay and Prayer for Adjudication.
- § 193. Need Not Show Insolvency.
- § 194. Signature and Verification.
- § 195. Adjudication Immediate, Creditors May Not Oppose.
- § 196. Petition May Be Dismissed by Court of Its Own Motion.

§ 190. Points of Difference between Voluntary and Involuntary Petition—Duplicate Petitions—Schedules.—The first step towards calling into action the machinery of the bankruptcy law is to prepare and file the petition.

In voluntary cases there need be but one petition prepared and filed, the requirement of triplicate filing applying only to the schedules, not to the petition itself. But in involuntary cases the petition must be prepared and filed in duplicate, one copy for the court's records, the other for service on the respondent.¹

The voluntary petition must be accompanied with schedules of all the debtor's liabilities and assets, but there is no requirement that schedules shall accompany the involuntary petition; for, naturally, creditors are not in a position to know the facts, and since the schedules would become of use only in case the petition were granted and the debtor adjudged bankrupt, it might never become necessary to use them at all; for this reason ten days' time is given the bankrupt after he has been adjudged bankrupt within which to file his schedules when the proceedings are in involuntary bankruptcy.²

1. Bankr. Act, § 59 (c): "Petitions shall be filed in duplicate, one for the clerk, the other for service on the bankrupt."

2. **Form of Voluntary Petition.**—The form of the debtor's voluntary petition is as follows:

To the Honorable.....
Judge of the District Court of the United States for the.....District
of

The petition of, of, in the county of, and
district and State of, (State occupation), respectfully
represents:

That he has had his principal place of business (or has resided, or has had his domicile) for the greater portion of six months next immediately preceding the filing of this petition at, within said judicial district; that he owes debts which he is unable to pay in full; that he is willing to surrender all his

§ 191. Voluntary Petition to Show Residence, etc., and Existence of Debt.—The voluntary petition in bankruptcy must show jurisdiction. It must show a sufficient residence, domicile or principal place of business of the debtor within the district (or ownership of property therein in cases of

property for the benefit of his creditors except such as is exempt by law, and desires to obtain the benefit of the acts of Congress relating to bankruptcy.

That the schedule hereto annexed, marked A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and (so far as it is possible to ascertain) the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said acts:

That the schedule hereto annexed, marked B, and verified by your petitioner's oath, contains an accurate inventory of all his property both real and personal, and such further statements concerning said property as are required by the provisions of said acts:

Wherefore your petitioner prays that he may be adjudged by the court to be a bankrupt within the purview of said acts.

.....Attorney.
United States of America, District ofss.:

I,, the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief.

.....Petitioner.
Subscribed and sworn to before me, this day of, A. D., 19..

.....
(Official character)

Form of Involuntary Petition.—The form of the involuntary petition of creditors is, in the nature of things, somewhat different in each case, since the indebtedness and names of the petitioning creditors are likely to vary and also the acts of the debtor complained of as grounds of action.

The general form of the involuntary petition is prescribed by the Supreme Court of the United States as follows:

To the Honorable

Judge of the District Court of the United States for the District of

The petition of, of and of, and, of, respectfully shows:

That, of, has for the greater portion of the six months next preceding the date of filing this petition, had his principal place of business (or resided, or had his domicile) at in the county of and State and district aforesaid, and owes debts to the amount of \$1,000. (And here should be added, if the debtor is a natural person, "and is not a wage earner nor chiefly engaged in farming or in the tillage of the soil;" or if the debtor be a corporation "and is a corporation engaged principally in—," stating whether it be a manufacturing, trading, mining, etc., corporation.)

That your petitioners are creditors of said, having provable claims amounting in the aggregate, in excess of securities held by them, to the sum of \$500.00. That the nature and amounts of your petitioners' claims are as follows:

.....
.....
And your petitioners further represent that said is insolvent, and that within four months next preceding the date of this petition the said committed an act of bankruptcy, in that he did heretofore, to-wit, on the day of

Wherefore, your petitioners pray that service of this petition, with a subpoena, may be made upon, as provided in the acts of Con-

nonresidents of the United States) to give the court jurisdiction;³ and these allegations of residence, domicile, etc., must not be made disjunctively.⁴ It must show that the petitioner owes debts which he is unable to pay;⁵ and that they are "provable" debts.⁶

§ 192. Need Show No Act of Bankruptcy Other than Debts Unable to Pay and Prayer for Adjudication.—The petition need show no act of bankruptcy other than the admission of inability to pay debts and desire to be adjudged bankrupt as prescribed in the official form.⁷

§ 193. Need Not Show Insolvency.—It need not allege the debtor is insolvent.⁸

§ 194. Signature and Verification.—The voluntary petition must be signed and verified by the petitioner. The requirements are essential.⁹ The verification may be made before a notary public who thereafter becomes the attorney of record for the bankrupt.¹⁰

§ 195. Adjudication Immediate, Creditors May Not Oppose.—If jurisdictional averments are sufficient, adjudication is at once entered. Creditors will not be heard in opposition. If the jurisdictional averments are sufficient, as soon as the voluntary petition is filed an order of adjudication is entered, either by the judge, or in case of the judge's absence, by the referee, an officer whose duties will be later explained. The clerk usually inspects the petition to see if it is in proper form and enters the adjudication on the records of the court without delay; for, as heretofore

gress relating to bankruptcy, and that he may be adjudged by the court to be a bankrupt within the purview of said acts.

.....

 Petitioners.

.....
 Attorney.

United States of America, District of, ss:

..... being three
 of the petitioners above named, do hereby make solemn oath that the statements contained in the foregoing petition, subscribed by them, are true.

Before me,, this day of, 19....

.....

 (Official character)

3. See ante, §§ 27, 31, et seq.

4. In re Laskaris, 1 A. B. R. 480 (Ref. N. Y.). See also, Official Form No. 1.

5. See ante, § 41.

6. See ante, §§ 41; post, § 625, et seq.; post, § 440.

7. See ante, § 102.

8. See ante, § 42.

9. In re McConnell, 11 A. B. R. 418 (Ref. N. Y.).

10. In re Kindt, 3 A. B. R. 443, 98 Fed. 403 (D. C. Iowa). Compare, analogously. In re Kimball, 4 A. B. R. 144 (D. C. Mass.).

seen (ante, § 43), a creditor cannot intervene to oppose a voluntary adjudication, for no one is supposed to have any object in opposing the debtor if he desires to have himself adjudged bankrupt; and, furthermore, as also before noted (ante, §§ 102, 192) the averments of the petition themselves constitute an act of bankruptcy.

Probably the rule prohibiting creditors from intervening to oppose the adjudication in voluntary cases would not, however, prevent creditors or any one else, for that matter, bringing to the attention of the court the lack of jurisdiction for want of the debtor's actual residence, etc. Such would seem to be a corollary of Bankruptcy Act, § 18 (g).

§ 196. Petition May Be Dismissed by Court of Its Own Motion.

—Either the adjudication is entered or the petition, if fatally defective, or if jurisdiction is wholly wanting, may be dismissed.¹¹

In re Waxelbaum, 3 A. B. R. 395, 98 Fed. 589 (D. C. N. Y.): "No express provision is made in the act or in the rules as to when or how an inquiry into the truth of the jurisdictional facts alleged in a voluntary petition is to be made; but, considering the complication which would often arise, it seems evident that the jurisdiction, when challenged, should be inquired into as early as possible, so that the proceedings, if invalid, may be arrested in limine; and the alternative of adjudication or dismissal given by (Bankr. Act) § 18 (g) implies that the court should make such inquiry into the facts as may be necessary to determine whether to adjudicate, or to dismiss."

11. Bankr. Act, § 18 (g); In re Garneau, 11 A. B. R. 679, 127 Fed. 677 (C. C. A. Ills.). As to vacating of adjudication and dismissal of petition, see post, § 429, et seq. As to requisite deposit for costs, see post, § 285, et seq.

CHAPTER VI.

PARTIES AND PETITION IN INVOLUNTARY BANKRUPTCY.¹

Synopsis of Chapter.

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- § 202. But Date of Filing Petition Determines How Many Must Join and Subsequent Payment or Assignment of Claims, Ineffectual.
- § 203. Different Claims Purchased in by One Creditor Lose Separate Identity.
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- § 209. Mode of Service of Notice.
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- § 211. Creditors May Join though Sufficient Already Petitioning, and May Plead Separately.
- § 212. Involuntary Proceedings Not to Be Dismissed Except on Merits, etc., if Any Creditor Willing to Take Up Contest.
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- § 214. Only Creditors or Those Holding Rights against Debtor at Time of Commission of Act of Bankruptcy Competent Petitioners.
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- § 219. Authority of Corporate Officer to File Petition.
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- § 225. Corporation Creditor Not Estopped by Officer Acting as Assignee.
- § 226. No Election of Remedies because of Previous Attack upon Preferences in State Court.

1. See interesting article "Creditors' Petitions in Involuntary Bankruptcy,"
I. National Bankruptcy News 62.

- § 227. Creditors Holding Provable Claims, and Only Such, Competent.
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- § 229. Claims Arising after Filing of Petition Insufficient.
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§ 197. How Many Creditors and to What Amount Must Join as Petitioners.—Three or more creditors must join as petitioners, if the total number of creditors is twelve or more; but one creditor will suffice if all the creditors are less than twelve; and such creditor or creditors must hold claims aggregating not less than \$500 over and above any securities, and the claims must be provable claims.²

§ 198. Whether Requirements Jurisdictional.—These provisions of the Bankruptcy Act, § 59 (b), are said to be jurisdictional.³ This jurisdic-

² Bankr. Act, § 59 (b): "Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt." *In re Blount*, 16 A. B. R. 101, 142 Fed. 263 (D. C. Ark.).

³ *In re Gillette*, 5 A. B. R. 125, 104 Fed. 769 (D. C. N. Y.); *In re Rogers Milling Co.*, 4 A. B. R. 540, 102 Fed. 687 (D. C. Ark.).

tional defect is probably waivable.⁴ And the petition must show on its face the requisite number of creditors and amount of claims held by them, although in fact, there may be a deficiency.⁵ But the defect is not fatal and may be supplied by amendment.⁶ And it is not meant by "jurisdictional" that the requirements affect jurisdiction over the subject matter, such as limit the operation of involuntary bankruptcy to certain corporations and require certain residence, domicile, etc.

§ 199. **Employees and Relatives Excluded.**—In computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in the petition, his employees (who were such at the time of the filing of the petition) and his relatives are not to be counted, unless they themselves have joined in the petition.⁷

§ 200. **Directors and Officers Excluded.**—Directors and officers of corporations need not be counted in determining whether the total number of creditors is less than twelve, unless they themselves voluntarily join in the petition.⁸

4. In re Gillette, 5 A. B. R. 125, 104 Fed. 769 (D. C. N. Y.); In re Mason, 3 A. B. R. 599, 99 Fed. 256 (D. C. N. C.).

5. In re Bedingfield, 2 A. B. R. 355, 96 Fed. 190 (D. C. Ga.); In re Stein, 12 A. B. R. 364, 130 Fed. 377 (D. C. Penna., disapproved in In re Plymouth Cordage Co., 13 A. B. R. 665, 135 Fed. 1000, C. C. A.).

6. See post, § 269.

7. Bankr. Act, § 59 (e).

8. In re Barrett Pub. Co., 2 N. B. N. & R. 80 (Ref. Ills.).

Fraudulently Preferred Creditors under Law of 1867.—And it was held under the law of 1867 that creditors who had been fraudulently preferred were not to be counted in determining whether a sufficient number had joined in the petition. In re Gillette, 5 A. B. R. 124, 104 Fed. 769 (D. C. N. Y.). [1867] Compare, to same effect, In re Israel, 12 N. B. Reg. 204, Fed. Cas. 7,111; [1867]. In re Hunt, 5 N. B. Reg. 493, Fed. Cas. 6,883; [1867] Clinton v. Mayo, 12 N. B. Reg. 39, Fed. Cas. 2,899; [1867] In re Rosenfields, 11 N. B. Reg. 86, Fed. Cas. 12,061.

Creditors Assenting to General Assignment.—And it has been held, under the present law, that creditors who have assented to the general assignment which is urged as the act of bankruptcy are not to be counted in. In re Miner, 4 A. B. R. 710, 104 Fed. 520 (D. C. Mass.): "For these reasons, because such is the letter of the act, because such was the construction of analogous provision in the Act of 1867, and because such seems to me the fair intent of the act as a whole, I hold that the creditors who have assented to the assignment are not to be reckoned in the computation required by § 59b."

Small Claims on Current Accounts of Grocers, etc.—In one case it has been held, that small claims of a few dollars or cents on current accounts of grocers, etc., purposely allowed to run in order to bring the number of creditors up to twelve and to defeat a single creditor who had been left out of a settlement arrangement should not be counted in, on the doctrine *de minimis lex non curat*.

In re Blount, 16 A. B. R. 97, 142 Fed. 263 (D. C. Ark.): "To treat the holders of such claims as creditors to be considered in determining the number existing for the purpose of preventing a bona fide creditor to institute proceedings of this nature, when an insolvent conveys all of his property, with the avowed intention of preferring all of his creditors except one, would be a violation, if not of the letter, certainly of the spirit of the bankruptcy law, and cannot be tolerated."

§ 201. Date of Adjudication Determines whether Requisite Number Have Joined.—The date of the adjudication and not the date of the filing of the petition is the date to test whether sufficient creditors in number and amount of claims have joined.⁹

§ 202. But Date of Filing Petition Determines How Many Must Join and Subsequent Payment or Assignment of Claims, Ineffectual.—The date of the filing of the petition determines whether the number of creditors owed by the bankrupt is in fact less than twelve and consequently whether three must join or one alone is sufficient.¹⁰ And this is so, for only those who were creditors at the time of the filing of the petition have provable claims and are interested in the bankruptcy. Thus, the payment of the debt of one of the petitioning creditors after the petition is filed will not cause the dismissal of the proceedings;¹¹ nor its assignment to one of the other creditors;¹² nor the payment of enough to reduce the aggregate below \$500.00, where other creditors intervene bringing the amount back to \$500.00.¹³ Also creditors induced by the bankrupt's assignee under a general assignment not to join in the petition should, nevertheless, be reckoned as among the whole number of creditors;¹⁴ or when so induced by the bankrupt himself.¹⁵

Creditors whose claims arose after the filing of the petition may not be counted in in ascertaining the number of creditors owed by the bankrupt, nor may such creditors join as petitioning creditors.

Moulton v. Coburn, 12 A. B. R. 557, 131 Fed. 201 (C. C. A. Mass.): "While we find in the statute an express privilege to creditors to join in a petition, we find nothing to contravene the ordinary rule of law that the allegations of a declaration, bill, or petition, are to be disposed of as of the time of filing or of beginning the suit. Thus, we find in the statute nothing to indicate that creditors whose debts are created after the filing of a petition are entitled to join, or that a bankrupt may defeat a petition by increasing the number of his creditors between the filing of the petition and the time of answer. That the statute permits a creditor to become a party to a proceeding already begun affords no indication that the substantial rights of the parties are to be determined as of any other date than that fixed by the filing of the original petition."

The purchase in by an assignee for the benefit of creditors, out of the funds of the estate, of claims of several creditors and then his reassign-

9. In re Plymouth Cordage Co., 13 A. B. R. 665, 135 Fed. 1000 (C. C. A. Okla.); *Moulton v. Coburn*, 12 A. B. R. 557, 131 Fed. 201 (C. C. A. Mass.).

10. In re Coburn, 11 A. B. R. 212, 126 Fed. 218 (D. C. Mass., referred to in *In re Adams*, 12 A. B. R. 369, 130 Fed. 788, D. C. Mass.; affirmed sub nom. *Moulton v. Coburn*, 12 A. B. R. 553, 131 Fed. 201, C. C. A.).

11. *Quare*, in *Gage v. Bell*, 10 A. B. R. 696, 124 Fed. 371 (D. C. Tenn.); *obiter*, in *re Coburn*, 11 A. B. R. 212, 126 Fed. 218 (D. C. Mass.).

12. Inferentially, in *re Brown*, 7 A. B. R. 102, 111 Fed. 979 (D. C. Mo.).

13. In *re Ryan*, 7 A. B. R. 562, 114 Fed. 373 (D. C. Penn., dist. in *In re Stein*, 12 A. B. R. 366); in *re Beddingfield*, 2 A. B. R. 355, 96 Fed. 190 (D. C. Ga.). Compare, *Gage v. Bell*, 10 A. B. R. 696, 124 Fed. 371 (D. C. Tenn.).

14. In *re Coburn*, 11 A. B. R. 212, 126 Fed. 218 (D. C. Mass.).

15. In *re Brown*, 7 A. B. R. 102, 111 Fed. 979 (D. C. Mo.).

ment of the same claims to several new persons in order to increase the number of creditors to more than twelve, so that three creditors must join in an involuntary bankruptcy petition against the debtor, will not defeat an involuntary petition filed by a single creditor, where, by the assignee's original purchase the original number of creditors was reduced below twelve, the effect of the assignee's purchase with funds of the estate being to extinguish them; and his subsequent attempted reassignment of them being ineffectual to restore their vitality as debts.¹⁶

§ 203. Different Claims Purchased in by One Creditor Lose Separate Identity.—Claims purchased by one creditor for the purpose of securing the statutory amount requisite for bringing involuntary proceedings do not retain their identity as separate claims in the sense of the law relating to the question.¹⁷

In re Burlington Malting Co., 6 A. B. R. 369, 109 Fed. 777 (D. C. Wis.): "Issue being taken upon the truth and bona fides of such claims, it now appears by the undisputed proof that the claims so bought in were purchased by the original petitioner and paid by him or his counsel in full, and that the purported intervenors have no actual claim or interest. The procedure is an obvious subterfuge and the intervening petitions are summarily dismissed. In any view the claims so appearing are provable only by the original petitioner, as purchaser and actual owner (In re Worcester County, 4 A. B. R. 496, 505), and furnish no aid for the purposes of jurisdiction."

They are simply several claims by one creditor.

Nor do claims thus bought in or assumed retain their separate identity so as to prevent one certain creditor, whose claim is the only one not taken care of, instituting or maintaining an involuntary petition; nor so as to require him to obtain sufficient other creditors to join with him to institute involuntary proceedings.¹⁸ Nor do claims contracted for on condition that the creditor will join, retain their identity as separate claims.¹⁹

And the court will inquire into the actuality of the purchase of claims by petitioning creditors. Thus, where one of the petitioning creditors was a corporation, whose business it was to purchase insolvent's assets and which had contracted for claims in order to qualify for involuntary proceedings, all doubts as to the actuality of the purchase will be resolved against the petitioning creditor.

Lowenstein v. McShane, 12 A. B. R. 601, 130 Fed. 1007 (D. C. Md.): "In dealing with this case the court cannot shut its eyes to the evident character of this proceeding in bankruptcy. A large enterprise, with much property and

16. Leighton v. Kennedy, 12 A. B. R. 229, 129 Fed. 737 (C. C. A. Mass.).

17. Lowenstein v. McShane Mfg. Co., 12 A. B. R. 601, 130 Fed. 1007 (D. C. Md.); (Obiter) In re Worcester Co., 4 A. B. R. 505, 102 Fed. 808 (C. C. A. Mass.).

18. Lowenstein v. McShane Mfg. Co., 12 A. B. R. 601, 130 Fed. 1007 (D. C. Md.). See post, §§ 739, 574.

19. In re Blount, 16 A. B. R. 97 (D. C. Ark.).

many creditors, was being administered by a court of competent jurisdiction through its receivers, and had been so administered for four months, lacking one day. Two creditors who were dissatisfied with the results of their intervention in the receivership case turned to the bankrupt court. They were but two out of a great number of creditors. But joining with them comes the Assets Realization Company, a corporation whose business it is to deal in the property of insolvent estates. It is not a creditor of the corporation desiring to protect itself by availing of the provisions of the bankrupt act to secure an equal distribution of its debtor's property, but it bought up the claims—one at 100 per cent., and other at less—for the express purpose of qualifying itself to join in the petition in bankruptcy, and take the administration out of a court where the great bulk of the creditors have shown that they are willing it should remain, and subject it to the added expense of the bankrupt court. It is evident that the Assets Realization Company has not laid out its money in buying claims—one at least at as much as 100 per cent.—without the expectation of deriving some pecuniary advantage greater than that of a mere creditor seeking to bring about a ratable distribution of an insolvent debtor's assets. In such a case the court should be slow to lend its aid, and, I think, should resolve every doubtful question of fact or law against a petitioning creditor who assumes such an attitude toward a valuable estate."

But if claims actually are purchased by a creditor or by one who later becomes a petitioning creditor, there is no good reason nor law why such purchase, if it be actually made, should change the debt. It is still a "provable" debt and the motive of the purchaser will not detract from the legal rights of the parties.²⁰

§ 204. Creditor's Claim Not to Be Split Up to Obtain Jurisdictional Number.—A creditor's claim may not be split up into several demands in order to create the requisite number of petitioning creditors.

In *re Tribelhorn*, 14 A. B. R. 493, 137 Fed. 3 (C. C. A. N. Y.): "He was the attorney for the petitioning creditors, and manifestly acquired a part of the demand of Schmidt for the purpose of being joined with Schmidt as a petitioning creditor. The Bankrupt Act does not sanction the splitting up by a single creditor of his demand into several demands in order to create the requisite number of petitioning creditors, and, if such a practice were tolerated, the provisions of § 59d would become practically nullified."

§ 205. Preferred Creditors to Be Counted in, if Necessary.—The claims of creditors who have received preferences (even if they no longer claim to be creditors), are, perhaps, nevertheless to be counted in, if necessary to sustain jurisdiction.²¹

20. (1867) In *re Woodford & Chamberlain*, 13 N. B. Reg. 575, Fed. Cases, No. 17,972, cited and distinguished in *Leighton v. Kennedy*, 12 A. B. R. 235, 129 Fed. 737 (C. C. A. Mass.). But compare In *re Beddingfield*, 2 A. B. R. 355, 96 Fed. 190 (D. C. Ga.).

21. In *re Cain*, 2 A. B. R. 378 (Master's Report approved by D. C. Ills., citing In *re Scrafford*, 15 N. B. Reg. 104, 21 Fed. Cases 866); In *re Norcross*, 1 A. B. R. 644 (Ref. Mo.). It is to be noted, however, that the preferred creditors in this case were opposing the adjudication. Obiter, compare, *Leighton v. Kennedy*, 12 A. B. R. 229, 129 Fed. 739 (C. C. A. Mass.).

Murtrey v. Smith, 15 A. B. R. 431, 142 Fed. 853 (Master's Report approved adopted by D. C.): "An equal distribution of the assets of an insolvent among the creditors of the same class is the aim and policy of the Bankruptcy; it denounces the unequal treatment of creditors, makes it a ground for summary proceedings against the insolvent and authorizes recovery from the debtor who is chargeable with notice of preference when accepting payment and his pro rata. Will the law countenance an action whereby the very act violating the law is interposed as a defense against its application? Can a debtor be heard to say: 'If I make a preference while insolvent, the Bankruptcy will be invoked and will administer my affairs for the benefit of all my creditors; but if I prefer for an amount large enough to leave less than \$1000 debts outstanding, the Bankruptcy Law will take its protecting hands away from the creditors whom I left unpaid?' Evidently the answer to this question is the negative, unless the law expressly answers it in the affirmative, or, be silent, the conclusion from other provisions of the law is irresistible that this question must be answered in the affirmative."

re Tirre, 2 A. B. R. 493 (D. C. N. Y.): "To exclude a debt upon the ground of a void preference would enable the parties to evade the Bankruptcy altogether and thus take advantage of their own wrong."

but are to be excluded, if they defeat jurisdiction, as, for instance, where all creditors but one or two are preferred.²²

evens v. Nave-McCord Co., 17 A. B. R. 610 (C. C. A. Colo.): "A creditor, who has a voidable preference, may not be counted against the petitioner in putting the number of creditors that must join in a petition for an adjudication in bankruptcy, until he surrenders his preference. If he surrenders before adjudication, he may be counted.

The argument, in support of the contention that creditors who have secured a voidable preference must be counted in computing the number of creditors that must join in the petition, is that such parties have provable claims, and that every one who has a provable claim, and who is not excluded by § 59e * * * is a countable creditor under the bankruptcy law of 1898. * * * Counsel has shown with much force and cogency that these provisions of the bankruptcy law clearly show that a preferred creditor has a claim which may always be proved and filed, and which may thereafter be allowed upon his surrender of his preference, and that the express specification in 59e of the creditors who may be counted in determining how many creditors must join in the petition includes preferred creditors who are not thus mentioned from the latter category under the familiar rule 'Expressio unius est exclusio alterius', and thus voidably includes them in those that must be counted. The argument is very persuasive, but it is met by other considerations which must not be disregarded. A creditor who has a voidable preference may make and file his usual proof of claim without surrendering his preference, and in that sense his claim is provable. In other words, it is susceptible of a formal statement of his claim under oath which may be filed in court, under §§ 57a and 57c. But the claimant may not secure an allowance of his claim, he may not vote upon the plan at a meeting of creditors, he may not obtain any advantage by means of it in the bankruptcy proceedings, until he first surrenders his preference. Sections 56a (30 Stat. 560 [U. S. Comp. St. 1901, pp. 3442, 3443]); *Keppel v. Tiffin*

. In *re Miner*, 4 A. B. R. 710, 104 Fed. 520 (D. C. Mass.); (1867) In *re Belknap*, Fed. Cas. 7,111; (1867) In *re Currier*, Fed. Cas. 3,492; (1867) *Clinton v. Clinton*, Fed. Cas. 2,899.

Savings Bank, 197 U. S. 357, 361, 367, 13 Am. B. R. 552. Cardinal rules for the construction of a statute are that the intention of the legislative body which enacted it should be ascertained and given effect, if possible, regardless of technical rules of construction and the dry words of the enactment; that that intention must be deduced not from a part but from the entire law; that the object which the enacting body sought to attain and the evil which it was endeavoring to remedy may always be considered for the purpose of ascertaining its intention; that the statute must be given a rational, sensible construction; and that, if this be consonant with its terms, it must have an interpretation which will advance the remedy and repress the wrong. *U. S. v. Ninety-Nine Diamonds* (C. C. A. 8th Cir.), 139 Fed. 961, 965, 2 L. R. A. (N. S.) 185.

"The discharge of the bankrupt from his debts and the equal distribution of his unexempt property among his creditors of the same class were the chief objects which Congress sought to attain by the enactment of this statute. The preference of one or more creditors over others of the same class was one of the principal evils at which the statute was leveled. Witness the prohibition of the allowance of the claim of a preferred creditor and of his participation in the meetings of creditors until he surrenders his preference and the right granted to the trustee to recover from him the property he has obtained thereby or its value. Section 56a, 57g, 60a, 60b (30 Stat. 560, 562 [U. S. Comp. St. 1901, pp. 3442, 3443, 3445]); *Pirie v. Chicago Title & Trust Co.*, 182 U. S. 438, 449, 5 A. B. R. 814; *Kippel v. Sav. Bank*, 197 U. S. 356, 361, 13 Am. B. R. 552, 25 Sup. Ct. 443, 49 L. Ed. 790. The bankruptcy law contains no express provision that a creditor who holds a voidable preference may so use his claim as to obtain any advantage from it before he surrenders his preference. Should a provision be ingrafted upon this statute by construction by means of which he may avail himself of the Act itself to defeat one of its main purposes, a construction by means of which he may use the statute to retain a preference which it was one of the chief objects of the Act to avoid? For, if this statute be interpreted to mean that a debtor may confer voidable preferences upon all his creditors but two, and may thereby enable them to hold their preferences and be counted against an adjudication, the evil which Congress sought to remove is promoted, and the remedy it provided is impaired. Such an interpretation does not accord with the spirit of the law. It would not be a reasonable, sensible construction of it, and it seems to be contrary to the intention evidenced by the body of the statute. The most persuasive argument against this conclusion is that creditors holding voidable preferences are not mentioned in § 59e in the list of those who may not be counted, and the rule that the specification of some is the exclusion of others. But, after a thoughtful consideration of this and the other contentions of counsel, the evil of preferences which the bankrupt law was enacted to remove, the remedy of an equal distribution of the property of the bankrupt which it was passed to provide, the prohibition of the use of their claims by preferred creditors until they surrender them which the Act contains, the general scope of the law and all its provisions read and considered together, and the duty to give to it a rational and sensible interpretation, have forced our minds to the conclusion that it was the intention of Congress that creditors who hold voidable preferences should not be counted either for or against the petition for an adjudication in bankruptcy until they surrender their preferences. This intention, thus deduced, must therefore prevail over the technical rules of construction which counsel for the appellees invoke."

In *re Blount*, 16 A. B. R. 97, 142 Fed. 266 (D. C. Ark.): "The main subject of the Bankruptcy Act is to secure an equal distribution of the assets of an in-

ent among all his creditors and prevent preferences. * * * The duty of the courts is to carry this intention of Congress into effect to the extent which the language of the act justifies. Mere schemes and artifices to avoid the letter and spirit of the law will not be tolerated. * * *

If the contention of counsel for the bankrupt is to be sustained, an insolvent debtor owing debts to 12 or more creditors can assign or convey his property to the benefit of some of his creditors, leaving some unprovided for, provided the creditors thus discriminated against do not exceed two; and the bankruptcy trustees are powerless to prevent this wrong, because they say that until the preferred creditors are actually paid out of the proceeds of the insolvent's estate, they are still his creditors. The reasoning of the referee, as well as the authorities cited by him, fully meet that contention and are approved by the court. When Mr. Ford, in consideration of the transfer to him of all the assets of the bankrupt, assumed the payment of all of the bankrupt's debts except that of the petitioning creditor Johnston, he not only became a trustee for the benefit of those preferred creditors, but under the laws of the State of Arkansas, construed by its highest court, he became absolutely liable to them for their claims."

eighteen v. Kennedy, 12 A. B. R. 232, 129 Fed. 739 (C. C. A. Mass.): " * * * If, if preferred creditors should be counted against an involuntary petition, they could, by merely sitting still, give effect to preferences illegally received and defeat the purposes of the bankruptcy statute."

206. Only Creditors Who Might Have Been Petitioners to Be Counted.—Only such creditors as might have joined as petitioning creditors should be counted in ascertaining whether the number of creditors is less than twelve.²³

207. Erroneous Averment of Less than Twelve.—If the petitioner erroneously avers that there are less than twelve creditors altogether and less than three have joined as petitioners the case is not thereupon to be dismissed, but the bankrupt must point out the remaining creditors and notice must be given them and also opportunity for sufficient of them to join.²⁴

²³ In *re Miner*, 4 A. B. R. 710, 104 Fed. 520 (D. C. Mass.). As to counting claimant creditors, see *In re Schenkein & Coney*, 7 A. B. R. 162 (Ref. N. Y.). Under the law of 1867 they could not be counted, *In re Scrafford*, Fed. Cases, 12,556.

²⁴ Bankr. Act, § 59 (d): "If it be averred in the petition that the creditors of the bankrupt are less than twelve in number, and less than three creditors have joined as petitioners therein, and the answer avers the existence of a larger number of creditors, there shall be filed with the answer a list under oath of all the creditors, with their addresses, and thereupon the court shall cause all such creditors to be notified of the pendency of such petition and shall delay the hearing upon such petition for a reasonable time, to the end that all parties in interest shall have an opportunity to be heard; if upon such hearing it shall appear that a sufficient number have joined such petition, or if prior to such hearing a sufficient number shall join therein, the case may be proceeded with, but otherwise it shall be dismissed."

In re Plymouth Cordage Co., 13 A. B. R. 665, 135 Fed. 1000 (C. C. A. Okla.); *In re Williams*, Fed. Cas., No. 17,700; (1867) *Roche v. Fox*, Fed. Cas., No. 74; *In re Brown*, 7 A. B. R. 102, 111 Fed. 979 (D. C. Mo., explained in *In re* *;*, 13 A. B. R. 362, 136 Fed. 78, C. C. A. N. Y.); *In re Mammoth Pine Lum-*

§ 208. **Bankrupt to Supply List of Creditors, if He Claims Averment Erroneous.**—The bankrupt must file with his answer a sworn list of all his creditors, where he claims the petitioning creditor erroneously has averred the total number of creditors to be less than twelve.²⁵

In *re Haff*, 13 A. B. R. 367 (C. C. A. N. Y.): "Here, although the bankrupt averred the existence of a larger number of creditors in his answer to the earlier petition, he annexed only a partial list, and not a list under oath of all his creditors, with their addresses as provided for in said section."

The debtor must do more than state simply the names and addresses of his other creditors. He must also give the amounts of the respective debts; the consideration; the date due and in general a complete description so as to enable the petitioning creditor to negotiate with the others to join him in his petition.²⁶

§ 209. **Mode of Service of Notice.**—The mode of service of such notice is left to the discretion of the court.

In *re Tribelhorn*, 14 A. B. R. 492, 137 Fed. 3 (C. C. A. N. Y.): "The mode of service is left to the discretion of the court. It not being contended that any of the creditors named were not actually served in due time to intervene if they had desired to do so, the mode of service upon them was immaterial."

Compare, In *re Barrett Pub. Co.*, 2 N. B. N. & R. 80 (Ref. Ills.): "I am of the opinion that it is the duty in the first instance of the bankrupt to send out such notice, and that on the omission of the bankrupt so to do, that the duty then falls upon the petitioner."

Probably the usual ten days' notice would suffice. And one case holds that the court need not withhold entry of adjudication to give time for such notification, if the creditors—not shown in the answer—have already been informed of the pendency of the bankruptcy proceedings.²⁷

ber Co., 6 A. B. R. 84 (D. C. Ark., distinguished in *In re Stein*, 12 A. B. R. 364, 130 Fed. 377, D. C. Pa.). But *In re Stein* is itself disapproved in *In re Plymouth Cordage Co.*, *supra*. Compare, *In re Brett*, 12 A. B. R. 492, 130 Fed. 981 (D. C. N. J.); *In re Romanow*, 1 A. B. R. 461, 92 Fed. 512 (D. C. Mass.); *In re Mercur*, 2 A. B. R. 626, 95 Fed. 634 (D. C. Penna.); *In re Mackay*, 6 A. B. R. 577, 110 Fed. 363 (D. C. Del.); *Hoffschlaeger Co. v. Young Nap*, 12 A. B. R. 515 (D. C. Hawaii). Compare, also, to same effect, inferentially, *In re Haff*, 13 A. B. R. 362, 135 Fed. 742 (C. C. A. N. Y.).

25. *Gage v. Bell*, 10 A. B. R. 696, 124 Fed. 371 (D. C. Tenn.).

26. See *Gage v. Bell*, 10 A. B. R. 696, 124 Fed. 371 (D. C. Tenn.). And the court may refer the answer and list to a special master to ascertain the full particulars. *Ibid*. But where all creditors not set forth in the answer had been informed of the pendency of the proceeding but had not entered any appearance, nor asked to intervene, and there was nothing to indicate that they could have been induced to join in the proceedings, the court may refuse to withhold its adjudication to give the clerk time to notify such creditors. *In re Tribelhorn*, 14 A. B. R. 492, 137 Fed. 3 (C. C. A. N. Y.).

27. *In re Tribelhorn*, 14 A. B. R. 492, 137 Fed. 3 (C. C. A. N. Y.).

210. Joining of Additional Creditors.—And creditors may join the petitioning creditors in contending for the adjudication of the bankrupt, after the filing of the petition.²⁸

211. Creditors May Join though Sufficient Already Petitioning May Plead Separately.—Creditors may join with the petitioning creditors as well as intervene to contest the adjudication, even though there are three petitioning creditors already. It would be strange, indeed, if other creditors should be cut off by the filing of the petition and denied a part in the management of the prosecution of the common right. Other creditors may file intervening petitions setting up acts of bankruptcy in their own way and may even add other acts, provided they have occurred within the four months preceding the filing of the intervening petition.²⁹ But may not add acts of bankruptcy occurring more than four months before the filing of such intervening petitions.³⁰ The intervening petition may be amended. Thus, it may be amended to supply a defect in its allegations as to the number of creditors of the bankrupt.³¹ The intervening petition may be withdrawn.³²

212. Involuntary Proceedings Not to Be Dismissed Except on Merits, etc., if Any Creditor Willing to Take Up Contest.—The proceedings may not be dismissed for want of prosecution or otherwise upon the merits, or by the court on its own motion for failure to comply with court rules, if any creditor objects to the dismissal and will himself take up the contest.³³

213. Time of Joining.—They may join at any time before the decision of the court upon the issue of bankruptcy, and be counted to make the requisite number of creditors and amount of claims.³⁴

²⁸ Bankr. Act, § 59 (f); *In re Haff*, 13 A. B. R. 362, 135 Fed. 742 (C. C. A. N. Y.); *Ayres v. Cone*, 14 A. B. R. 739, 138 Fed. 783 (C. C. A. S. Dak.); *In re Plymouth Cordage Co.*, 13 A. B. R. 665, 135 Fed. 1000 (C. C. A. Okla.); *In re Dingfield*, 2 A. B. R. 355, 96 Fed. 190 (D. C. Ga.); *In re Bellah*, 8 A. B. R. (D. C. Del.); *In re Stein*, 5 A. B. R. 288, 105 Fed. 749 (D. C. Pa., dismissed, on other grounds, in *In re Plymouth Cordage Co.*, 13 A. B. R. 665, 135 Fed. 1000, C. C. A. Okla.).

²⁹ *In re Haff*, 13 A. B. R. 362, 135 Fed. 742 (C. C. A. N. Y.). Also, *In re Haff*, 5 A. B. R. 288, 105 Fed. 749 (D. C. Pa.); *In re Beddingfield*, 2 A. B. R. 355, 96 Fed. 190 (D. C. Ga.). But other creditors cannot be compelled to come and join. *In re Gillette*, 5 A. B. R. 119, 104 Fed. 769 (D. C. N. Y.).

³⁰ *In re Haff*, 13 A. B. R. 362, 135 Fed. 742 (C. C. A. N. Y.).

³¹ *In re Haff*, 13 A. B. R. 362, 135 Fed. 742 (C. C. A. N. Y.).

³² *Moulton v. Coburn*, 12 A. B. R. 554, 131 Fed. 201 (C. C. A. Mass., affirming *In re Coburn*, 11 A. B. R. 212, 126 Fed. 218).

³³ Impliedly, *In re Cronin*, 3 A. B. R. 552, 98 Fed. 584 (D. C. Mass.). Although this was a case where one of the petitioning creditors was objecting, the principle involved is the same and would apply to the case of any creditor. This case was distinguished in *Moulton v. Coburn*, 12 A. B. R. 555, 131 Fed. 121 (C. C. A. Mass.).

³⁴ *In re Plymouth Cordage Co.*, 13 A. B. R. 665, 135 Fed. 1000 (C. C. A. N. Y.); *In re Romanow*, 1 A. B. R. 461, 92 Fed. 510 (D. C. Mass.); *In re Beddingfield*, 2 A. B. R. 355, 96 Fed. 190 (D. C. Ga.); *obiter*, *In re Tribelhorn*, 14 A. B. R. 491, 137 Fed. 3 (C. C. A. N. Y.).

And they may so join even though the original creditors had not provable claims or were insufficient in number.

In *re Vastbinder*, 11 A. B. R. 121, 126 Fed. 417 (D. C. Pa.): "It is urged, however, that as the original petition was insufficient, by reason of one of the petitioners being disqualified, it cannot be cured by the intervention of others; but that does not seem to be the law. The proceedings, as originally instituted, were formally sufficient, and even though some of the petitioning creditors were not as argued, entitled to prosecute them, they, nevertheless, inured to the benefit of all, and others may unquestionably come in for the purpose of supplying any deficiency."

But they may not join after the decision of the court upon the issues.³⁵

In *re Tribelhorn*, 14 A. B. R. 491, 137 Fed. 3 (C. C. A. N. Y.): "After a hearing and dismissal of an involuntary petition (for deficiency of parties plaintiff) it is too late for any new creditor to intervene as a matter of right, and a denial of the application is proper."

Creditors may join after the expiration of the four months period in order to make up the requisite number, even though the original creditors had no provable claims or were insufficient in number.³⁶

§ 214. Only Creditors or Those Holding Rights against Debtor at Time of Commission of Act Competent Petitioners.—Only creditors who were such at the time of the commission of the alleged act of bankruptcy or who held their rights against the bankrupt at that time may petition the debtor into bankruptcy.³⁷

But their claims need not have been "provable" at the time of the commission of the act if "provable" at the time of the filing of the petition.³⁸ Two cases, however, hold that if the claim was an unliquidated tort claim for personal injury at the time of the commission of the alleged act of bankruptcy although reduced to judgment at the time of the filing of the petition, it may not be one of the petitioning creditors' claims.³⁹

³⁵ *Neustadter v. Chicago Dry Goods Co.*, 3 A. B. R. 96, 96 Fed. 830 (D. C. Wash.).

³⁶ In *re Romanow*, 1 A. B. R. 461, 92 Fed. 510 (D. C. Mass.); In *re Mammoth Pine Lumber Co.*, 6 A. B. R. 84 (D. C. Ark.); In *re Mackey*, 6 A. B. R. 577, 110 Fed. 355 (D. C. Del.), approved by In *re Haff*, 13 A. B. R. 367, 135 Fed. 742 (C. C. A. N. Y.); inferentially, In *re Plymouth Cordage Co.*, 13 A. B. R. 665, 135 Fed. 1000 (C. C. A. Okla.).

³⁷ In *re Callison*, 12 A. B. R. 344, 130 Fed. 987 (D. C. Fla., affirmed sub nom. *Brake v. Callison*, 11 A. B. R. 797, 129 Fed. 196). But compare, as to frauds against subsequent creditors, *Beasley v. Coggins*, 12 A. B. R. 355, 57 So. Rep. 213; *Beers v. Hanlin*, 3 A. B. R. 745, 99 Fed. 695 (D. C. Ore.); In *re Brinckmann*, 4 A. B. R. 551, 103 Fed. 65 (D. C. Ind.); (1867) In *re Muller*, Fed. Cases, No. 9,912; (1867) In *re Burk*, Fed. Cases, No. 2,156.

³⁸ Compare, post, § 228.

³⁹ *Beers v. Hanlin*, 3 A. B. R. 745, 99 Fed. 695 (D. C. Ore.); In *re Brinckmann*, 4 A. B. R. 551, 103 Fed. 65 (D. C. Ind.). But these cases are clearly erroneous. The claim in each case was undeniably a "provable" debt at the time the petition was filed and that was enough.

§ 215. **Relatives, Officers, Directors, etc., Competent Petitioners.**

Members of the debtor's family may be petitioning creditors, as a wife and sons.⁴⁰

And directors, officers and stockholders who are creditors may be petitioning creditors.⁴¹

First Nat. Bank v. Ice Co., 14 A. B. R. 448, 136 Fed. 466 (D. C. Pa.): "Having carried the company along as they had, by advancing money and lending their credit, they were not obliged to sit by and do nothing, simply because of their official relation to it."

§ 216. **Solicitation by Bankrupt to File Involuntary Petition, or Creditors Not to Resist Adjudication, Not Improper.**—It is not

proper for the directors of a corporation to solicit creditors to file a petition against the corporation, based on the fifth act of bankruptcy.⁴² It is not such collusion as will defeat adjudication for a corporation to admit in writing its inability to pay its debts and its willingness to be judged a bankrupt on that ground, and to accompany the same with solicitation of certain creditors to file a bankruptcy petition against it.⁴³

Nor is it improper for the creditors to solicit the bankrupt not to resist a petition for adjudication.

In re Billing, 17 A. B. R. 90 (D. C. Ala.): "It is neither immoral nor illegal and contrary to public policy for petitioning creditors to urge upon their debtor, who is in fact insolvent, and has committed an act of bankruptcy, not to resist adjudication in an involuntary proceeding, or for such debtor to heed the importunity of creditors at any stage in the proceeding against him. When such a debtor does no more than abandon resistance once begun to an effort to adjudicate him a bankrupt, and consents to be adjudged, because he deems it to be the best interests of all his creditors, his conduct, whether induced solely by his own volition and judgment, or inspired by the solicitation of creditors, is whether or not there be any formal agreement between the debtor and the petitioning creditors as to his consent to an adjudication, does not work any fraud or wrong upon creditors. The law gives the creditors the right to force such a debtor into bankruptcy. Having the right under the law and facts of this case to force the debtor into bankruptcy, his creditors had a perfect moral and legal right to seek to end the prolonged litigation, by agreement to that end between themselves and the bankrupt. The bankrupt could lawfully consent

40. Impliedly, *Bankr. Act*, § 59 (e); *In re Novak*, 4 A. B. R. 311, 101 Fed. 800 (C. Iowa).

41. *Obiter*, *In re Rollins Gold & Silver Mining Co.*, 4 A. B. R. 327 (Ref. N. Y.).

42. *In re Moench*, 12 A. B. R. 240, 123 Fed. 965 (C. C. A. N. Y., affirming 10 B. R. 656).

43. *In re Duplex Radiator Co.*, 15 A. B. R. 324, 142 Fed. 906 (D. C. N. Y.). That where a corporation itself desiring to go through bankruptcy is unable to get three creditors to file a petition but succeeds in getting two and induces a third creditor to assign its claim; and thereupon the two and the assignee of the third file the petition, it has been held, that the court should dismiss the petition as a collusion to avoid the statute. *In re Independent Thread Co.*, 7 B. R. 704, 113 Fed. 998 (D. C. N. J.). This is a doubtful rule. Contrast, incidentally, *In re Moench*, 12 A. B. R. 240, 123 Fed. 465 (C. C. A. N. Y., affirming A. B. R. 656).

in advance to a decree, which the law, on the evidence, would surely pronounce against him, if the litigation continued. In such a case the law seeks to bring about the equitable pro rata distribution of his estate among his creditors, according to the provisions of the bankruptcy statute. His consent only aids in carrying out the policy of the statute, and in bringing about a status, which the law, under the circumstances, declares ought to exist."

Nor, for that matter, is the bankrupt's solicitation of creditors not to file a petition in bankruptcy against him, improper.⁴⁴

§ 217. Partnership Creditors Competent to Petition against Individual Partner.—Partnership creditors are creditors also of each partner and may be petitioning creditors against the individual partner.⁴⁵

§ 218. Partnership as Petitioning Creditor in Firm Name.—Whether a partnership who is a creditor may be one of the petitioning creditors in its firm name, *quære*.⁴⁶

§ 219. Authority of Corporate Officer to File Petition.—As to what is sufficient authority in an officer of a creditor corporation to authorize him to file an involuntary petition, there has been one holding under the present law.⁴⁷

§ 220. Secured Creditors Competent to Extent of Deficit.—Creditors holding securities are competent to join as petitioners. But their claims are to be counted in estimating the \$500 only for the deficit left after the deduction of the value of their securities.⁴⁸

§ 221. Estoppel of Creditors by Connivance.—Creditors who have connived at the alleged act of bankruptcy, whether it be either actually or constructively fraudulent, or not fraudulent at all, are of course estopped from proceeding against the debtor in involuntary bankruptcy on that ground.⁴⁹

Clark v. Henne & Meyer, 11 A. B. R. 583, 127 Fed. 288 (C. C. A. Tex.): This was a case where a proposal was made and acted on at a meeting of all creditors but one that the bankrupt should execute a transfer in the form of a deed of trust or chattel mortgage in the usual form with power of sale and condition of defeasance of his stock of goods and all evidences of indebtedness to a trustee to apply the proceeds of sale as therein stated in which event the court

⁴⁴. *In re Brown*, 7 A. B. R. 102, 111 Fed. 979 (D. C. Mo.).

⁴⁵. *In re Hee*, 13 A. B. R. 8 (D. C. Hawaii); *In re Mercur*, 2 A. B. R. 626, 95 Fed. 634 (D. C. Pa.).

⁴⁶. *In re Livingston*, 13 A. B. R. 357 (D. C. Hawaii).

⁴⁷. *In re Winston*, 10 A. B. R. 171, 122 Fed. 187 (D. C. Tenn.).

⁴⁸. Bankr. Act, § 59 (B); *In re Blount*, 16 A. B. R. 697, 142 Fed. 263 (D. C. Ark.).

⁴⁹. *Obiter*, *Woolford v. Steel Co.*, 15 A. B. R. 40, 138 Fed. 582 (D. C. Del.); (1867) *In re Williams*, Fed. Cas., No. 17,706.

And the creditors were estopped from setting up such conveyance as a ground for the debtor's adjudication as bankrupt.

Obiter, Moulton v. Coburn, 12 A. B. R. 553, 131 Fed. 201 (C. C. A. Mass.): A creditor who has assented in writing to the terms of a common law assignment for the benefit of creditors is not entitled, ordinarily, to join in an involuntary petition alleging as the sole act of bankruptcy the making of the general assignment to which he has expressly assented. This is not because he has ceased to be a creditor, but because, having voluntarily elected that the bankrupt's estate shall be administered under the assignment, and having accepted the provisions of the deed of trust, he is thereby estopped from action consistent with the agreement."

In re Marks Bros., 15 A. B. R. 459, 142 Fed. 279 (D. C. Pa.): " * * * it has been well settled that it is a just ground for refusing to allow a petitioner to complain of an act of bankruptcy which has been induced or brought about by himself. 'To hold otherwise would enable the unscrupulous to entrap a person into bankruptcy.' A party cannot thus take advantage of his own wrong."

Lowenstein v. McShane Mfg. Co., 12 A. B. R. 601, 130 Fed. 1007 (D. C. Md.): As to Lowenstein and N. Frank & Sons, it is objected that, by their participation in the receivership proceedings in the State court, they have elected to proceed in that forum, and are estopped from petitioning bankruptcy. It appears that Lowenstein and N. Frank & Sons on November 28th, 1903, intervened in that case on the day after the receiver was appointed, and filed petitions in the Circuit Court No. 2 praying that court to appoint a coreceiver. These petitions came on for hearing on March 24, 1904, and a coreceiver was appointed by the court, although not the one urged by the petitioner.

"This action, it seems to me, was an election by those two creditors to avail of the proceedings in the State court, and it appears that, during the period between their intervention in that case and their filing the petition in bankruptcy, much was done by the receivers in the State court. The large business of the corporation was carried on, money was, by the orders of court, expended for the repairs of buildings, and leases to quite a number of tenants were effected at very remunerative rents, and sales of property have been negotiated. It seems to me that equitably, after four months' participation, these creditors should be held to be estopped from taking this proceeding, which would be destructive of the acts of the receivers."

§ 222. Mere Proving of Claims under General Assignment or Receivership No Estoppel.—But the mere proving of claims under a general assignment for the benefit of creditors in the State Insolvency Courts will not operate to estop the creditors so proving claims from filing an involuntary petition against the bankrupt.⁵⁰

Hays v. Wagner, 18 A. B. R. 167, 150 Fed. 533 (C. C. A. Ohio): "The claim of the Hayden-Clinton National Bank is assailed, not on the ground of its inefficiency but because the bank itself had filed a claim as a creditor under the Ohio assignment of April 29, 1904, relied upon as the act of bankruptcy. The

⁵⁰. *In re Hirose*, 12 A. B. R. 154 (D. C. Hawaii); *In re Curtis*, 2 A. B. R. 226, 1 Fed. 630 (C. C. A. Ills.), distinguished in *Moulton v. Coburn*, 12 A. B. R. 553, 131 Fed. 201, and also in *Durham Paper Co. v. Seaboard Knitting Mills*, 10 A. B. R. 29, 121 Fed. 179; *Leidigh Carriage Co. v. Stengel*, 2 A. B. R. 383, 95 ed. 643 (C. C. A. Ohio); apparently, but perhaps not really, contra, *Durham Paper Co. v. Seaboard Knitting Mills*, 10 A. B. R. 29, 121 Fed. 179 (D. C. N. Car.).

petition below was filed July 16, 1904, and there is nothing in the record, as it now stands, to show that any claim was ever filed with the Ohio assignee by this bank, but the statement of evidence which was stricken from the record by the *nunc pro tunc* order does contain the information that on August 5, 1904, the bank presented to the assignee a claim amounting to \$10,000, being a note for that amount, of which Hays was one of the makers. But, if this information were properly before us, it would not lead us to eliminate this claim. We think that, after joining in the petition below, the bank had a right, if it deemed it advisable, to present the note referred to in the Ohio assignment. It is not the same note, and, besides, it was presented after, and not before, the bank joined in the petition below. Having joined in the petition, the bank could not in that way withdraw from the litigation."

Nor will the proving of claims under a receivership estop them.⁵¹

§ 223. **Actual Connivance at Act Essential to Estoppel.**—Actual connivance at the act of bankruptcy or laches in objecting to it would seem to be the test.⁵²

Obiter, Leidigh Carriage Co. v. Stengel, 2 A. B. R. 383, 95 Fed. 637 (C. C. A. Ohio): "It seems that the decisions in which it has been held that a creditor was estopped from instituting bankruptcy proceedings against one who has made a general assignment have been cases in which the petitioning creditor had induced and abetted the committing of the act of bankruptcy which he afterward relied upon in his petition, or where, after he learned of the act he acquiesced in it and did not at once, when he might have done so, file a petition in bankruptcy and avoid the act."

Impliedly, *Sinsheimer v. Simonson*, 3 A. B. R. 824, 95 Fed. 954 (C. C. A. Ky.): "The assignee wrote and asked from them statements of account, which they gave. It was not filed with the assignee for the purpose of becoming a party to the assignment, but was a mere answer to the inquiry * * *."

"Further, we are satisfied, from an examination of the evidence, that the reason why the petition in bankruptcy was not filed until February, 1899, though prepared shortly after the deed of assignment, was the promise of a speedy settlement and composition of the claims by the defendants, which might make unnecessary all the proceedings in bankruptcy. As the delay was due to the solicitation of the defendants, it could not have misled them into a change of any position. * * *"

"The sale by the petitioners of two small bills of goods to the assignee, and the receipt of the money for the same, was not an act which was calculated to mislead any one into the belief that petitioners affirmed the validity of the assignment, and did not intend to impeach it. *Haydock v. Coope*, 53 N. Y. 68, is closely analogous upon this point, and supports our view. Under these circumstances, we do not think that the petitioning creditors, by their delay, misled the defendants or others to believe that they were not intending to file a petition in bankruptcy within the required four months."

51. In *re Salmon & Salmon*, 16 A. B. R. 136, 143 Fed. 395 (D. C. Mo.).

52. In *re Curtis*, 2 A. B. R. 226, 94 Fed. 630 (C. C. A., affirming 1 A. B. R. 440, distinguished in *Moulton v. Coburn*, 12 A. B. R. 556, 131 Fed. 201, C. C. A. Mass.). Compare, to similar effect, as to proving claims, In *re Folb*, 1 A. B. R. 22, 91 Fed. 107 (D. C. N. Car.).

§ 224. And Actual Connivance at or Express Assent to General Assignment May Suffice to Effect Estoppel.—But where the very act of bankruptcy urged is the making of a general assignment, creditors who have assented thereto are estopped and may not be petitioning creditors nor be reckoned in ascertaining the number of creditors.⁵³

Moulton v. Coburn, 12 A. B. R. 553, 131 Fed. 201 (C. C. A. Mass., affirming *In re Coburn*, 11 A. B. R. 212): "It must be assumed that the assenting creditor had knowledge of his rights under the Bankruptcy Act, and voluntarily chose to assent to the terms of the assignment in preference to exercising his rights under the act. Here was a complete election between rights under the assignment and rights under the Bankruptcy Act. That one small creditor alone cannot file a petition in bankruptcy, that he may have doubts of his ability to induce other creditors to join him, and that his remedy by a petition in bankruptcy is dependent upon the co-operation of other creditors, does not justify him in assenting to an assignment, and afterwards repudiating it if he can find a sufficient number of creditors to join him in a petition. The election results from his choice of rights which are inconsistent with the enforcement of rights under the Bankruptcy Act. That he may not have an individual right to prefer a petition in bankruptcy does not render impossible an election between such rights as the act confers and rights under an assignment. He has chosen between two rights, one of which is derived from an instrument in which a clear intention appears that he should not enjoy both."

Likewise where the act of bankruptcy complained of is a receivership.⁵⁴ Likewise, where the petitioning creditor procured a judgment creditor to issue the execution complained of.⁵⁵

A stricter rule is laid down in *Durham Paper Co. v. Seaboard Knitting Mills*, 10 A. B. R. 29, 121 Fed. 179 (D. C. N. C.), as follows:

"A petitioner who participates in, receives benefit under or assents to a general assignment, valid under the laws of the State, is estopped from afterwards filing or becoming a party to a petition in bankruptcy to avoid such assignment."⁵⁶

§ 225. Corporation Creditor Not Estopped by Officer Acting as Assignee.—A corporation creditor of an alleged bankrupt, which was not preferred, under the bankrupt's prior general assignment for creditors, is not estopped to join in the petition for involuntary bankruptcy by the fact that one of its officers in his individual capacity, acted as the assignee.⁵⁷

§ 226. No Election of Remedies because of Previous Attack upon Preferences in State Court.—It is not to be construed as an

^{53.} *In re Miner*, 4 A. B. R. 710, 104 Fed. 520 (D. C. Mass.). But compare, *Hays v. Wagner*, 18 A. B. R. 167, 150 Fed. 533 (C. C. A. Ohio).

^{54.} *Woolford v. Steel Co.*, 15 A. B. R. 40, 138 Fed. 582 (D. C. Del.); *Lowenstein v. McShane Co.*, 12 A. B. R. 601, 130 Fed. 1007 (D. C. Md.).

^{55.} *In re Marks Bros.*, 15 A. B. R. 459, 142 Fed. 279 (D. C. Pa.).

^{56.} To same effect, see *In re Romanow*, 1 A. B. R. 461, 92 Fed. 510 (D. C. Mass.).

^{57.} *In re Winston*, 10 A. B. R. 171, 122 Fed. 187 (D. C. Tenn.).

election of the remedies of the State court to first attack there, preferences under a general assignment. Attacking preferences under a general assignment by action in the State court does not estop the same creditors from attacking the same preferences by instituting bankruptcy proceedings against the assignor. The bankruptcy proceedings and the assignment proceedings are not similar suits on the same cause of action.⁵⁸

§ 227. Creditors Holding Provable Claims, and Only Such, Competent.—Creditors holding provable claims, and only such, are competent.⁵⁹ Even the wife of the debtor has been held competent to be a petitioning creditor, in States where she may be his creditor.⁶⁰

§ 228. Must Be Provable at Time of Filing Petition.—The provability must be at the time of the filing of the petition. The claim need not be provable at the time of the commission of the alleged act of bankruptcy, although the original obligation at least must have existed at that time.⁶¹

§ 229. Claims Arising after Filing of Petition Insufficient.—And a creditor whose claim arose since the filing of the petition has not a provable debt.⁶²

§ 230. Contingent Claims Insufficient.—Contingent claims are not provable and are not sufficient for petitioning creditors' claims.⁶³

But the fact that the damages cannot be fully ascertained and are not fully suffered until after the filing of the petition will not make the claim contingent in the sense of the bankruptcy law.⁶⁴

And the bankrupt's liability as endorser before maturity of the obligation is a provable debt and the holder may be a petitioning creditor.⁶⁵

§ 231. Surety's Claims.—A surety on a defaulting contractor's bond completing work at an expense greater than the balance of the contract

58. *Leidigh Carriage Co. v. Stengel*, 2 A. B. R. 383, 95 Fed. 637 (C. C. A. Ohio).

59. Bankr. Act, § 59 (b); *In re Yates*, 8 A. B. R. 69, 114 Fed. 365 (D. C. Calif.). As to what are "provable" claims and what are not, see post, "Provable Debts," ch. XXI, § 625, et seq., where the various propositions are taken up and discussed in full and authority cited.

60. *In re Novak*, 4 A. B. R. 312, 101 Fed. 800 (D. C. Iowa).

61. See ante, § 214.

62. *Obiter*, *In re Coburn*, 11 A. B. R. 212, 126 Fed. 218 (D. C. Mass., affirmed in *Moulton v. Coburn*, 12 A. B. R. 553); *obiter*, *In re Adams*, 12 A. B. R. 368, 130 Fed. 788 (D. C. Mass.). See post, ch. XXI, div. 5, § 668, et seq.

63. See post, "Contingent Claims," §§ 611, 640, et seq.

64. *In re Grant Shoe Co.*, 12 A. B. R. 349, 130 Fed. 881 (C. C. A. N. Y.); *In re Stern*, 8 A. B. R. 569, 116 Fed. 604 (C. C. A. N. Y., affirming *Manhattan Ice Co.*, 7 A. B. R. 408, 114 Fed. 400.). See post, § 685, et seq.

65. *In re Rothenberg*, 15 A. B. R. 485, 140 Fed. 798 (D. C. N. Y.). See post, § 643, et seq.

price is a creditor of the contractor to the extent of its loss, and may file a petition against him.⁶⁶

It has been held, that a surety before payment of any part of the principal's obligation is not a creditor, and cannot file a petition against him; but this is not correct law, by the great weight of authority.⁶⁷

§ 232. Unliquidated Claims Sufficient if Provable.—Creditors holding unliquidated claims may be petitioning creditors provided their claims belong to some one or more of the classes mentioned in the Bankruptcy Act, § 63 (b) as provable, to-wit:⁶⁸ contracts, express or implied; judgments; costs; or taxes; or are capable of being presented as such, as in cases where the tort may be waived and suit brought on implied contract. Thus, for instance, unliquidated claims arising *ex contractu* are provable and sufficient for petitioning creditors' claims. Damages for breach of warranty upon a sale of personal property are claims arising on contract, and are provable although the amount thereof is undetermined.⁶⁹

Likewise, damages for breach of contract of sale covering a period of time where the time for performance has not expired, is a provable debt if new contracts have been made so that the extent of the damages is ascertainable.

In *re Stern*, 8 A. B. R. 569, 116 Fed. 604 (C. C. A. N. Y., affirming *In re Manhattan Ice Co.*, 7 A. B. R. 408, 114 Fed. 400): "The question as to what constitutes a provable claim in involuntary petitions in bankruptcy has been much discussed. It has been held that one having an unliquidated claim for damages for a tort was not such a creditor as to be entitled to institute involuntary proceedings. In *re Brinckmann* (D. C.), 4 Am. B. R. 551, 103 Fed. 65. So it has been held, that such claims and claims for rent to accrue under a lease or for breach of warranty are not provable as debts until they have been liquidated. * * *

"But in the case at bar, the question is not necessarily whether the claims are liquidated or unliquidated, but whether they are 'provable.' The statute provides that the petitioning creditors shall have 'provable claims.' Counsel for defendant corporation contends that damages to accrue in the future are not provable because they are uncertain in amount, and because not having yet accrued they are not yet in existence. But in actions for personal injuries, or for breaches of warranty in the sale of seeds, or for failure to deliver goods which have no recognized market value, the injured party is entitled to recover compensation for such elements of damage as are shown to be reasonably certain or probable, or such as naturally result in such cases and may be supposed likely to occur in the given case. * * *

"The petitioners herein proved that the amount of ice used by them in their business was about 1,000 tons a year; that under the new contracts which they were obliged to make they were paying an excess over the contract price with the petitioners of from 60 cents to \$1.50 a ton; that the price of ice fluctuated

66. *Boyce v. Guaranty Co.*, 7 A. B. R. 6, 111 Fed. 138 (C. C. A. Ohio).

67. *Phillips v. Dreher Shoe Co.*, 7 A. B. R. 326, 112 Fed. 404 (D. C. Pa.). But compare *Swarts v. Siegel*, 8 A. B. R. 689, 117 Fed. 13 (C. C. A. Mo.). Also, see post, "Claims of Sureties," § 642, et seq.

68. See post, § 704.

69. *In re Grant Shoe Co.*, 12 A. B. R. 349, 130 Fed. 881 (C. C. A. N. Y., affirming 11 A. B. R. 48).

from year to year; that they had made unsuccessful attempts to get their ice cheaper. Upon this evidence the court was justified in finding, and it found, that this evidence tended to show that the petitioners could not replace the contract without suffering a direct loss much in excess of \$500, and that they were creditors for the requisite amount, and were not obliged to await the expiration of the time for which the contracts were to continue."

Contra, *In re Morals*, 5 A. B. R. 425, 105 Fed. 761 (D. C. Fla.): In this case the court held, that a claim for breach of warranty upon a contract for the sale of cigars, not liquidated, could not be used as a basis for adjudication in bankruptcy, because it sounded in tort.

It is true that the Bankruptcy Act, § 63 (b) seems to imply that an unliquidated claim, even though arising on contract, is not "provable" until liquidated; from which it would follow, that it could not be used as a basis for involuntary proceedings, since the creditors must hold "provable" claims; and this is the holding in one case.

In re Big Meadows Gas Co., 7 A. B. R. 697, 113 Fed. 974 (D. C. Pa.): "It will thus be seen the demand is proved after liquidation and that prior thereto an application is to be made to the court for direction as to the manner of such liquidation. After careful and deliberate consideration of the question here involved, we have reached the conclusion that the unliquidated demand herein made only becomes a provable debt after it has been judicially ascertained and liquidated in the statutory method set forth. Such construction is in accord with other provisions of the act. The provisions requiring petitioning creditors should have claims aggregating five hundred dollars in excess of all securities evidences that Congress felt there should be definite, ascertained claims, and that too in excess of all securities, as a foundation on which to base a petition to adjudicate one a bankrupt. Where a claim against another has not been judicially ascertained and where its validity and certainty are evidenced by no paper, acknowledgment or other admission of the debtor, it would offend our sense of right to allow such self asserted claim to constitute sufficient ground for harrassing another with a petition in bankruptcy. It will readily be seen that an averred but unfounded claim might be made an effective weapon to enforce an unjust demand or even to bankrupt a struggling but solvent debtor.

But the wording of the Bankruptcy Act, § 63 (b) to the effect that unliquidated claims may be liquidated and "thereafter proved" is not conclusive that such claims are not previously "provable;" and certainly, an unliquidated claim, if capable of being presented as a claim *ex contractu*, is discharged by the bankrupt's discharge although never in fact, so presented, all which implies that the claim is all the time "provable," since only "provable" debts are discharged.

But unliquidated claims for torts which cannot be presented in form *ex contractu* as on implied contract, are not provable and are not sufficient claims for petitioning creditors; as for instance, damages for personal injury.⁶⁹

69. *In re Yates*, 8 A. B. R. 69, 114 Fed. 365 (D. C. Calif.); *Beers v. Hanlin*, 3 A. B. R. 745, 99 Fed. 695 (D. C. Ore.); *In re Brinckmann*, 4 A. B. R. 551, 103 Fed. 65 (D. C. Ind.). Both the cases, *Beers v. Hanlin* and *In re Brinckmann*, go too far, for the claims in those two cases were reduced to judgment at the time of the filing of the petition, although not at the time of the commission of the act of bankruptcy charged.

§ 233. **Preferred Creditors Competent.**—Creditors who have received references within four months of the filing of the petition, nevertheless have provable claims, and may join as petitioning creditors.⁷⁰

Stevens v. Nave-McCord Co., 17 A. B. R. 610, 150 Fed. 71 (C. C. A. Colo.): "A creditor who holds a voidable preference has a provable claim in the sense that he may make and file the formal proof thereof specified by the bankruptcy law; but he may not procure an allowance of his claim, he may not vote at a creditors' meeting, and he may not obtain any advantage from his claim in the bankruptcy proceeding before he surrenders his preference.

"Such a preferred creditor may present or may join in a petition for an adjudication of bankruptcy. But he may not be counted for the petition unless he surrenders his preference before the adjudication."

The fact that they will not be allowed to participate in the dividends unless the preferences are surrendered, is like any other objection to the substance of the claim. The claim is nevertheless provable; but it simply is not allowable unless the preference is surrendered, and it stands as any other unallowable though provable claim of a petitioning creditor would stand.

However, since the passage of the amendment of 1903 making recoverable only such preferences as were received under circumstances indicating the creditor's collusion, the rule is that creditors who have received such preferences will not be counted for the petition without surrender, or at least offer of surrender, of the preference, before adjudication.⁷¹

The petition should show an offer to surrender; or should be amended to show it.⁷²

70. In re Wise, 2 N. B. N. & R. 151 (Ref. N. Y.); In re Thompson, 2 N. B. N. R. 1016 (Ref. Minn.); In re Herzikopf, 9 A. B. R. 90, 118 Fed. 101 (D. C. Calif.); In re Miller, 5 A. B. R. 140, 104 Fed. 764 (D. C. N. Y.), which was a case of "innocent" preference, however. In re Hornstein, 10 A. B. R. 308, 122 Fed. 273, 277 (D. C. N. Y.); In re Douglass Coal & Coke Co., 12 A. B. R. 551, 131 Fed. 769, Master's Report (D. C. Tenn.). Compare, to same effect, In re Norcross, 1 A. B. R. 644 (D. C. Mo.); In re Cain, 2 A. B. R. 378 (D. C. Ill.). Compare *Keppel v. Tiffin Sav. Bank*, 13 A. B. R. 552, 197 U. S. 356. Contra, In re Wing Yick Co., 13 A. B. R. 757 (D. C. Hawaii); In re Fishplate Clothing Co., 11 A. B. R. 204, 125 Fed. 926 (D. C. N. Car.); In re Gillette & Prentice, 5 A. B. R. 119, 104 Fed. 769 (D. C. N. Y.), which was a case of fraudulent preference, however. Contra, In re Rogers Milling Co., 4 A. B. R. 540, 102 Fed. 687 (D. C. Ark.).

Under the law of 1867, compare, In re Bloss, Fed. Cas. 1,562; In re Calif. Pac. Ry. Co., Fed. Cas. 2,315; In re Stansell, Fed. Cas. 13,293; *Rankin v. Railway Co.*, Fed. Cas. 11,567. Compare resume in *Keppel v. Tiffin Sav. Bank*, 13 A. B. R. 552, 197 U. S. 356.

71. *Stevens v. Nave-McCord Co.*, 17 A. B. R. 610, 150 Fed. 71 (C. C. A. Colo.). One court has several times given such preferred creditors the option either of having the petition dismissed or of depositing the preference with the clerk of the court—a proceeding without express sanction in the statute, at any rate. In re Gillette, 5 A. B. R. 119, 104 Fed. 769 (D. C. N. Y.); In re Miller, 5 A. B. R. 140, 104 Fed. 764 (D. C. N. Y.).

72. In re Miller, 5 A. B. R. 140, 104 Fed. 764 (D. C. N. Y.). [1867] Compare, In re Rodo, 20 Fed. Cas. 153.

If the creditor, however, offer in the petition to surrender his preference, then at any rate any disqualification is removed.⁷³

Obiter, *In re Vastbinder*, 11 A. B. R. 118, 126 Fed. 417 (D. C. Pa.): "But, however this may be, it is conceded by all the authorities that a preferred creditor may surrender his preference and thus qualify, and since, as pointed out by Brandenburg, there is no one, prior to the selection of a trustee, to whom he can surrender, it is sufficient if he offers to do so in the petition or course of the proceedings; and that, in effect, is what has been done here."

But if the act of bankruptcy charged is precisely the giving of the preference to such creditor, such creditor may not, without surrender (or offer of surrender) of his preference, file the involuntary petition.⁷⁴

§ 234. Attaching Creditors and Other Creditors Obtaining Liens by Legal Proceedings.—An attaching creditor whose lien was acquired within the four months may be a petitioning creditor, for he has a provable claim—merely his lien is null and void.⁷⁵ Nevertheless, before adjudication he should be required formally to surrender his attachment lien.⁷⁶ And the filing of the petition itself does not amount to such a release.⁷⁷

§ 235. Validity of Petitioning Creditor's Claim May Be Disputed.—Whether a petitioning creditor's debt is a valid debt is a proper issue.⁷⁸

^{73.} *In re Yick Co.*, 13 A. B. R. 757 (D. C. Hawaii); *Stevens v. Nave-McCord Co.*, 17 A. B. R. 610, 150 Fed. 71 (C. C. A. Colo.). Obiter, *In re Girard Glazed Kid Co.*, 12 A. B. R. 295, 129 Fed. 841 (D. C. Penn.).

^{74.} Obiter, *Leighton v. Kennedy*, 12 A. B. R. 229, 129 Fed. 731 (C. C. A. Mass.).

^{75.} *In re Hornstein*, 10 A. B. R. 308 (D. C. N. Y.); *In re Schenkein & Coney*, 7 A. B. R. 162, 113 Fed. 421 (Ref. N. Y.); impliedly, *In re Richard*, 2 A. B. R. 506, 94 Fed. 633 (D. C. N. C.); contra, *In re Burlington Malting Co.*, 6 A. B. R. 369, 109 Fed. 777 (D. C. Wis.); compare, obiter, *First Nat'l Bank v. Ice Co.*, 14 A. B. R. 448, 136 Fed. 466 (D. C. Pa.).

^{76.} *In re Hornstein*, 10 A. B. R. 308 (D. C. N. Y.); impliedly, *In re Richard*, 2 A. B. R. 506, 94 Fed. 633 (D. C. N. C.); contra, *In re Schenkein & Coney*, 7 A. B. R. 162, 113 Fed. 421 (Ref. N. Y.).

^{77.} *In re Burlington Malting Co.*, 6 A. B. R. 369, 109 Fed. 777 (D. C. Wis.).

^{78.} *In re Ferguson*, 11 A. B. R. 371 (D. C. Pa.).

Assigned Taxes Sufficient.—A claim for taxes acquired by assignment is a sufficient claim for involuntary proceedings. Obiter, *In re Cleanfast Hosiery Co.*, 4 A. B. R. 702 (Ref. N. Y.). But compare, query, *In re Beddingfield*, 2 A. B. R. 355, 96 Fed. 190 (D. C. Ga.).

Other Instances as to Provability of Claims Sought to Be Used in Involuntary Petitions.—Account originating with partnership, later continued with its successor, a corporation; payments thereon credited to partnership claim; balance due to corporation. *Hoffschlaeger Co. v. Young Nap*, 12 A. B. R. 517 (D. C. Hawaii).

Subcontractor's claim against head contractor, conditioned by contract on the owner's paying, is not sufficient. *In re Ellis*, 16 A. B. R. 225, 143 Fed. 103 (C. C. A. Ohio).

Partner's claim for share of profits is not provable claim against the partnership. Obiter, *In re Schenkein & Coney*, 7 A. B. R. 162, 113 Fed. 421 (Ref. N. Y.).

A corporation that is a de facto partner cannot prove its claim for its contributory share as a debt simply because it was ultra vires to be a partner. *Wallerstein v. Ervin*, 7 A. B. R. 256, 112 Fed. 124 (C. C. A. Penn.).

Unpaid stock subscription. *Hays v. Wagner*, 18 A. B. R. 163, 150 Fed. 533 (C. C. A. Ohio).

A debt owing but not yet due is nevertheless provable and permitted to share

But compare *Gage v. Bell*, 10 A. B. R. 701, 124 Fed. 371 (D. C. Tenn.): "The court is not now prepared to say that such proceedings are not admissible, but it very well may be said that a petitioning creditor, having a debt provable on the face of it, ought not to be compelled by the defendant debtor to enter into litigation about it, legal and equitable, and antecedently to establish it by overthrowing all the defenses, real or fabricated, that the debtor may choose to set up by pleadings specially framed to present such issues. It is in effect tantamount to holding that a creditor with a disputed debt cannot be a petitioning creditor in bankruptcy; or, at least, not until he has cleared away all dispute and controversy, and established his debt by a judgment at law; for it would be, in effect, a requirement to do this, even if he must get such a judgment or its equivalent in the bankruptcy proceedings. And the result is that before we can inquire whether a debtor is insolvent, and has committed an act of bankruptcy, we must engage in a preliminary work of litigation in law and equity, and, possibly, even in admiralty as well, with each petitioning creditor, in order that he may know beforehand whether the debtor has any defense he may possibly make to the creditor's claim of debt. This is converting the language of the statute, 'three or more creditors having provable claims,' into a requirement that there shall be 'three or more creditors having proved and established debts,' before they may file the petition. Section 59b. If a debt is wholly wanting in existence, if it has been paid, for example, or if it has been fabricated for the purpose, of course the defendant should be allowed to show that fact in some form. But if it be a reasonably fair and honest claim of debt, which is provable in the sense that it is a claim that the court of bankruptcy after adjudication will hear and establish, if proved, the creditor should not be bound before the adjudication to so prove and establish it, but should be allowed to rely upon its provable quality, *prima facie*, to support an involuntary petition in bankruptcy."

§ 236. Withdrawal of Petitioning Creditors.—A creditor may withdraw from an involuntary petition, on leave of court.

In *re Coburn*, 11 A. B. R. 212, 126 Fed. 218 (D. C. Mass., affirmed sub nom. *Moulton v. Coburn*, 12 A. B. R. 553, C. C. A.): "A creditor misled may be permitted to withdraw." Citing *In re Heffron*, Fed. Cas. No. 6,321, and *In re Sargent*, Fed. Cases No. 12,361.

But leave to withdraw will be refused where the creditor's claim was settled by the bankrupt in order to induce withdrawal;⁷⁹ or, perhaps, where any of the other petitioning creditors objects.⁸⁰

in dividends, so a creditor holding it as a claim is competent to be one of the petitioning creditors. (1867) See *Linn v. Smith*, 4 N. B. Reg. 12.

Instance held valid, *Cleage v. Laidley*, 17 A. B. R. 598, 149 Fed. 346 (C. C. A. Mo.), charge of illegality; "gambling in futures" debt.

Instance held valid, *Hays v. Wagner*, 18 A. B. R. 163, 150 Fed. 533 (C. C. A. Ohio), subscription to capital stock.

⁷⁹ In *re Beddingfield*, 2 A. B. R. 355, 96 Fed. 190 (D. C. Ga.). And a petitioning creditor cannot be allowed subsequently to disqualify himself by conniving at a perpetuation of the assignment which is charged as the act of bankruptcy. *Hays v. Wagner*, 18 A. B. R. 167, 150 Fed. 533 (C. C. A. Ohio).

⁸⁰ In *re Granite Quarries Co.*, 16 A. B. R. 823 (D. C. Mass.), in which case all wished to withdraw except one and that one held a disputed claim then being litigated; yet the court held the case to await the outcome of the litigation. In *re Cronin*, 3 A. B. R. 552, 98 Fed. 584 (D. C. Mass.); (1867) In *re Heffron*, 10 N. B. Reg. 213, Fed. Cas. 6,321; (1867) In *re Sargent*, 13 N. B. Reg. 144, Fed. Cas. 12,361. (1867) Compare, In *re Indianapolis*, etc., 5 Biss. 287, Fed. Cas. 7,023.

§ 237. **Disqualification of Part of Petitioning Creditors.**—Where one of the three original petitioning creditors turns out to be disqualified, yet the case will not be dismissed if there remain any intervening creditors who are qualified.⁸¹ But the court will not hold the case where no creditors have yet intervened, and will not require notice to be given to other creditors, so they may come in and fill the vacancies in the complement.⁸²

In re Tribelhorn, 14 A. B. R. 491, 137 Fed. 3 (C. C. A. N. Y.): "After a hearing and dismissal of an involuntary petition (for lack of sufficient number of petitioning creditors) it is too late for any new creditor to intervene as a matter of right and a denial of the application is proper."

§ 238. **Change of Ownership of Petitioning Creditor's Claim—New Owner Substituted.**—Where a transfer of ownership occurs in a petitioning creditor's claim, pending the suit, the transferee may be substituted in the place of the original creditor; thus, the trustee in bankruptcy of a petitioning creditor may be substituted.⁸³

DIVISION 2.

ALLEGATIONS AND FORM OF PETITION.

§ 239. **All Essential Facts of Capacity, Jurisdiction and Cause to Be Pledged, According to Usual Rules.**—All the essential facts giving capacity to the parties and jurisdiction to the court and forming the elements of the cause of action must be alleged, and their allegation must conform to the usual rules of pleading.⁸⁴

In re Plotke, 5 A. B. R. 175 (C. C. A. Ills.): "The essential facts must appear affirmatively and distinctly, and it is not sufficient that jurisdiction may be inferred argumentatively. Wolfe v. Ins. Co., 148 U. S. 389; Parker v. Ormsby, 141 U. S. 81, 83."

§ 240. **Nature and Amount of Petitioners' Claims and Number Joining, to Be Shown.**—The petition must show the nature of the petitioning creditors' claims.

In re White, 14 A. B. R. 241, 135 Fed. 199 (D. C. Pa.): "An involuntary petition which fails to state the nature of the claims of the petitioning creditors is defective, but amendable."

81. In re Vastbinder, 11 A. B. R. 118, 126 Fed. 417 (D. C. Pa.).

82. In re Gillette, 5 A. B. R. 119, 104 Fed. 769 (D. C. N. Y.). To same effect, compare, In re Neustadter v. Dry Goods Co., 3 A. B. R. 98, 96 Fed. 830 (D. C. Wash.).

83. Hays v. Wagner, 18 A. B. R. 163, 150 Fed. 533 (C. C. A. Ohio).

84. Clark v. Henne, 11 A. B. R. 593, 127 Fed. 288 (C. C. A. Tex.).

Caption.—The caption of a petition in bankruptcy is no part of the petition and is not jurisdictional.

In re Garman, 15 A. B. R. 587 (D. C. Hawaii): "If the body of the petition is sufficient and the petition is properly served the court has jurisdiction even though the caption be defective."

But the statement of the nature of the petitioners' claims need not be made with the particularity requisite in the proof of debt under § 57, Bankr. Act.⁸⁵

In re Brett, 12 A. B. R. 496, 130 Fed. 981 (D. C. N. J.): "There is nothing in the Bankruptcy Act, or in the General Orders or forms prescribed by the Supreme Court under the authority of the Act, requiring greater particularity. The provision of § 57 of the Act, which requires the consideration of the claim to be set forth and sworn to relates to the proof of the claim, and not to the averments of the petition."

They must be shown to be provable claims. It must also appear that the petitioning creditors' claims aggregate at least \$500;⁸⁶ and that there are three creditors joining in the petition, unless the total number of creditors owed by the bankrupt is less than twelve.⁸⁷

§ 241. Amount of Total Indebtedness, Residence, Domicile, etc., to Be Shown.—It must be alleged that the debtor owes \$1,000 or more.

It must be alleged that the debtor has resided, had his domicile or principal place of business within the district for the greater portion of the six months next preceding the filing of the petition, or that he resides outside the United States, etc., and has property within the district, etc.⁸⁸ Where more than one of the facts of territorial jurisdiction are alleged, the allegation of the residence, domicile and principal place of business must not be made disjunctively.⁸⁹

§ 242. Corporation to Be Brought within Class Subject to Bankruptcy.—If the defendant is a corporation, it must be brought by allegation within one or the other of the classes of corporations subject to bankruptcy.⁹⁰

§ 243. Natural Persons to Be Shown Not within Excepted Classes.—The exceptions as to wage earners, farmers, etc., should be neg-

85. Instance, In re Brett, 12 A. B. R. 492, 130 Fed. 981 (D. C. N. J.): "Owner and holder of promissory note for \$100 dated January 15, 1904, and made by the alleged bankrupt, and payable to the creditor's order three months after date," is a sufficient allegation without statement of consideration.

86. See post, citations under the subject of amendments to supply defective allegations, § 261, et seq. See also, post, § 268, et seq.

87. See post, citations under the subject of amendments to supply defective allegations in this particular, § 268. See also, ante, div. 2 of the chapter.

88. In re Plotke, 5 A. B. R. 175, 104 Fed. 964 (C. C. A. Ills.). See ante, § 31, et seq. In re Blair, 3 A. B. R. 588, 99 Fed. 76 (D. C. N. Y.).

89. In re Laskaris, 1 A. B. R. 480 (Ref. N. Y.). Obiter, In re Clisdell, 2 A. B. R. 424 (D. C. N. Y.).

90. Obiter, Woolford v. Steel Co., 15 A. B. R. 33, 138 Fed. 582 (D. C. Del.), wherein it is held that filing demurrer with answer and going to trial waives insufficiency of allegations. For instance of an apparently wrong decision, see In re Stern, 8 A. B. R. 569, 116 Fed. 604 (C. C. A. N. Y.). But this case may perhaps be explained by the fact that the demurrer was put in with the answer, and that the parties went to trial without objection, thus suffering the actual facts pertaining to the business of the corporation to get before the court.

ated in the petition where it is sought to put a natural person into involuntary bankruptcy.⁹¹

In *re Mero*, 12 A. B. R. 121, 128 Fed. 630 (D. C. Conn.): "It is certainly *v. Craig*, 6 A. B. R. 383, 110 Fed. 137): "There was nothing in the petition to bring the alleged bankrupt within the terms of the statute. It did not allege what the defendant's business or occupation was and there was no allegation to show that he did not come within the excepted classes, which, under the law, are too important to be wholly ignored. Farmers and wage earners constitute a large majority of the people. These are excepted from that portion of the clause relating to involuntary bankruptcy, and the petition should either have shown what the business of the defendant was, or that he did not come within the excepted classes." In this case, however, it is to be noted, that the direct issue of fact was made by answer, after demurrer overruled.

In *re Bellah*, 8 A. B. R. 310, 116 Fed. 69 (D. C. Del.): "In accordance with the elementary rule that in proceeding on a statute, the pleador must negative an exception in the enacting clause, a petition in involuntary bankruptcy against an individual is defective if it omits to aver that the defendant was not a wage earner nor a person engaged chiefly in farming or the tillage of the soil."

In *re Brett*, 12 A. B. R. 492, 130 Fed. 981 (D. C. N. J.): "In pleading upon statutes, where there is an exception in the enacting clause, the plaintiff should negative the exception. In accordance with this rule, the petition must contain allegations which fairly negative the exception of the Bankruptcy Act concerning wage earners and farmers."

Contra, *quære*, *obiter*, *Bank v. Craig*, 6 A. B. R. 383, 110 Fed. 137 (D. C. Ky.): "It might, I suppose, be quite fairly inferred that the judges of that court, in framing the rules and forms, considered the question whether the allegation that the debtor was not a wage earner and was not chiefly engaged in farming or the tillage of the soil was essential, and concluded that it was not. Otherwise doubtless the form prescribed would have included it. They probably thought that the exceptions named in § 4, could not be specially and affirmatively pleaded if the facts justified it, and that they need not be anticipated or negated in the petition. Settling Form 3 is strong evidence of this."

§ 244. Exceptions Not Mere Matter of Defense.—The exceptions are not merely matter of defense to be pleaded by the debtor and not to be considered by the court unless pleaded. This is so, for there is no presumption that a natural person is or is not a wage earner or a person engaged chiefly in the tillage of the soil, or in farming. And it is not a mere personal privilege for the respondent to raise himself or to waive at pleasure. It is a jurisdictional matter.⁹²

And the petition is demurrable for want of the allegation.⁹³

91. *Ledbetter v. U. S.*, 170 U. S. 606; In *re Mero*, 12 A. B. R. 171, 128 Fed. 630 (D. C. Conn.); In *re Callison*, 12 A. B. R. 344, 130 Fed. 987 (D. C. Fla.), affirmed, sub. nom., in *Brake v. Collision*, 11 A. B. R. 797, 129 Fed. 196). *Obiter*, *Edelstein v. U. S.*, 17 A. B. R. 649, 149 Fed. 636 (C. C. A. Minn.). *Obiter* and impliedly, *Beach v. Macon Grocery Co.*, 9 A. B. R. 762, 120 Fed. 736 (C. C. A. Ga.); In *re Livingston*, 13 A. B. R. 357 (D. C. Hawaii); In *re White*, 14 A. B. R. 241, 135 Fed. 199 (D. C. Penna.). Impliedly, *Rise Admr. v. Bordner*, 15 A. B. R. 297, 140 Fed. 566 (D. C. Pa.).

92. In *re Taylor*, 4 A. B. R. 515, 102 Fed. 728 (C. C. A. Ill.). See ante, § 30.

93. *Obiter*, *Edelstein v. U. S.*, 17 A. B. R. 649, 149 Fed. 636 (C. C. A. Minn.). Also, see remaining cases cited, § 243.

§ 245. Negating of Exceptions Not Necessarily by Direct Denial but Statement of Actual Occupation Sufficient.—The negating need not be by direct denial but may be simply by way of affirmative allegation as to the character of the alleged bankrupt's chief occupation, showing inconsistency with his being chiefly a farmer or tiller of the soil.⁹⁴

In re Mero, 12 A. B. R. 121, 128 Fed. 630 (D. C. Conn.): "It is certainly necessary either to set forth the kind of business the defendant was engaged in so that one may be able to see that it is not of the excluded classes or to state specifically that it was not of the excluded classes."

In re Brett, 12 A. B. R. 492, 130 Fed. 981 (D. C. N. J.): "The petition must contain allegations which fairly negative the exception of the Bankruptcy Act concerning wage earners and farmers. The form in which the exception should be negated is immaterial. It may be done in the express language of negation or in affirmative language, which clearly shows that the alleged bankrupt is neither wage earner, nor a person chiefly engaged in farming or the tillage of the soil. * * * Although the exception of the statute is not negated in the petition now under consideration, in express words of negation, which is the form usually employed in common-law pleading, the averments concerning the debtor's residence and domicile, his principal place of business, and his owning and conducting a store and saloon, all in the city of Paterson, exclude the idea of his being a 'wage earner' or 'a person engaged chiefly in farming,' and do sufficiently negative the exception."

In re Taylor, 4 A. B. R. 515, 102 Fed. 728 (C. C. A. Ills.): "The petition should either have shown what the business of the defendant was or that he did not come within the excepted classes."

In re White, 14 A. B. R. 241, 135 Fed. 199 (D. C. Pa.): "Must show either by a negative averment that the alleged bankrupt is not one of the excepted classes, or there must be a specific statement as to his principal business."

This permission does not violate the rule against argumentative pleading, for it affirmatively shows the debtor's class.⁹⁵

But the defect is amendable.⁹⁶

^{94.} In re Livingston, 13 A. B. R. 357 (D. C. Hawaii); In re Lackow, 15 A. B. R. 826 (Special Master, Pa.). Obiter, inferentially, In re Pilger, 9 A. B. R. 245, 118 Fed. 206 (D. C. Wis.).

Failure of respondent to deny the negative allegation of the petition is an admission that the respondent does not come within any of the excepted classes. *Hoffschlaeger Co. v. Young Nap*, 12 A. B. R. 517 (D. C. Hawaii).

Answer affirming that the respondent comes within the excepted classes, the petition failing to negative the exception, is conclusive where the case is set down for hearing on petition and answer and the petition should be dismissed. *Obiter, Rise Amr. v. Bordner*, 15 A. B. R. 297, 140 Fed. 566 (D. C. Pa.).

After the petitioners have introduced testimony tending to prove the negative of the exceptions, it then devolves upon the respondent to prove he comes within the exceptions, he being, in the nature of things, in full possession of evidence to disprove such averments if they are not true. *Hoffschlaeger Co. v. Young Nap*, 12 A. B. R. 517 (D. C. Hawaii).

Answering over waives a demurrer for failure to negative the exceptions, even though the answer expressly asserts an intention not to waive it. *Bank v. Craig Bros.*, 6 A. B. R. 381, 110 Fed. 137 (D. C. Ky.).

And the defect may not be taken advantage of collaterally. Thus, not on discharge. *Edelstein v. U. S.*, 17 A. B. R. 649, 149 Fed. 636 (C. C. A. Minn.).

^{95.} But compare, analogously, In re Plotke, 5 A. B. R. 175, 104 Fed. 964 (C. C. A. Ills.): "The essential fact must appear affirmatively and distinctly: it is not sufficient that jurisdiction may be inferred argumentatively."

^{96.} That the failure to negative the exceptions is remediable by amendment, see post, "Amendments," § 261, et seq.

Beach v. Macon Grocery Co., 9 A. B. R. 762, 120 Fed. 736 (C. C. A. Ga.): "Where the petition to adjudicate a natural person an involuntary bankrupt is in the form prescribed in the General orders of the Supreme Court, and contains averments consistent with the alleged bankrupt being a merchant and not chiefly engaged in the tillage of the soil, if not sufficient for want of a specific charge that the alleged bankrupt is not a wage earner nor a person engaged chiefly in farming or the tillage of the soil, the defect may be cured by amendment."

However, it is at least preferable to deny in the words of the statute.⁹⁷

§ 246. **Act to Be Shown to Be within Four Months.**—The act of bankruptcy must be alleged to have occurred within the preceding four months.⁹⁸

§ 247. **Insolvency of Individual Partners to Be Alleged in Partnership Cases.**—In partnership cases, where insolvency is an essential element of the act of bankruptcy, the petition must show not only that the partnership assets are insufficient to pay firm debts, but that the excess of the individual assets of its members over their respective individual indebtedness would not add sufficient assets to make up for the deficiency.⁹⁹

§ 248. **Creditors to Be Shown to Have Existed at Time of Commission of Act.**—It must affirmatively appear that another creditor or other creditors existed at the time of the act complained of than the creditors to whom the transfer was made. A subsequent creditor may complain only where a design existed to defraud future creditors.¹⁰⁰

§ 249. **Distinct Acts Alleged in Same Petition.**—Distinct acts of bankruptcy may be alleged in the same petition, but they must all be shown to have occurred within the preceding four months.¹⁰¹

§ 250. **Multifariousness.**—The petition must not be multifarious; that is to say, it must not include several matters perfectly distinct and independent.

It is a temptation to the practitioner who is accustomed to joining any

97. *Hoffschlaeger Co. v. Young Nap*, 12 A. B. R. 514 (D. C. Hawaii).

98. *Davis v. Stevens*, 4 A. B. R. 763, 104 Fed. 235 (D. C. S. Dak.); under first act of bankruptcy. *Bradley Timber Co. v. White*, 10 A. B. R. 329, 121 Fed. 779 (C. C. A. Ala., affirming 9 A. B. R. 441).

99. *Vaccaro v. Security Bank*, 4 A. B. R. 482, 103 Fed. 436 (C. C. A. Tenn.).

100. *Brake v. Callison*, 11 A. B. R. 797, 129 Fed. 196 (C. C. A. Fla.); *In re Flint Hill Stone & Construction Co.*, 18 A. B. R. 83, 149 Fed. 1007 (D. C. N. Y.).

Recording of conveyance does not impart constructive notice of its fraudulent character to subsequent creditors so as to prevent the attacking of it on the ground that it was made in furtherance of a scheme to defraud subsequent creditors. *Beasley v. Coggins*, 12 A. B. R. 355, 57 So. Rep. 213.

101. *Bradley Timber Co. v. White*, 10 A. B. R. 329, 121 Fed. 779 (C. C. A. Ala.).

number of defendants in a fraudulent conveyance suit or a creditor's bill, asking for an injunction against this one and relief against that one and so forth, to join some fraudulent transferee as a party defendant to the petition in bankruptcy and to pray for an injunction to issue upon him forbidding him to dispose of the property in controversy; but such joinder is improper in bankruptcy. The reason of it becomes evident on reflection. A bankruptcy petition is a proceeding in rem to determine the status of a person; the adjudication settles the status of the defendant as a bankrupt, and all the world must take notice of it. Now, in other proceedings in rem to determine status, as, for instance, proceedings for determining one insane or otherwise non compos mentis, it would not for a moment be thought right practice to join some dishonest person who had been getting the ward's property away from him by fraud, even if the proceedings for the determination of the ward's unfitness to longer control his property were instituted precisely for the purpose of enabling the defrauding party to be reached. So in bankruptcy, a petition is multifarious that unites with the allegations and prayer for the adjudication of the debtor, allegations and prayer for the provisional seizure of the property by the marshal;¹⁰² or for an injunction against attaching creditors;¹⁰³ or for an injunction against a receiver appointed by the State court, forbidding him to dispose of certain property in his hands.¹⁰⁴ Separate proceedings must be brought.¹⁰⁵

Thus, whether the bankruptcy court will or will not have jurisdiction over assets of the estate in the possession of a State court receiver, is not an issue that can be raised on the hearing of the petition for adjudication of bankruptcy.¹⁰⁶

And, whether or not the preference which is alleged as the act of bankruptcy upon which adjudication of bankruptcy is asked, is voidable as against the preferred creditors, is not one to be decided at the adjudication on the petition.¹⁰⁷

And it would be multifarious and without jurisdiction to join an assignee or receiver of the bankrupt, even when no relief were sought against him.¹⁰⁸

102. In re Kelly, 1 A. B. R. 306, 92 Fed. 333 (D. C. Tenn.); In re Ogles, 1 A. B. R. 671, 93 Fed. 426 (D. C. Tenn.); Mather v. Coe, 1 A. B. R. 504, 92 Fed. 333 (D. C. Ohio). See, for proper practice, Philips v. Turner, 8 A. B. R. 171, 114 Fed. 726 (C. C. A. Miss.).

103. Mather v. Coe, 1 A. B. R. 504, 92 Fed. 333 (D. C. Ohio); In re Ogles: 1 A. B. R. 671, 93 Fed. 426 (D. C. Tenn.).

104. Mather v. Coe, 1 A. B. R. 504, 92 Fed. 333 (D. C. Ohio); In re Ogles, 1 A. B. R. 671, 93 Fed. 426 (D. C. Tenn.).

105. Mather v. Coe, 1 A. B. R. 504, 92 Fed. 333 (D. C. Ohio).

106. In re Kersten, 6 A. B. R. 516, 110 Fed. 929 (D. C. Wis.).

107. Leidigh Carriage Co. v. Stengel, 2 A. B. R. 383, 95 Fed. 637 (C. C. A. Ohio).

108. In re Bay City Irrigating Co., 14 A. B. R. 370, 135 Fed. 850 (D. C. Tex.). But compare, Louisville Trust Co. v. Cominger, 7 A. B. R. 421, 184 U. S. 18, where an assignee for creditors was joined.

§ 251. **Petition a Pleading and to Conform to Usual Rules.**—The petition is a pleading, and should conform to the usual rules of pleading in the manner of statement.¹⁰⁹

§ 252. **Thus, Petition to Set Up Facts, Not Legal Conclusions.**—Thus, the petition should set up facts, not legal conclusions.¹¹⁰ Thus, it will not do to allege that the petitioner has a provable claim, but the facts showing it to be one should be alleged.¹¹¹

In re Nelson, 1 A. B. R. 63 (D. C. Wis.): "Issuable facts not conclusions should be alleged." Reversed, on other grounds; in 7 A. B. R. 142.

Nor will it do merely to say that the debtor within the preceding four months had transferred property with intent to prefer, or with intent to hinder, delay or defraud. The facts, showing these various elements of the cause of action, must be alleged.

§ 253. **Facts Not to Be Alleged Argumentatively.**—Nor should the facts be alleged argumentatively.

In re Plotke, 5 A. B. R. 175, 104 Fed. 964 (C. C. A. Ills.): "The essential facts must appear affirmatively and distinctly and it is not sufficient that jurisdiction may be inferred argumentatively."

§ 254. **Facts Should Be Ultimate Facts, Not Evidence.**—The facts stated should be the ultimate facts and not mere evidentiary facts.

In re Bellah, 8 A. B. R. 310, 116 Fed. 69 (D. C. Del.): "* * * the manner and details of the concealment being matters of evidence and not of averment."

§ 255. **Allegations in Mere Words of Statute Insufficient; Except as to Fourth and Fifth Acts.**—Allegations in the mere words of the statute are insufficient.¹¹²

In re Hark Bros., 14 A. B. R. 400, 135 Fed. 603 (D. C. Pa.): "There is one rule, however, followed by all the courts, that allegations of acts of bankruptcy in a petition in the language of the Act without setting forth any other facts or circumstances are insufficient."

In re Bellah, 8 A. B. R. 310, 116 Fed. 69 (D. C. Del.): quoting U. S. v. Carll, 105 U. S. 611: "It is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished."

109. Clark v. Henne & Meyer, 11 A. B. R. 583, 127 Fed. 288 (C. C. A. Tex.).

110. In re Cliffe, 2 A. B. R. 317, 94 Fed. 354 (D. C. Penna.). Inferentially, In re White, 14 A. B. R. 241, 135 Fed. 199 (D. C. Penna.).

111. Hoffschlaeger Co. v. Young Nap, 12 A. B. R. 514 (D. C. Hawaii). A case under second act of bankruptcy. Impliedly, In re White, 14 A. B. R. 241, 135 Fed. 199 (D. C. Penn.). But compare, inferentially, In re Hark Bros., 14 A. B. R. 400, 135 Fed. 603 (D. C. Penn.).

112. In re Cliffe. 2 A. B. R. 317. 94 Fed. 354 (D. C. Pa.).

Except undoubtedly, as to classes 4 and 5 of acts of bankruptcy, as to which the statutory words could not well be amplified without pleading merely evidentiary facts.

§ 256. Allegations of Residence, Domicile, etc., Not to Be Made Disjunctively.—Allegations as to residence, domicile, etc., should not be made disjunctively.¹¹³

§ 257. Petition to Set Forth Essential Facts of Act Charged, Definitely and Certainly.—The petition must allege, as fully, definitely and certainly as the petitioners' information permits, the acts charged and the essential elements of the cause of action and of the capacity of the parties and of the jurisdiction; and where it is incomplete it must contain explanation of its lack of completeness.

Thus, as to allegations of the first act of bankruptcy, fraudulent concealments, removals, etc., the allegations must be definite and certain.¹¹⁴

Inferentially, *In re White*, 14 A. B. R. 241, 135 Fed. 199 (D. C. Penna.): "This is a demurrer to the petition, the second reason of which alleges that it does not set forth when the money which is alleged is owing to the several creditors became due, nor the amount of the securities held by the petitioners, nor the manner in which the value of the securities is fixed, nor does it set forth when the goods were sold. The petition in this respect conforms to the language prescribed by the Supreme Court under General Order 37. It is stated that the claims are for 'goods sold and delivered,' and that 'Hark Brothers purchased the same within one year from this date,' to-wit, the 21st day of October, 1904, the date of the execution of the petition. It is not necessary to state when the several amounts became due as it is alleged they have 'provable claims' nor is there anything to require them to state the amount of the securities held, nor the manner in which the value of the securities are fixed. This objection is overruled."

Likewise as to allegations of the second act of bankruptcy, preferential transfers.¹¹⁵

In re Ewing, 8 A. B. R. 269, 115 Fed. 707 (C. C. A. N. Y.): "The demurrer to the petition for the adjudication of Ewing as a bankrupt should have been sustained because the petition omits to aver that any of the payments alleged to have been made by Ewing, the alleged bankrupt, to Bouvier, were made with intent to prefer Bouvier over his other creditors."

In re Nelson, 1 A. B. R. 63, 98 Fed. 76 (D. C. Wis.): "The specific fact must be alleged with time, place and circumstances." Reversed, on other grounds, sub nom. *Wilson v. Nelson*, 7 A. B. R. 142, 183 U. S. 191.

In re Blumberg, 13 A. B. R. 343, 133 Fed. 845 (D. C. Pa.): The allegation

¹¹³. *In re Laskaris*, 1 A. B. R. 480 (Ref. N. Y.).

¹¹⁴. *In re Bellah*, 8 A. B. R. 310, 116 Fed. 69 (D. C. Del.); *In re Mero*, 12 A. B. R. 171, 128 Fed. 630 (D. C. Conn.); *In re Hark Bros.*, 14 A. B. R. 400 (D. C. Penn.); *In re Flint Hill Stone & Construction Co.*, 18 A. B. R. 83, 149 Fed. 1007 (D. C. N. Y.).

¹¹⁵. *In re Vastbinder*, 11 A. B. R. 121, 126 Fed. 417 (D. C. Pa.); *Clark v. Henne & Meyer*, 11 A. B. R. 593, 127 Fed. 288 (C. C. A. Tex.).

here was that the transfer was made for "improper considerations." No specification of names nor amounts was made. The court says: "The difficulty of obtaining accurate information concerning fraudulent transfers of property or preferential payments has been suggested as an excuse for the vagueness of such averments as are found in this petition, and I am not insensible that such difficulty may often exist. Due allowance should be made for it, but the petitioning creditors are nevertheless bound to as full a disclosure as their information may enable them to make, supplemented by an explanation of its lack of completeness, so far as it may thus be lacking. Impossibilities are not expected of petitioning creditors, more than of other suitors; but they must found their case on something more than rumor, or vague hearsay, or mere suspicion."

In *re Flint Hill Stone & Construction Co.*, 18 A. B. R. 83, 149 Fed. 1007 (D. C. N. Y.): "But here we have no allegation that the endorsements were not made at the time, or even that the mortgages were given to secure indorsements past or present, or that they were given not in due course of business for a present full and adequate consideration. The petition is silent as to the consideration. True, it says the mortgagees were indorsers, but it does not say the mortgages were given to secure such indorsements. Nor is there any allegation that the officers of the corporation knew of its insolvency when the mortgages were given. Neither does it affirmatively appear that, when the mortgages were given, the alleged bankrupt had other creditors. The petitioners were creditors when the petition was verified, but it is not alleged that they were such when the mortgages were given. For anything that appears, the chattel mortgages were for money borrowed to pay off and satisfy all the debts owing by such corporation, if any, existing at the time such mortgages were given. If such was the case, there was neither intent to hinder, delay or defraud, or to prefer one creditor over another. There must be an allegation either that the mortgages were given with intent to hinder, delay and defraud the other creditors of the alleged bankrupt, or that they were given with intent to prefer the mortgagees over the other creditors of the corporation. The petition should also allege that there were other creditors, and that the debts or indorsements secured by the mortgages were pre-existing or if then incurred or made that the mortgages were given for an inadequate consideration, etc., as the case may be."

And similarly as to allegations of the third act of bankruptcy—failure to vacate preferential legal proceedings.¹¹⁶

In *re Rome Planing Mills*, 3 A. B. R. 124, 96 Fed. 812 (D. C. N. Y.): "The petition must prove the entry of the judgment, the issue of an execution; the levy thereunder, the debtor's insolvency at the time of the judgment and levy, and also either that the property was actually sold at execution sale, or that the sale was advertised for a day certain and that the debtor had permitted the levy to stand until the sale was only five days distant."

In *re Vastbinder*, 11 A. B. R. 118, 126 Fed. 417 (D. C. Pa.): "* * * held insufficient where its only allegations as to the five days is merely that the attachment 'has not to this time been vacated.'"

Thus, the allegations as to the claims of the petitioners and as to the

¹¹⁶. In *re Cliffe*, 2 A. B. R. 317, 94 Fed. 354 (D. C. Pa.); In *re Vetterman*, 14 A. B. R. 245, 135 Fed. 443 (D. C. N. H.). See *Seaboard Steel Casting Co. v. Trigg*, 10 A. B. R. 594 (D. C. Va.).

domicile, residence or place of business of the debtor, must be made definite and certain.

In *re Plotke*, 5 A. B. R. 175 (C. C. A. Ills.): "The essential facts must appear affirmatively and distinctly, and it is not sufficient that jurisdiction be inferred argumentatively. *Wolfe v. Ins. Co.*, 148 U. S. 389, 141 U. S. 81, 83."

Hoffschlaeger v. Young Nap, 12 A. B. R. 510 (D. C. Hawaii): "Allegation of debt as 'balance due upon goods, wares and merchandise sold and delivered to respondent by petitioner at respondents' request' is sufficient as to the nature of petitioners' claims."

§ 258. But No Greater Nicety nor Fullness Requisite than Nature of Facts Permits.—But no greater nicety nor fullness is required than the nature of the facts will permit.¹¹⁷

Thus, as to the first act of bankruptcy.

In *re Mero*, 12 A. B. R. 171, 128 Fed. 630 (D. C. Conn.): "It is important that the allegations in this respect shall be as specific as possible but it would be unfair and contrary to the spirit and purpose of the Bankrupt Law to require greater detail than it is probable that creditors can furnish. I do not think it necessary to allege 'in what manner the said bankrupt indicated his intent.'"

In *re Bellah*, 8 A. B. R. 310, 116 Fed. 69 (D. C. Del.): "An averment in a petition in involuntary bankruptcy that the defendant at a certain time received a specified sum of money from a specified source, which sum 'he has ever since concealed and secreted with intent to hinder, delay or defraud his creditors,' is not defective for want of particularity; the manner and details of the concealment being matters of evidence and not of averment."

Thus, as to the second act of bankruptcy.

In *re Lackow*, 14 A. B. R. 514 (D. C. Pa.): "The time of making the preferential payment and its amount are both specified and the failure to state the names of the creditors is sufficiently accounted for. If their names had been known, it would have been necessary to set them forth, but I do not think that the Bankrupt Law intended to require from petitioning creditors the attempt to perform impossibilities. If they do not know the names of preferred creditors, and cannot learn them by proper inquiry and investigation, the petition is good, in my opinion, although it may only aver in general terms that the payment has been made, adding the reason why a more specific allegation is not possible."

§ 259. Prescribed Bankruptcy Forms to Be Adhered to as Closely as Facts Permit.—The regular forms prescribed by the Supreme Court should be adhered to as closely as the facts will permit.¹¹⁸

Gage v. Bell, 10 A. B. R. 696, 124 Fed. 371 (D. C. Tenn.): "It is to be observed that Form No. 6 (89 Fed. xxx, 32 C. C. A. liv) does not contemplate any other pleading than that of a brief and simple denial (1) that the defendant debtor

¹¹⁷. Inferentially, but obiter, In *re Hark Bros.*, 14 A. B. R. 400, 135 Fed. 603 (D. C. Penna.); In *re Vastbinder*, 11 A. B. R. 121, 126 Fed. 417 (D. C. Pa.).

¹¹⁸. Impliedly, In *re White*, 14 A. B. R. 241, 135 Fed. 199 (D. C. Penna.). See also, *Bradley Timber Co. v. White*, 10 A. B. R. 329, 121 Fed. 779 (C. C. A. Ala.).

has committed the act of bankruptcy, or (2) that he is insolvent, and (3) an averment 'that he should not be declared a bankrupt for any cause in said petition alleged.' At first I was inclined to hold that no other pleading whatever was permissible than this, and that under it any defense whatever, whether by demurrer or otherwise, could be made that would defeat the petition for any cause. But yielding to the license given by General Order No. 38, that the several forms shall be observed and used with such alterations as may be necessary to suit the circumstances of any particular case, and conforming to the practice in other districts, reluctantly and with constantly increasing regret, I allowed other and special pleadings to be framed, and now, as in this case, in almost every case there are demurrers, formidable answers after the manner of pleadings in chancery, with exceptions, replications, etc., until the practice has departed from the simple forms prescribed and degenerated into those of a suit in equity. I doubt if this is proper practice."

And the courts discourage the use of the complicated forms used in the federal chancery practice.¹¹⁹ But the official forms are intended to execute the Act and not to add to its provisions by making that which the statute treats as immaterial in some cases, a material fact in every case.¹²⁰ And the provisions of sec. 57 as to the allegations required in order to make due "proof" of claims for participation in the dividends, need not be complied with in alleging the provable claims of the petitioning creditors in the petition itself.¹²¹

§ 260. **Answering Over Waives Defects.**—Defective or insufficient statements of facts are waived by answering over without objection.¹²² Likewise, all formal or modal defects, not reaching to the jurisdiction, are waived by answering over.¹²³

§ 261. **Amendments.**—Amendments may be allowed to bankruptcy petitions, as to other pleadings.¹²⁴

119. *Gage v. Bell*, 10 A. B. R. 696, 124 Fed. 371 (D. C. Tenn.); *Bradley Timber Co. v. White*, 10 A. B. R. 329, 121 Fed. 779 (C. C. A. Ala.).

120. *West v. Lea Bros.*, 2 A. B. R. 463, 175 U. S. 590.

121. *In re Brett*, 12 A. B. R. 492, 130 Fed. 981 (D. C. N. J.); *Hoffschlaeger Co. v. Young Nap*, 12 A. B. R. 510 (D. C. Hawaii).

122. *In re Cliffe*, 2 A. B. R. 317, 94 Fed. 354 (D. C. Pa.); *Motor Vehicle Co. v. Oak Leather Co.*, 15 A. B. R. 804, 141 Fed. 518 (C. C. A. Ills.).

123. *Leidigh Carriage Co. v. Stengel*, 2 A. B. R. 383, 95 Fed. 637 (C. C. A. Ohio).

124. *Gleason v. Smith Perkins Co.*, 16 A. B. R. 605, 145 Fed. 895 (C. C. A. Pa.). *In re Vastbinder*, 11 A. B. R. 119, 126 Fed. 417 (D. C. Pa.), although this was not really an amendment of the pleading, but simply of the verification. *Obiter*, *Woolford v. Steel Co.*, 15 A. B. R. 31, 138 Fed. 582 (D. C. Del.); *In re Blumberg*, 13 A. B. R. 343, 133 Fed. 845 (D. C. Pa.); *Beach v. Macon Grocery Co.*, 9 A. B. R. 762, 122 Fed. 736 (C. C. A. Ga.); *In re Weinman*, 2 N. B. N. & R. 51 (Ref. Pa.); *In re Mercur*, 10 A. B. R. 505, 122 Fed. 384 (C. C. A. Pa.), also 2 A. B. R. 626 (D. C. Pa.); *In re Shoemith*, 13 A. B. R. 645, 135 Fed. 684 (C. C. A. Ills.); *In re Cliffe*, 2 A. B. R. 317, 94 Fed. 354 (D. C. Pa.); *In re White*, 14 A. B. R. 241, 135 Fed. 200 (D. C. Pa.); *In re Plymouth Cordage Co.*, 12 A. B. R. 665, 135 Fed. 1000 (C. C. A. Okla.). Impliedly, *In re First Nat'l Bank of Belle Fourche*, 18 A. B. R. 270, 128 Fed. 630 (C. C. A.). Instance, *In re Mero*, 12 A. B. R. 171, 128 Fed. 630 (D. C. Conn.).

In re Bellah, 8 A. B. R. 310, 116 Fed. 69 (D. C. Del.): "Rule 11 of the general orders in bankruptcy deals with amendments to a petition and schedules, but was not intended to abrogate or restrict the general power of amendment in other respects vested in the court."

In re Brett, 12 A. B. R. 492, 130 Fed. 981 (D. C. N. J.): "If the demurrer * * * should be sustained, the petition should not be dismissed without first giving the petitioners an opportunity to apply for leave to amend."

Obiter, Wilder v. Watts, 15 A. B. R. 67, 138 Fed. 426 (D. C. S. C.): "Amendments are usually allowed if the ends of justice will be promoted, but, as they are not matters of right, the court must exercise its discretion in permitting them. The amendment proposed states a new and independent cause of bankruptcy, not related to the original petition. The petitioners have given no reason why this alleged act of bankruptcy was not stated in their first petition."

Gleason v. Smith, 16 A. B. R. 605, 145 Fed. 895 (C. C. A. Pa.): "The power of the court to grant the amendment is undoubted. In the Bellah case * * * it was held that General Order No. XI, which relates to amendment of petitions, was not intended to abrogate or restrict the general power of amendment in the court."

§ 262. **Must Be "Something to Amend by."**—There must be something already in the record by which to amend. The right to amend can go no further than to bring forward and make effective that which in some shape is already there.¹²⁵

In re Mercur, 10 A. B. R. 505, 122 Fed. 384 (C. C. A. Pa.): "The general right to amend, regardless of the time which has elapsed, is abundantly sustained by the authorities. * * * But to do so it is plain there must be in the record as it stands the substance of that which is asked for; the right to amend can go no further than to bring forth and make effective that which is in some shape already there."

But the mere general allegation (not objected to at the trial) of "other preferences" is sufficient to support an amendment, where the facts actually admitted in evidence tend to establish other preferences.¹²⁶

§ 263. **Similar Acts of Series Added by Amendment.**—Similar acts of bankruptcy in a series of like acts may be added by amendment.

Obiter, White v. Bradley Timber Co., 8 A. B. R. 672, 116 Fed. 768 (D. C. Ala.): "There is some authority for the proposition that, where the amendment offered shows acts of bankruptcy of a like character as the one attempted to be shown in the original petition the amendment will be allowed or authorized before or at the hearing of the cause."

§ 264. **Acts Occurring within Four Months of Application to Amend, Added.**—And acts of bankruptcy, occurring within the four

^{125.} Compare, Ludowici Roofing Tile Co. v. Penn. Inst., 8 A. B. R. 739 (D. C. Pa.), involving the Mercur bankruptcy.

But see In re Shoesmith, 13 A. B. R. 645, 135 Fed. 684 (C. C. A. Ills.), that "The jurisdiction comes from the Bankrupt Act and is not conferred by the accuracy and precision of the averments made in the petition."

^{126.} Motor Vehicle Co. v. Oak Leather Co., 15 A. B. R. 804, 141 Fed. 518 (C. C. A. Ills.).

months before the filing of the application for leave to amend, may be added.¹²⁷

§ 265. But Occurring before and Not Originally Referred to, Not to Be Added.—But an act of bankruptcy not referred to in the original petition, and occurring more than four months before the amendment is asked for, may not be added.¹²⁸

In *re Haff*, 13 A. B. R. 362, 135 Fed. 742 (C. C. A. N. Y.): "The general rule seems to be that an original petition cannot be amended by setting out therein acts of bankruptcy not referred to in the original petition and occurring more than four months before the application for an order allowing the amendment."

§ 266. Except, Where Two Petitions Consolidated or Pending at Same Time, Earlier Acts in One May Be Adopted into Other.—Where, however, two petitions against the same debtor have been consolidated, or are pending at the same time in different districts, earlier acts in one may be adopted into the other by amendment, under General Order No. 6.¹²⁹

And compare, In *re Sears*, 8 A. B. R. 713, 117 Fed. 294 (C. C. A. N. Y.): "The order allowing an amendment of the petition by the insertion of a special act of bankruptcy was erroneous, because it clearly appeared that such act of bankruptcy was not an earlier act than that first alleged, but was later. The case is controlled by the terms of General Order, No. 6 and as that makes explicit provision for it an amendment not within its terms is unwarranted."

127. In *re Mercur*, 2 A. B. R. 626, 95 Fed. 634 (D. C. Pa.); obiter, In *re Haff*, 13 A. B. R. 365, 136 Fed. 78 (C. C. A. N. Y.). But compare, obiter, *White v. Bradley Timber Co.*, 8 A. B. R. 671, 116 Fed. 768 (D. C. Ala.). Contra, where the petitioners were not ignorant of the act and especially where they participated in it, *Wilder v. Watts*, 15 A. B. R. 67, 138 Fed. 426 (D. C. S. C.).

128. Obiter, In *re Riggs Restaurant Co.*, 11 A. B. R. 508, 130 Fed. 691 (C. C. A. N. Y.). [1867] In *re Cole & Hoblitzel*, 1 N. B. R. 516; [1867] In *re Craft*, 2 N. B. R. 111, Fed. Cas. 3,317; [1867] In *re Leonard*, 4 N. B. R. 562, Fed. Cas. 8,255; *White v. Bradley Timber Co.*, 8 A. B. R. 671, 116 Fed. 768 (C. C. A. Ala.); [1867] *Stern v. Schonfield*, Fed. Cas. 13,377; analogously, In *re Stephenson*, 2 A. B. R. 66, 94 Fed. 110 (D. C. Del.); In *re Maund*, 1 L. R. Q. B. Div. 194 (1895). But compare, In *re Shoesmith*, 13 A. B. R. 645, 135 Fed. 684 (C. C. A. Ills.). Contra, In *re Strait*, 2 A. B. R. 308 (Ref. N. Y.).

129. *Wilder v. Watts*, 15 A. B. R. 57, 138 Fed. 426 (D. C. S. C.). Compare, obiter, *Gleason v. Smith*, 16 A. B. R. 605, 145 Fed. 895 (C. C. A. Pa.).

Gen. Order No. 6: "In case two or more petitions shall be filed against the same individual in different districts, the first hearing shall be had in the district in which the debtor has his domicile, and the petition may be amended by inserting an allegation of an act of bankruptcy committed at an earlier date than that first alleged, if such earlier act is charged in either of the other petitions; and in case of two or more petitions against the same partnership in different courts, each having jurisdiction over the case, the petition first filed shall be first heard, and may be amended by an insertion of an allegation of an earlier act of bankruptcy than the first alleged, if such earlier act is charged in either of the other petitions."

§ 267. Amendment to Make Pleadings Conform to Facts Proved.

—Amendment may be allowed to make pleadings conform to the facts proved, or will be “deemed made.”¹³⁰

In *re Lange*, 3 A. B. R. 231, 97 Fed. 197 (D. C. N. Y.): “Though these were not set out in the petition, yet being of like general character as the one debt stated, though not for rent, they would have been allowed to be inserted in the petition by amendment, if applied for before the trial; and as the defendant cannot claim surprise, all the evidence being derived from his own testimony to his own book entries, the amendment should be deemed made.”

And where the evidence admitted actually proves another act of bankruptcy than the one alleged, the petition may be amended to conform to the facts proved.¹³¹ Similarly, where a new trial is granted the original petition may be amended to conform to the facts developed at the first trial.¹³²

§ 268. Failure to Show Requisite Number, and Amount or Nature of Claims Amendable.—The failure of the petition to show on its face the requisite number of creditors and amount of claims held by them is not fatal but may be supplied by amendment.¹³³

In *re Plymouth Cordage Co.*, 13 A. B. R. 665, 135 Fed. 1000 (C. C. A. Okla.): “The fact that there is no averment that the creditors are less than twelve cannot be more fatal to the right of the petitioner to an adjudication in bankruptcy than the fact that he has made such an averment, which, upon the trial, proved to be without foundation in fact. The truth is that the contention of counsel for the respondent fails to distinguish between the averments essential to jurisdiction over the subject matter and the parties and those requisite to invoke a favorable adjudication upon the petition. Jurisdiction of the subject matter and of the parties is the right to hear and determine the suit or proceeding in favor of or against the parties to it. The facts essential to invoke this jurisdiction differ materially from those essential to constitute a good cause of action for the relief sought. A defective petition in bankruptcy or an insufficient complaint at law, accompanied by proper service upon the defendants, gives jurisdiction to the court to determine the questions it presents, although it may not contain averments which entitle the complainant to any relief; and it may be the duty of the court to determine either the question of its jurisdiction or the merits of the controversy against the petitioner or plaintiff. Allegations indispensable to a favorable adjudication or decree include all

^{130.} In *re Miller*, 5 A. B. R. 145, 104 Fed. 764 (D. C. N. Y.); *Motor Vehicle Co. v. Oak Leather Co.*, 15 A. B. R. 804, 141 Fed. 518 (C. C. A. Ills.); *Hark v. Allen Co.*, 17 A. B. R. 3 (C. C. A. Pa., affirming *In re Hark Bros.*, 15 A. B. R. 460). But compare, analogously, *In re Pierce*, 4 A. B. R. 554, 103 Fed. 64 (D. C. N. Y.).

^{131.} In *re Miller*, 5 A. B. R. 145, 104 Fed. 764 (D. C. N. Y.); *Motor Vehicle Co. v. Oak Leather Co.*, 15 A. B. R. 804, 141 Fed. 518 (C. C. A. Ills.).

^{132.} In *re Hark Bros.*, 15 A. B. R. 460, 142 Fed. 279 (D. C. Pa., affirmed in *Hark v. Allen Co.*, 17 A. B. R. 3); *Hark v. Allen Co.*, 17 A. B. R. 3 (C. C. A. Pa., affirming *In re Hark Bros.*, 15 A. B. R. 460, 142 Fed. 279, D. C. Pa.), changing from fraudulent removal, etc., to preferential transfer.

^{133.} In *re Beddingfield*, 2 A. B. R. 355, 96 Fed. 190 (D. C. Ga.). Compare, to same effect, *In re Broadway Sav. Trust Co.*, 18 A. B. R. 255 (C. C. A. Mo.); *In re First Nat'l Bank of Belle Fourche*, 18 A. B. R. 265 (C. C. A. Mo.). Contra, *In re Stein*, 12 A. B. R. 364, 130 Fed. 377 (D. C. Penn.).

those requisite to state a complete cause of action, and they comprehend many that are not requisite to the jurisdiction of the suit or proceeding. The averment that all the creditors of Smith were less than twelve was not of the former, but of the latter, class. It was not essential to invoke the jurisdiction of the court over the parties to the proceeding and the property it involved, because the act of Congress gave that court, upon the filing of the petition of the creditor, jurisdiction to hear and determine the questions it presented, whether they were questions of jurisdiction or upon the merits. Not only this, but the averment that the creditors were less than twelve was not even essential to a favorable adjudication upon the petition, because the Bankruptcy Law provided that if two other creditors, whose claims were sufficient in amount, joined in the petition of the cordage company, the court might proceed to adjudicate the issue of bankruptcy upon the merits, although the creditors exceeded twelve in number."

Thus, amendment may be allowed to supply the averment that there are less than twelve creditors.¹³⁴ Likewise, failure to state the nature of the petitioning creditors' claims is remediable by amendment.¹³⁵

And in an intervening petition, amendment may be allowed to supply such deficiencies, if the original petition was defective in these particulars.¹³⁶

§ 269. Omission or Defects in So-Called "Jurisdictional" Averments Amendable.—Jurisdictional as well as other averments may be amended or inserted.¹³⁷

In re Weinmann, 2 N. B. N. & R. 51 (Ref. Pa.): "A petition in bankruptcy may be amended with respect to jurisdictional averments as to the residence or place of business of the bankrupt."

Thus, by inserting the averment that the bankrupt's creditors are less than twelve in number,¹³⁸ or, by inserting the residence or domicile of one partner, jurisdiction over one partner giving jurisdiction over all.¹³⁹

Or, by inserting the averment that the bankrupt is not a wage earner nor a farmer.¹⁴⁰

Obiter, Beach v. Macon Grocery Co., 9 A. B. R. 762, 120 Fed. 736 (C. C. A. Ga.): "The petition in the case is in the form prescribed in general orders of the Supreme Court, and besides contains averments consistent with the alleged

134. Inferentially, In re Bellah, 8 A. B. R. 310, 116 Fed. 69 (D. C. Del.); In re Haff, 13 A. B. R. 362, 136 Fed. 78 (C. C. A. N. Y.); In re Plymouth Cordage Co., 13 A. B. R. 665, 135 Fed. 1000 (C. C. A. Okla.).

135. In re White, 14 A. B. R. 241, 135 Fed. 199 (D. C. Pa.).

136. In re Haff, 13 A. B. R. 362, 136 Fed. 78 (C. C. A. N. Y.).

137. In re Plymouth Cordage Co., 13 A. B. R. 665, 135 Fed. 1000 (C. C. A. Okla.). Obiter, Woolford v. Steel Co., 15 A. B. R. 31, 138 Fed. 582 (D. C. Del.).

138. In re Plymouth Cordage Co., 13 A. B. R. 665, 135 Fed. 1000 (C. C. A. Okla.).

139. In re Blair, 3 A. B. R. 588, 99 Fed. 76 (D. C. N. Y.).

140. In re Plymouth Cordage Co., 13 A. B. R. 665, 135 Fed. 1000 (C. C. A. Okla.), quoted at § 268; In re White, 14 A. B. R. 241 (D. C. Pa.); In re Bellah, 8 A. B. R. 310, 116 Fed. 69 (D. C. Del.); In re Brett, 12 A. B. R. 496, 130 Fed. 983 (D. C. N. J.); In re Pilger, 9 A. B. R. 245, 118 Fed. 206 (D. C. Wis.); In re Mero, 12 A. B. R. 171, 128 Fed. 633 (D. C. Conn.).

bankrupt being a merchant, and not chiefly engaged in tilling the soil, and for that reason it is probably sufficient, or, if not sufficient because of the omission to specifically charge that the alleged bankrupt is not within the excepted class, the defect is one that may be cured by amendment."

Or, by inserting an averment of requisite residence;¹⁴¹ or an averment that the debtor is a corporation principally engaged in manufacturing, etc.¹⁴²

But it has been held, that a petition showing on its face less than \$500 of debts belonging to the petitioning creditors, cannot be amended to include enough more to make up the jurisdictional amount;¹⁴³ and that this is so, although the ones sought to be added were omitted from the original petition through a clerical mistake. But this seems an improper rule, if in fact there were sufficient in number originally.

§ 270. **Misnomer—Amendment Allowable.**—Where a misnomer of a party has occurred, the error may be corrected by amendment.¹⁴⁴

§ 271. **Amendment May Be Refused.**—Amendment may be refused, where refusal would not be an abuse of discretion.

Woolford v. Steel Co., 15 A. B. R. 31, 138 Fed. 582 (D. C. Del.): "Where two petitions in involuntary bankruptcy were filed in the District Court of the United States for the District of Delaware against a corporation April 12, 1905, each alleging only one and the same act of bankruptcy, namely, the appointment because of its insolvency of receivers and putting them in charge of the property of the corporation December 12, 1904, by the Circuit Court of the United States for the same district, and each of the petitions was substantially defective, although curable by amendment; and where it further appeared that all of the petitioning creditors in each petition before the appointment of receivers by the Circuit Court took part in procuring or consented to and approved the appointment of receivers and, thus, aided and assisted in the commission of the act on which their petitions in bankruptcy were founded; and where it further appeared that there was no evidence that the corporation was insolvent within the meaning of that term as used in the Bankruptcy Act; and where it further appeared that the estate of the corporation was in course of administration by the Circuit Court through its receivers, and that the receivers had faithfully, diligently and efficiently discharged their duty, and that whatever delay may have occurred was the result of causes over which they had no control; and where it further appeared that the throwing of the corporation into bankruptcy would cause unnecessary expense, delay and confusion in the proper administration of its property: Held, that applications to amend the petitions should be denied and motions for the dismissal of the petitions should be granted."

"If the petitions had not been defective, the petitioners would have had a right under the Bankruptcy Act to proceed to support them by evidence and, if

141. In re Weinmann, 2 N. B. N. & R. 51 (Ref. Pa.).

142. Obiter, In re First Nat. Bank of Belle Fourche, 18 A. B. R. 270, 152 Fed. 64 (C. C. A.).

143. In re Stein, 12 A. B. R. 364, 130 Fed. 377 (D. C. Penn.).

144. Gleason v. Smith, 16 A. B. R. 606, 145 Fed. 895 (C. C. A. Pa.).

successful, to have the corporation adjudged bankrupt, regardless of any delay, confusion or expense attending such a course. But the petitions being fatally defective, leave to amend should not be granted, thereby withdrawing the administration of the property from the Circuit Court, unless for cogent reasons, not appearing in this case."

Wilder v. Watts, 15 A. B. R. 57, 138 Fed. 426 (D. C. S. C.): "In aid of the referee's conclusion that Watts committed an act of bankruptcy in the preferential payments, the attorneys for the petitioner, pending the hearing before me, asked leave to amend their petition, so as to charge these alleged preferential payments as acts of bankruptcy. Amendments are usually allowed if the ends of justice will be promoted, but, as they are not matters of right, the court must exercise its discretion in permitting them. As an adjudication in involuntary proceedings puts a stigma upon the person so adjudicated, he ought, in fairness, to have opportunity of answering; and the proposed amendment, duly verified, should have been served upon him. This was not done. The amendment proposed states a new and independent cause of bankruptcy, not related to the original petition. The petitioners have given no reason why this alleged act of bankruptcy was not stated in their first petition. They cannot claim ignorance, because one of the alleged preferential payments now, stated as an act of bankruptcy was made to parties who filed the original petition. There are respectable authorities holding that acts of bankruptcy occurring subsequent to those stated in the original petition cannot be allowed to be brought in by amendment. * * *

"It does not appear to me that the proposed amendment is 'clearly in furtherance of justice.' The petitioners have not shown any good reason, or any reason at all, why the acts of bankruptcy set up were omitted from the original petition, and have made no excuse for such omission; and, as it appears from the whole case that the alleged bankrupt has no assets to be administered, I fail to see how the interest of creditors can be served by harassing him with further proceedings."

§ 272. Amendment to Make Partnership Petition Out of Individual Petitions Refused.—A petition to have a partnership adjudged bankrupt nunc pro tunc as of the date of the original adjudication of its several members in individual bankruptcy may be refused.¹⁴⁵

But where the individual members have joined in one petition with the obvious intent to have themselves adjudicated bankrupt as partners but fail specifically to pray for the adjudication of the firm, the adjudication may be amended nunc pro tunc into a partnership adjudication.

In re Meyers, 3 A. B. R. 260, 2 N. B. N. & R. 111 (D. C. N. Y.): "I have no doubt that the petition in the present case was designed to procure a firm adjudication and the discharge of both bankrupts from the firm debts. The petition for adjudication is in the form prescribed by the Supreme Court for partnership cases, except that in the final prayer it does not ask that said 'firm' may be adjudged bankrupt, but only that the petitioners may be adjudged bankrupt. In the petition, however, they are described as the members, and the only members, of the firm of Meyers Bros.; and the schedules show that all their debts were debts as copartners in that firm. The order of adjudication

^{145.} *In re Mercur*, 10 A. B. R. 505, 122 Fed. 384 (C. C. A. Pa., affirming 8 A. B. R. 275, 739).

follows the petition, and does not adjudicate the firm bankrupt, but only the two petitioners. In the notice for the first meeting of creditors, the two petitioners are described as 'formerly trading as Meyers Brothers.' A trustee was appointed of the bankrupt's estate and effects, which under the petition must include their joint and several estate."

§ 273. Amendment Relates Back to Date of Filing of Original.—The amendment relates to and takes effect as of the date of the filing of the original petition.¹⁴⁶

§ 274. Cause of Error to Be Stated in Application to Amend.—The cause of the error in the original petition must be stated in the application for leave to amend.¹⁴⁷

White v. Bradley Timber Co., 8 A. B. R. 671, 116 Fed. 768 (D. C. Ala.): In this case the petition had been dismissed for lack of stating any act of bankruptcy, and the motion to vacate the dismissal and for leave to amend failed to state reason for original omission. The court says: "The authorities are to the effect that, in the application for leave to amend, the petitioners shall state the cause of the error in the paper originally filed. It must be shown that the petitioners or their attorney had no knowledge of, and could not have ascertained with reasonable diligence, the facts sought to be added by the amendment, at the time the original petition was filed, or that the facts were omitted by inadvertence, mistake, or other reason which would excuse such omission."

§ 275. Alleged Bankrupt to Have Reasonable Time to Answer Amended Petition.—An alleged bankrupt has a right to a reasonable time to answer an amended petition.¹⁴⁸

§ 276. Prayer, Signature and Verification.—The petition must contain a prayer for adjudication,¹⁴⁹ and must be subscribed and verified.

§ 277. Verification by Attorney.—An attorney may verify a petition for his client under the same circumstances that would authorize him to do so in any other equity case in the United States Courts. And he may do so if he has knowledge of the facts and his client has authorized him to verify, or ratifies his verification.¹⁵⁰

146. *In re Shoesmith*, 13 A. B. R. 645, 135 Fed. 684 (C. C. A. Ills.); *Bank v. Sherman*, 101 U. S. 403.

147. Gen. Ord. No. XI; *In re Portner*, 18 A. B. R. 89, 149 Fed. 799 (D. C. Pa.).

148. *Lockman v. Lang*, 12 A. B. R. 497, 132 Fed. 1 (C. C. A. Colo.); *Wilder v. Watts*, 15 A. B. R. 57, 138 Fed. 426 (D. C. S. C.).

149. In partnership bankruptcies, a prayer that "said copartners may be adjudged bankrupt" is a prayer solely for adjudication of the partnership and does not include adjudication of its members as individuals, *In re Wing Yick Co.*, 13 A. B. R. 757 (D. C. Hawaii).

150. Compare, analogously, *In re Roukous*, 12 A. B. R. 170, 128 Fed. 648 (D. C. R. I.). But see, *contra quare*, *In re Nelson*, 1 A. B. R. 63, 98 Fed. 76 (D. C. Wis.). This case was reversed, on other grounds, by the Supreme Court in *Wilson v. Nelson*, 7 A. B. R. 142, 183 U. S. 191. Also, *contra* (obiter), *In re Simonson*, *Whiteson & Co.*, 1 A. B. R. 197, 92 Fed. 904 (D. C. Ky.).

Obiter, In re Herzikopf, 9 A. B. R. 90, 118 Fed. Rep. 101 (D. C. Calif.): "And no other evidence of his authority than the fact of his admission to practice in the District Court is required."

Rogers v. Mining Co., 14 A. B. R. 252, 136 Fed. 407 (C. C. A. Alaska): "May be made by the attorney in fact of the petitioning creditors."

In re Hunt, 9 A. B. R. 251, 118 Fed. 282 (D. C. Iowa): "In clause 9 of section 1 of the Bankrupt Act it is provided that the word 'creditor' shall include any one who owns a demand or claim provable in bankruptcy and may include his duly authorized agent, attorney or proxy. * * * As it is not declared that the petition shall be verified by the creditor in person, the verification will be sufficient if made by the agent or attorney representing the creditor, it being made to appear that the affiant has knowledge of the facts verified."

In re Chequasset Lumber Co., 7 A. B. R. 87, 112 Fed. 56 (D. C. N. Y.): "It fully appears that the persons who made the verifications were the ones most fully acquainted with the facts and apparently the only agents of the corporations who had the necessary knowledge to enable them to verify the petition. The verifications are deemed sufficient."

Obiter, In re Vastbinder, 11 A. B. R. 118, 126 Fed. 418 (D. C. Pa.): "There can be no doubt as to the right of an attorney in fact to make the necessary oath, where the facts are within his own knowledge and this will be assumed where the oath is in positive terms."

In re Livingston, 13 A. B. R. 357 (D. C. Hawaii): "An authorized agent is qualified to verify an involuntary bankruptcy petition when his principals are at a distance and he is acquainted with the facts."

But the attorney's oath must be positive and not qualified.

In re Vastbinder, 11 A. B. R. 119, 126 Fed. 417 (D. C. Pa.): "But in the present instance the oath is not positive, but qualified, to the best of the affiants' knowledge, information and belief; rather loose terms, which may be made to mean anything or nothing. The difficulty is, that the facts which are affirmed of knowledge are not distinguished from those which are based on information, thus in effect dissipating the force of the affidavit. The first ground of demurrer is, therefore, well taken, but as this is an amendable defect opportunity will be given to remedy it."

§ 278. **Form of Oath.**—No particular form of oath is requisite.

In re Bellah, 8 A. B. R. 310, 116 Fed. 69 (D. C. Del.): "While a petition in involuntary bankruptcy must be signed and verified in duplicate by the petitioning creditors, or those authorized to represent them, the Bankruptcy Act does not provide or require that such petition shall be verified by a formal affidavit or an affidavit of any sort, the only provision applicable to the verification of such petition being that 'all pleadings setting up matters of facts shall be verified under oath.'"

§ 279. **Agent to Allege Capacity and Authority.**—The person verifying for a corporation or as agent for another must state his capacity and that he is authorized.¹⁵¹

^{151.} (1867) In re Sargent, Fed. Cases, No. 12,361. Authority of president of corporation to institute or join in filing bankruptcy proceedings against a debtor, held to be conclusive under the terms of a certain by-law, until revoked by board of directors, In re Winston, 10 A. B. R. 171, 122 Fed. 187 (D. C. Tenn.).

In *re Bellah*, 8 A. B. R. 310, 116 Fed. 69 (D. C. Del.): "A corporation can act only through its officers, or agents, and where its name is subscribed by an individual to a petition in involuntary bankruptcy, and the petition purports to be verified by the same person, it is necessary that such person should set forth under oath or affirmation that he was authorized to sign and verify the petition on behalf of the corporation. The omission of such an averment, unless remedied, is fatal; but is not an incurable defect, jurisdictional or otherwise."

In *re Livingston*, 13 A. B. R. 357 (D. C. Hawaii): "The authority of an agent to act for his principal in petitioning for adjudication in involuntary bankruptcy, is material and should be set forth in the affidavit or otherwise established."

§ 280. Amendment of Verification Permitted.—Even if the verification be irregular the petition will not, as a rule, be stricken from the files; for the court will usually give an opportunity for correct verification to be made.¹⁵²

§ 281. Each Petitioner to Verify.—The petition must be verified by each petitioner.¹⁵³

§ 282. Waiver of Objections to Verification.—Objections to the verification may be waived.¹⁵⁴ They may be waived by the bankrupt answering over, where the bankrupt is the objecting party;¹⁵⁵ or by the bankrupt appearing and going into the merits notwithstanding his motion is solely to the jurisdiction;¹⁵⁶ or by the bankrupt's failure to raise the objection within the time limited for pleading.¹⁵⁷ Doubtless there are other things that would operate as waivers.

152. In *re Vastbinder*, 11 A. B. R. 119, 126 Fed. 417 (D. C. Pa.); In *re Bellah*, 8 A. B. R. 310, 116 Fed. 69 (D. C. Del.). Inferentially, *Bank v. Craig Bros.*, 6 A. B. R. 381, 110 Fed. 137 (D. C. Ky.). Inferentially, In *re Nelson*, 1 A. B. R. 63, 98 Fed. 76 (D. C. Wis., reversed, on other grounds, by Sup. Ct., 7 A. B. R. 142).

153. Inferentially, *Bank v. Craig Bros.*, 6 A. B. R. 381, 110 Fed. 137 (D. C. Ky.). But that all have not verified, is not jurisdictional; and the proper remedy is to move for a rule to require a proper verification, and if the rule is not complied with, to move to dismiss the petition for that reason. *Bank v. Craig Bros.*, 6 A. B. R. 381, 110 Fed. 137 (D. C. Ky.).

154. Failure to File Petition and Schedules at Time of Verification.—Failure to file the petition and schedules at the time of their verification is not a jurisdictional defect to be taken advantage of after adjudication. In *re Berner*, 3 A. B. R. 325 (Ref. Ohio).

155. In *re Plymouth Cordage Co.*, 13 A. B. R. 668, 135 Fed. 1000 (C. C. A. Okla.); *Leidigh Carriage Co. v. Stengel*, 2 A. B. R. 383, 95 Fed. 637 (C. C. A. Ohio); In *re Herzikopf*, 9 A. B. R. 90, 118 Fed. 101 (D. C. Calif.); In *re Vastbinder*, 11 A. B. R. 118, 126 Fed. 418 (D. C. Pa.); (1867) *Roche v. Fox*, Fed. Cases, No. 11,974.

156. In *re Smith*, 9 A. B. R. 98, 117 Fed. 961 (D. C. Conn.).

157. In *re Simonson*, 1 A. B. R. 197, 92 Fed. 904 (D. C. Ky.).

DIVISION 3.

FILING IN DUPLICATE.

§ 283. **Involuntary Petition to Be Filed in Duplicate.**—The petition in involuntary bankruptcy must be filed in duplicate, one copy for the clerk to keep for the files, the other for service on the bankrupt with the writ of subpœna. They are duplicate originals.¹⁵⁸

§ 284. **Waiver by Appearance.**—The objection that it was not filed in duplicate is waived by answering over or general appearance within four months of the commission of the alleged act of bankruptcy.

In re Plymouth Cordage Co., 13 A. B. R. 668, 135 Fed. 1000 (C. C. A. Okla.): "The objection that a petitioner in bankruptcy failed to file a duplicate of his petition is waived by an answer by the bankrupt within four months of the alleged acts of bankruptcy without presenting the objection."

But it has been held that, where an involuntary petition is filed within the four months period, but the duplicate is not filed within such period, the proceedings are invalidated and the debtor cannot be adjudged bankrupt;¹⁵⁹ even though thereafter the respondent appears, generally, and without objection.¹⁶⁰ But this is not good law. The object of requiring the duplicate is to supply the respondent with a copy, and he may waive the privilege.

In re Plymouth Cordage Co., 13 A. B. R. 668, 135 Fed. Rep. 1000 (C. C. A. Okla.): "The copy for service on the bankrupt is for his benefit. The only object of requiring its filing is to give him a copy of the petition, in order to enable him to answer it. The right to it is a personal privilege, which he may demand and secure or may renounce and waive. As the only benefit of the privilege is to enable him more speedily and conveniently to answer the petition, an answer without a demand of the privilege is a waiver of it. It stops the bankrupt from thereafter insisting upon it, because it leads the petitioner to proceed and to incur expenses in reliance upon the renunciation of the privilege which has become functus officio by the answer."

DIVISION 4.

DEPOSIT FOR COSTS AND POVERTY AFFIDAVITS.

§ 285. **Deposit for Costs.**—The party filing the bankruptcy petition, whether it be a voluntary or involuntary petition, must accompany it with a deposit of \$30.00; \$15.00 of which is for the referee, \$10.00 for the

¹⁵⁸. Bankr. Act, § 59 (c); In re Stevenson, 2 A. B. R. 66, 94 Fed. 110 (D. C. Del.); In re Bellah, 8 A. B. R. 321, 116 Fed. 69 (D. C. Del.); In re Plymouth Cordage Co., 13 A. B. R. 667, 135 Fed. 1000 (C. C. A.).

¹⁵⁹. In re Stevenson, 2 A. B. R. 66, 94 Fed. 110 (D. C. Del.).

¹⁶⁰. In re Stevenson, 2 A. B. R. 66, 94 Fed. 110 (D. C. Del.); In re Dupree, 8 A. B. R. 321, note, 97 Fed. 28 (D. C.).

clerk, and \$5.00 for the trustee.¹⁶¹ The deposit is the same in both voluntary and involuntary bankruptcies.

§ 286. **Indemnity for Expenses.**—In addition, indemnity for the expenses of the referee also may be—and usually is by rule of court—demanded in advance.¹⁶²

§ 287. **Poverty Affidavit.**—In cases of voluntary bankruptcy the petitioner may be excused from making these deposits—except the indemnity for expenses—upon filing what is called a poverty affidavit and proving to the satisfaction of the court an absolute inability to make the deposit.¹⁶³

§ 288. **Showing May Be Demanded in Addition to Poverty Affidavit.**—The mere filing of the poverty affidavit is not conclusive, although it is undoubtedly *prima facie* proof. The court may demand other proof; and, in practice, the prospective bankrupt may be cross-examined as to his inability to make the deposit. Merely that he has no money, or no property except such as is exempt from levy of execution, or that it is inconvenient for him to get the money, will not suffice. There must exist absolute *inability* to raise the money.

In re Levy, 4 A. B. R. 109, 101 Fed. 247 (D. C. Wis.): "Without adopting the extreme view there expressed (*Sellers v. Bell*, 2 A. B. R. 554, 94 Fed. 801), I am clearly of opinion that the statute intends to exempt a petitioner who has

161. See Bankr. Act, § 40 (a), as to the deposit for the referee; § 48 (a) as to that for the trustee; and § 52 as to the clerk's fee.

162. The clerk is also entitled to reimbursement for his expenses necessarily incurred in publishing or mailing notices or other papers, and may charge a certain rate for each notice he sends, not as a fee but as a means of covering his estimated expenses in publishing or mailing notices. In re Hardware & Furniture Co., 14 A. B. R. 186, 134 Fed. 997 (D. C. N. Car.).

Gen. Order No. XXXV: "1. The fees allowed by the act to clerks shall be in full compensation for all services performed by them in regard to filing petitions or other papers required by the act to be filed with them, or in certifying or delivering papers or copies of records to referees or other officers, or in receiving or paying out money; but shall not include copies furnished to other persons, or expenses necessarily incurred in publishing or mailing notices or other papers.

"2. The compensation of referees, prescribed by the act, shall be in full compensation for all services, performed by them under the act or under these general orders; but shall not include expenses necessarily incurred by them in publishing or mailing notices, in traveling, or in perpetuating testimony, or other expenses necessarily incurred in the performance of their duties under the act and allowed by special order of the judge.

"3. The compensation allowed to trustees by the act shall be in full compensation for the services, performed by them; but shall not include expenses necessarily incurred in the performance of their duties and allowed upon the settlement of their accounts.

"4. In any case in which the fees of the clerk, referee, and trustee are not required by the act to be paid by a debtor before filing his petition to be adjudged a bankrupt, the judge, at any time during the pendency of the proceedings in bankruptcy, may order those fees to be paid out of the estate; or may, after notice to the bankrupt, and satisfactory proof that he then has or can obtain the money with which to pay those fees, order him to pay them within a time specified, and, if he fails to do so, may order his petition to be dismissed."

163. Bankr. Act, § 51 (a) (2).

no means, from making the preliminary deposit of \$25, and must be fairly interpreted to that end; that the affidavit in connection with the schedules establishes prima facie right to such exemption, subject, however, to investigation; and, if the inquiry is fairly answered respecting available means, and none appear held by the petitioner when the proceedings were instituted, nor obtainable through his individual earnings or efforts, the exemption must be allowed."

In *re Bean*, 4 A. B. R. 54, 100 Fed. 262 (D. C. Vt.): The court held that money subject to exemption "may be subject to an order for payment of statutory fees which are primarily for the benefit of the bankrupt and do not depend upon property not exempt but upon absolute inability."

In *re Hines*, 9 A. B. R. 27, 117 Fed. Rep. 790 (D. C. W. Va.): "A fair construction of the above language indicates that it was the intention of the act to allow voluntary bankrupts to file their petition without the payment in advance of the fees therefor, only in case they did not have, and could not obtain, the money with which to pay such fees. In other words, if the bankrupt was absolutely without money or effects of any kind, but was able to borrow from his friends money with which to pay the court costs, he could not properly make the affidavit required in this case, and it would be his duty to pay the fees. * * * The petitioner is not a pauper in the sense of the Bankruptcy Act. Exemptions allowed by the statute were not intended to cover exonerations from the payment of the fees provided for the court officers by that act. Having held that the statute does not confer upon a voluntary petitioner in bankruptcy the unqualified right to proceed upon his own affidavit as to his poverty, it follows that if, from the schedule filed by such petitioner, facts appear which are at variance with such affidavit, an order should be made requiring the bankrupt to deposit such fees before proceeding further with the case."

In *re Collier*, 1 A. B. R. 182, 93 Fed. 191 (D. C. Tenn.): "It cannot be * * * the intention of the statute to confer upon the petitioner the unqualified right to proceed in bankruptcy upon his own affidavit as to his poverty, nor that such affidavit should be taken as conclusive of the fact. * * * And the court will not be satisfied in doubtful cases until an inquiry has been made into the circumstances."

Obiter, contra, *Sellers v. Bell*, 2 A. B. R. 554, 94 Fed. 801 (C. C. A. Ala.): "If these ideas are to find permanent lodgment in the minds of the judges of the courts of bankruptcy and become active, the carefully expressed provisions of the Bankruptcy Act granting the right to insolvent debtors to present their petition for relief in some cases in forma pauperis will not only be denied, but this humane and benevolent bounty from the government will be tortured into a most malignant snare. It is manifest that paragraph 4 of General Order 35 relates only to cases in voluntary bankruptcy, and the language shows that there may be such cases in which the petitioning debtor is not required to pay the fees of the clerk, referee, and trustee before or at the time of filing his petition, although he presents a schedule of property in excess of the exemptions allowed by the law of the State of his domicile and surrenders an estate in bankruptcy. Otherwise, it would be futile to provide that 'the judge at any time during the pendency of the proceedings in bankruptcy may order those fees to be paid out of the estate.' The terms of the affidavit, as prescribed by sec. 52, are 'that he is without, and cannot obtain, the money with which to pay such fees.' This affidavit may well be made in cases in which there is an estate to be surrendered, consisting not in money or in property that has a market value or can be converted into money by the petitioning debtor without substantial sacrifice of its value, and from which, therefore, he could not obtain the money in the exercise of perfect good faith towards the court and his creditors. Upon the presentation of his petition and schedules, accompanied by the affidavit in

the terms of the statute, the clerk has no option as to filing the petition and taking the action thereon prescribed by the law. The judge of the Court of Bankruptcy, on the motion of parties interested, or on his own motion, after notice to the bankrupt, may have satisfactory proof that the bankrupt has not made a full surrender of his assets, and that he then has, or can obtain, the money with which to pay those fees." But this case is obiter since it was concerned with an opposition to discharge on the ground of having committed a false oath in swearing to a poverty affidavit.

If afterward the court is satisfied that the bankrupt has obtained or can obtain the money for these fees, the judge, upon notice to the bankrupt, may order him to pay them, on penalty of a dismissal of the proceedings.¹⁶⁴

§ 289. One Deposit for Partnership and One for Each Partner Adjudicated.—It has been held that in partnership cases one deposit will not be enough: that there must be one deposit for each estate administered.¹⁶⁵

In *re Barden*, 4 A. B. R. 31, 101 Fed. 555 (D. C. N. Car.): "Other sections might be quoted to illustrate the provisions peculiar to partnerships, but the foregoing are sufficient to show a recognition of the partnership as a distinct entity and the legislative intent to recognize different estates when a partnership and the individual partners are adjudged bankrupt—the sense in which the words 'each estate' is used in the section providing for the payment of the clerk's fees. * * * In short the proceedings are separate, the estates different. The only logical conclusion from the act itself—keeping in view the legislative intent deducible therefrom, 'estate' having no restricted technical meaning but meaning the ownings, real and personal property, choses in action, whatever may belong to the person as defined in the statute—is that Congress meant exactly what the statute provides. Clerks shall receive for their services to each estate a filing fee of ten dollars, that is ten dollars for filing the petition and schedules of the partnership and ten dollars for filing the petition and schedules of each individual member thereof—ten dollars for each estate to be administered. And if Congress thus used the words 'each estate' it is not probable the phrase 'in each case' was used in a more restricted sense. * * * As the estates must be kept separate, the petition and schedules being different, many questions may arise as to the estates of the firm or individual members, thus making several cases. Because the papers are or may be filed in the same file case, jacket or envelope does not of necessity make them one and the same case. * * * My conclusion is that the proper construction of the statute in

¹⁶⁴. Gen. Ord. No. XXXV (4); *Anonymous*, 2 A. B. R. 527 (D. C. Wash.). Apparently *contra*, *Sellers v. Bell*, 2 A. B. R. 529, 94 Fed. 801 (C. C. A. Ala.). But this was a case of opposition to discharge for swearing falsely that he could not obtain filing fees.

In *re Herbold*, 14 A. B. R. 119 (D. C. Wash.): In this case the court, obiter, says the bankrupt may be cited for contempt for not paying; but there is no authority for this assertion. Gen. Order No. XXV prescribes the remedy for noncompliance.

But the judge, not the referee (unless perhaps under local rule of court), must be the one to make the order, In *re Plimpton*, 4 A. B. R. 614, 103 Fed. 775 (D. C. Vt.).

¹⁶⁵. Obiter, In *re Mercur*, 10 A. B. R. 510 (C. C. A. Pa.). *Contra* (in a voluntary case), In *re Langslow*, 1 A. B. R. 258, 98 Fed. 869 (D. C. N. Y.). *Contra*, In *re Gay*, 3 A. B. R. 529, 98 Fed. 870 (D. C. N. Y.).

proceedings where a petition is filed by a partnership to have a firm adjudged bankrupt, and petitions by the individual members of the firm, each petition and the accompanying schedules, constitute separate and distinct cases, hence the referee and trustee are entitled to a fee of ten dollars and five dollars respectively in each case—one on the partnership petition, and one on the petition of each individual member. The general idea of the bankrupt law is economy in its administration, but above this the law is just—just to bankrupts, just to creditors, and was intended to be just to the officers of the court. Any other construction would not be in keeping with the spirit of the law, but flagrantly unjust to the officers.”

In *re Farley & Co.*, 8 A. B. R. 266, 115 Fed. 359 (D. C. Va.): “The language of the act in respect to the fees of the referee and trustee is not so plain. Sections 40a and 48a. In each, the language is a fee ‘in each case’ to be deposited with the clerk at the time the petition is filed. If I am right in thinking that three petitions should have been filed in the matter in hand, it seems clear that the word ‘case’ as used in the act is intended to apply to the duties of these officers as to each estate. And even if separate petitions are not necessary, it still does not follow that the proceedings as to the three separate estates constitute only one ‘case.’ * * * If only a firm petition is filed and a discharge of the members of the firm quoad the firm liabilities only is wanted, then only one fee should be allowed to each officer. In such a case it is true that the several estates of the firm and the partners will be involved, but only the firm estate will be administered. If, however, the partners seek discharges, both as against the firm creditors and as against their respective individual creditors, it is evident that the several estates must be administered. In such cases several fees are allowable.”

§ 290. Return of Deposit in Involuntary Cases, but Not in Voluntary.—The deposit will be returned to the petitioners in involuntary cases out of the funds of the estates, but in purely voluntary bankruptcies it will not be returned, because the money deposited by the bankrupt on the filing of his petition would belong to his trustee in any event.

In *re Matthews*, 3 A. B. R. 265, 97 Fed. 772 (D. C. Iowa): “The provisions of General Order No. 10 do not apply to the deposit of \$25, which the clerk, under section 51 of the Bankrupt Act, is required to collect from the bankrupt when he files his petition. The money thus collected by the clerk is intended to cover the statutory fees to be paid to the clerk, referee, and trustee as compensation for their services; and being paid to the clerk when the petition is filed, the amount of the estate passing to the trustee is lessened by that sum, and, if this amount should be now returned to the bankrupt, he would be receiving part of his estate as it belonged to him before he filed his petition, which estate by the adjudication became in fact the property of the creditors. The provisions of General Order No. 10 are intended to cover money which the bankrupt or some third party may be called upon to furnish after the initiation of the proceedings in order to meet expenses incurred by the officer for the purposes specially recited in the order, which purposes do not include the money deposited with the clerk to meet the fees (not expenses) of the clerk, referee and trustee. Money thus advanced, if the bankrupt has met the requirements of the law with respect to turning over his estate to his creditors, is deemed to have been obtained from sources other than the estate belonging to the cred-

itors, and therefore provision is made for its repayment out of the estate. The purpose of the order is to protect the officers from personal loss in the performance of their duties under the Bankrupt Act, but it is not the intent of the order that the bankrupt shall be repaid the money which presumably he took out of his estate to pay the fees of officers before he filed his petition in bankruptcy."

§ 291. Return Where Voluntary and Involuntary Petitions Both Pending and Adjudication on Voluntary.—If a voluntary petition is filed and adjudication had thereon during the pendency of an involuntary petition against the same debtor, it has been held that the petitioning creditors may have their deposit and expenses repaid out of the estate in the voluntary proceedings.

In *re Stegar*, 7 A. B. R. 665, 113 Fed. 978 (D. C. Ala.): "Creditors by commencing the involuntary proceedings, incur liability for costs and attorneys' fees, and, if the petition be wrongfully filed, for damages. They also get in position to avoid preferences and transfers which might not be assailable on the adjudication under the later voluntary petition. The court cannot deprive petitioning creditors of these rights, or enlarge their liabilities, by dismissing the prior involuntary proceeding in order to administer the estate under the voluntary petition. How, then, are the rights of petitioning creditors to be saved, if they are not allowed to proceed, and the administration of the insolvent estate is had under the insolvent's voluntary petition, subsequently filed?

"A debtor who, without appearing in an involuntary proceeding, subsequently files a voluntary petition, upon which he is adjudged a bankrupt, cannot complain of the filing of the involuntary petition. The court would never dismiss the creditor's petition under such circumstances; and unless the petition were dismissed, or petitioners withdrew it, there could not, under the plain terms of the Bankrupt Act, be any liability to the defendant. This liability out of the way, it would remain to save the creditors harmless as to costs and attorney's fees. This is easily effected by directing an adjudication on the voluntary proceeding, staying the involuntary proceeding in the meanwhile, reserving to petitioning creditors the right to prove their costs and expenditures under the adjudication on the voluntary petition with leave to bring forward the involuntary petition if subsequently it be found necessary to protect rights which could not be saved by adjudication under the voluntary petition."

This case (*In re Stegar*) lays down doubtful law, however, where no adjudication nor finding is actually made upon the involuntary petition. If creditors have not established their right upon the facts alleged by them, why should they be entitled to a return of their deposit for costs which otherwise would not be recoverable? Moreover, there is no rule of priority therefor laid down in the statute nor in the Supreme Court's orders.

There is a tendency in the courts continually to enlarge the number of allowances to be made out of insolvent estates beyond those limited in the statute. So many different claimants stand ready to dip into the estate for reimbursement that creditors always are in danger of being further

and further postponed each year in bankruptcy administration. Besides the priorities specifically granted by the bankruptcy act itself, the list of those entitled to reimbursement out of the estate has been continually extended by judicial construction. The tendency of the courts to pay every litigant's expense bill out of the estate is contrary to the clear intent of the act. Certainly, if no showing is made by the petitioning creditors that they actually had the right of action alleged by them, they ought not to be reimbursed their costs and expenses out of the estate, simply because the bankrupt thereafter voluntarily petitions himself into bankruptcy.

CHAPTER VII.

DIFFERENT PROCEEDINGS BY OR AGAINST SAME DEBTOR PENDING AT SAME TIME.

Synopsis of Chapter.

§ 292. Statement of Situation.

DIVISION 1.

- § 293. Petition in District of Domicile First to Be Heard.
- § 294. In Partnership and Corporation Cases Petition First Filed, First Heard.
- § 295. Other Hearing Stayed.
- § 296. Court Making First Adjudication Retains Jurisdiction.
- § 297. But Court Having Right to Retain, May Relinquish.
- § 298. Amendment by Adopting Earlier Act from Other Petitions.

DIVISION 2.

- § 299. Subsequent Voluntary Petition Allowable Though Involuntary Pending.
- § 300. But Notice to Petitioning Creditors First, before Adjudication on Voluntary Petition.
- § 301. Precedence to Involuntary Petition Where Creditors' Rights Require.
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- § 303. Stay of Involuntary Petition to Ascertain Propriety of Adjudication on Voluntary.
- § 304. Voluntary and Involuntary Petitions in Different Districts—Bankrupt's Domicile Preferred.

DIVISION 3.

- § 305. Bankruptcy Proceedings Absolute Preference over Federal Equity Proceedings in Same District.

§ 292. **Statement of Situation.**—Sometimes different proceedings are instituted contemporaneously against the same debtor in the same or in different jurisdictions; and likewise it frequently occurs that during the pendency of involuntary proceedings against a debtor he files a voluntary petition himself.

Complications thus are likely to arise requiring rules for the guidance of the court.

DIVISION 1.

PRACTICE WHERE TWO OR MORE INVOLUNTARY BANKRUPTCY PETITIONS ARE FILED AGAINST THE SAME DEBTOR.

§ 293. **Petition in District of Domicile First to Be Heard.**—Where two or more involuntary petitions are pending at the same time against

the same debtor, hearing shall be first had upon the petition filed in the district where the debtor had his domicile.¹

This is so in the case of a corporation as well as in that of a natural person, the word "individual" as used in Gen. Order VI being the same as "person" and including a corporation.

In re United Button Co., 12 A. B. R. 766 (D. C. N. Y.): "While the use of the word cannot be regarded as fortunate for the purpose of clear expression, if the intent was to include corporations, yet it is concluded with some reluctance that such was the intent. It is of the greatest importance that the Bankruptcy Act should be administered with the utmost harmony as regards the several district courts, and that each of such courts should concede freely what is due to a particular court which has acquired jurisdiction and first undertaken the administration of a bankrupt's estate. Priority of jurisdiction should carry the right of administration, at least where it is followed by priority or adjudication, and, aside from the compulsion of General Order VI, such rule would prevail."

§ 294. In Partnership and Corporation Cases Petition First Filed, First Heard.—In the case of a partnership, the petition first filed will be first heard;² and this is so whether all the different petitions were filed by creditors, or all by partners, and whether filed in different districts, or in the same district. In case one of the petitions be filed by creditors and the other by one of the partners, the general orders prescribe no express rule, but the petition first filed would properly be the one first heard. In the case of a corporation the same rule prevails.³

§ 295. Other Hearing Stayed.—Hearing upon the other petitions may be stayed until adjudication is made upon the petition first heard.⁴

§ 296. Court Making First Adjudication Retains Jurisdiction.—The court making the first adjudication of bankruptcy retains jurisdiction over all proceedings therein until the same are closed;⁵ and may stay the other proceedings.⁶

1. Gen. Ord. VI; In re United Button Co., 13 A. B. R. 454, 137 Fed. 668 (D. C. Del.); In re United Button Co., 12 A. B. R. 763, 132 Fed. 378 (D. C. N. Y.); obiter, In re Waxelbaum, 3 A. B. R. 395, 98 Fed. 589 (D. C. N. Y.).

2. Gen. Ord. No. VI; In re Sears, 7 A. B. R. 279, 112 Fed. 58 (D. C. N. Y.).

3. In re Tybo Mining & Reduc. Co., 13 A. B. R. 62, 132 Fed. 697 (D. C. Nev.); In re Elmira Steel Co., 5 A. B. R. 484, 517, 528, 109 Fed. 456, 474, 480 (D. C. N. Y.).

4. Gen. Ord. No. VI; In re Tybo Mining & Reduc. Co., 13 A. B. R. 62, 132 Fed. 697 (D. C. Nev.).

5. Gen. Ord. No. VI. Two corporations with property and business so commingled as to be incapable of separation, both being bankrupt were in one case treated as a single corporation. In re Bridge & Iron Co., 13 A. B. R. 304, 133 Fed. 568 (D. C. Kans.).

6. In re United Button Co., 12 A. B. R. 761, 132 Fed. 378 (D. C. N. Y.).

§ 297. **But Court Having Right to Retain, May Relinquish.**—But the court having such right of retaining jurisdiction shall, if satisfied that it is for the greatest convenience of parties in interest, order the case to be transferred to one of the other courts where petitions have thus been filed.⁷

But there must be clear warrant before the court abandons its duty to another court.

In *re United Button Co.*, 13 A. B. R. 454, 137 Fed. 668 (D. C. Del.): "Unquestionable jurisdiction of the case, owing to the domicile of the bankrupt, existing here, the burden of satisfying this court that the greatest convenience of the parties in interest requires a removal of the case to New York, rests upon those seeking such removal." It is not going far to say that on general principles of policy a court having taken cognizance of a case within its undoubted jurisdiction should not abandon to other tribunals the performance of the duty it has assumed unless it has clear warrant for so doing. The Bankruptcy Act does not define or describe 'greatest convenience' or 'parties in interest,' as those phrases are used in § 32 and General Order VI. Both expressions are elastic and largely indefinite. It is manifestly too narrow a construction of the phrase 'parties in interest' to restrict it merely to unsecured creditors in bankruptcy. The bankrupt is not only literally but substantially a party in interest. A creditor holding a security which is sought to be set aside by the trustee in bankruptcy is also a party in interest. And it probably may be stated with accuracy that all persons whose pecuniary interests are directly affected by proceedings in bankruptcy are, within the true meaning of § 32 and General Order VI, parties in interest. What may be for the greatest convenience of parties in interest does not necessarily depend upon only one factor or circumstance entering into the situation. Proximity of the place of business of the bankrupt to the court entertaining proceedings in bankruptcy, though a circumstance sometimes entitled to weight is by no means conclusive, and the same may be said with respect to proximity to the place of manufacture. Proximity of a majority of the creditors of the bankrupt in number or in the amount of their claims is a circumstance which should also be duly weighed. And the same may be said with at least equal force of a majority of the debtors of the bankrupt in number or in amount. Nor is the element of expedition or of economy in the administration of the estate in bankruptcy to be lost sight of. Taking into consideration all the circumstances disclosed by the petition, affidavits and exhibits, this court is not satisfied that the transfer of the case in hand to the District Court for the Southern District of New York would be for the greatest convenience of the parties in interest. I do not think that the petitioners have adduced the preponderance of evidence required of them as those on whom the onus of proof rests, to justify a removal."

Contra, In *re General Metals Co.*, 12 A. B. R. 770, 133 Fed. 84 (D. C. N. Y.): "Under these circumstances, although neither district affords any very conspicuously superior advantages over the other as a place for the administration of the estate, I think upon the whole that the greatest convenience of the parties in interest will be subserved by having this estate administered in Colorado."

7. Gen. Ord. No. VI; In *re Waxelbaum*, 3 A. B. R. 392, 98 Fed. 589 (D. C. N. Y.); In *re General Metal Co.*, 12 A. B. R. 770, 133 Fed. 84 (D. C. N. Y.); In *re Tybo Mining & Reduc. Co.*, 13 A. B. R. 62, 132 Fed. 697 (D. C. Nev.); In *re Sears*, 7 A. B. R. 278, 112 Fed. 58 (D. C. N. Y.).

"Parties in interest" are not to be confined to unsecured creditors: all persons, including the bankrupt himself, are comprehended.⁸ The burden of proof is on the parties desiring the transfer.⁹

The wish of the majority of the creditors is strong evidence, although not conclusive, as to the "greatest convenience."¹⁰ Creditors who have received preferences which they do not offer to surrender will not be heard to urge their own convenience.¹¹

§ 298. Amendment by Adopting Earlier Act from Other Petitions.—The petition in the case first heard may be amended by adding any earlier act of bankruptcy alleged in any of the other petitions;¹² but, apparently, not by the addition of a later act.¹³

In re Sears, 8 A. B. R. 713, 117 Fed. 294 (C. C. A. N. Y.): "The order allowing an amendment of the petition by the insertion of a further act of bankruptcy was erroneous, because it clearly appeared that such act of bankruptcy was not an earlier act than that first alleged, but was later. The case is controlled by the terms of General Order No. 6, and, as that makes explicit provision for it, an amendment not within its terms is unwarranted. Except for that provision, such an amendment would have been permissible, and its allowance a reasonable exercise of judicial discretion; but the provision, by implication, limits the power of amendment to the single case in which an earlier act of bankruptcy is sought to be incorporated into the petition."

It seems, however, quite a misapplication of the rule, "inclusio unius, exclusio alterius," to hold that the mere permission granted in General Order No. 6 to adopt an earlier act of bankruptcy alleged in the superseded petition, excludes the adoption of a later act. Such holding misses the very object of the general order, which, doubtless, is merely to prevent creditors losing the benefit of any earlier act alleged in the superseded petition, right to plead which might not exist in the petitioning creditors of the superseding petition, because of the expiration of the four months period.

DIVISION 2.

PRACTICE WHERE VOLUNTARY AND INVOLUNTARY BANKRUPTCY PROCEEDINGS ARE PENDING AT THE SAME TIME AGAINST SAME DEBTOR.

§ 299. Subsequent Voluntary Petition Allowable though Involuntary Pending.—The pendency of an involuntary petition before ad-

8. In re United Button Co., 13 A. B. R. 454, 137 Fed. 668 (D. C. Del.).

9. In re United Button Co., 13 A. B. R. 454, 137 Fed. 668 (D. C. Del.).

10. In re United Button Co., 13 A. B. R. 454, 137 Fed. 668 (D. C. Del.).

An erroneous transfer is not to be corrected by motion to vacate or annul but by usual petitions for review or appeal. Kyle Lumber Co. v. Bush, 13 A. B. R. 535, 133 Fed. 688 (C. C. A. Ala.).

11. In re Sears, 7 A. B. R. 278, 112 Fed. 58 (D. C. N. Y.).

12. Gen. Order No. VI.

13. Wilder v. Watts, 15 A. B. R. 57, 138 Fed. 426 (D. C. S. C.).

judication will not of necessity invalidate a subsequent voluntary petition filed in the same or another district.¹⁴

In re Waxelbaum, 3 A. B. R. 392, 98 Fed. 589 (D. C. N. Y.): "The first petition may be invalid for lack of jurisdiction * * * or other considerations may justify a subsequent voluntary petition and the question of jurisdiction must be determined on each petition and neither is necessarily conclusive of the other."

§ 300. But Notice to Petitioning Creditors First, before Adjudication on Voluntary Petition.—Where a voluntary petition is filed whilst involuntary proceedings are pending, notice should be given to creditors before entry of adjudication is made on the voluntary petition, and thereupon the court should give priority to whichever petition seems proper.¹⁵ But if adjudication has already been made on the voluntary petition, it is proper practice for creditors to have an order served in the voluntary case upon the bankrupt to show cause why the voluntary adjudication should not be vacated and the petition be dismissed.¹⁶

§ 301. Precedence to Involuntary Petition Where Creditors' Rights Require.—Precedence should be given to the involuntary petition and no adjudication be entered on the voluntary petition until the involuntary petition shall have been heard and decided, whenever it appears that if the estate is administered under the voluntary petition preferences or other voidable transfers will be rendered unassailable by reason of the expiration of the four months limitation.¹⁷ And an adjudication entered on the voluntary petition before the hearing on the involuntary petition will be set aside.¹⁸

§ 302. But Adjudication on Voluntary Petition an Absolute Right Where Creditors' Rights Not Imperiled.—But the right of a debtor to file a voluntary petition and to be adjudicated bankrupt thereon cannot be denied and precedence be given to the involuntary proceedings, where it does not appear that thereby voidable transfers will be rendered unassailable by reason of the expiration of the four months limitation.

In re Stegar, 7 A. B. R. 665, 113 Fed. 978 (D. C. Ala.): "Ordinarily, however, it is true that the debtor has the right to avail himself of the benefits of the Bankrupt Law on his own petition, and that this right cannot be forfeited or rendered ineffectual merely because the creditors' petition is first filed and

14. Compare, to same effect, under law of 1867, In re Canfield, Fed. Cases, No. 2,380.

15. In re Dwyer, 7 A. B. R. 532, 112 Fed. 777 (D. C. N. Dak.).

16. Inferentially, In re Waxelbaum, 3 A. B. R. 395, 98 Fed. 589 (D. C. N. Y.).

17. In re Dwyer, 7 A. B. R. 532, 112 Fed. 777 (D. C. N. Dak.). Inferentially, In re Stegar, 7 A. B. R. 665, 113 Fed. 978 (D. C. Ala.).

18. In re Dwyer, 7 A. B. R. 532, 112 Fed. 777 (D. C. N. Dak.). See post, § 442.

pending undetermined when the debtor files his petition. A debtor has the undoubted legal right to contest the involuntary proceeding, which must necessarily be based upon some violation of the act, of which the debtor may not be guilty, and is therefore unwilling to be adjudged guilty, although desirous to have his estate distributed among creditors on his own petition. The debtor is not bound to postpone this right because of the involuntary proceeding, and may, unless he has waived the right, push his own proceeding, and at the same time contest the creditors' proceeding. A voluntary and involuntary petition are filed in different rights, and based on different grounds, though the effects of the adjudication may be the same in each proceeding. The two petitions not being filed in the same right, nor based on the same cause, and an adverse judgment to the petitioning creditors being no bar to an adjudication on the voluntary proceeding, the mere pendency of a prior involuntary petition, upon which there has been neither hearing nor adjudication, is not ground for abatement of the subsequent voluntary petition."

But the adjudication on the subsequently filed voluntary petition will not invalidate the involuntary proceedings.¹⁹

§ 303. Stay of Involuntary Petition to Ascertain Propriety of Adjudication on Voluntary.—The involuntary proceedings need not be dismissed but may be stayed until, in the course of the administration of the voluntary proceedings, it is ascertained that creditors' rights would be prejudiced, whereupon trial may be had upon the involuntary petition.²⁰

§ 304. Voluntary and Involuntary Petitions in Different Districts —Bankrupt's Domicile Preferred.—Where the involuntary and the voluntary petitions have been filed in different districts, the case should be heard in the district of the bankrupt's domicile, or else transferred to the district where it would be for the greatest convenience of the parties in interest.²¹

19. *Gleason v. Smith*, 16 A. B. R. 606, 145 Fed. 895 (C. C. A. Pa.).

20. *In re Stegar*, 7 A. B. R. 665, 113 Fed. 978 (D. C. Ala.).

Deposit for Costs.—As to the right of the petitioning creditors in the involuntary case to reimbursement of their deposit for costs and their expenses out of the voluntary case, see ante, ch. VI, § 285, et seq.

Proof of claims or acceptance of dividends in the voluntary proceedings will not be a bar or waiver of the right to prove the claims under the involuntary proceedings. *In re Stegar*, 7 A. B. R. 665, 113 Fed. 978 (D. C. Ala.).

Consolidation of voluntary and involuntary proceedings "without prejudice" does not mean that adverse claimants who have obtained possession by replevin after the filing of the petition shall be permitted to retain possession. *In re Briskman*, 13 A. B. R. 57, 132 Fed. 201 (D. C. N. Y.).

As to **voluntary and involuntary petitions in the same court under the law of 1867**: *In re Stewart*, 3 N. B. Reg. 109, Fed. Cas., No. 13,419; *In re Wielarski*, 4 N. B. Reg. 390, Fed. Cases, No. 17,619; *In re Flanagan*, 5 Sawy. 312, 18 N. B. Reg. 439, Fed. Cases, No. 4,850; *In re Canfield*, Fed. Cases, No. 2,380.

21. *In re Waxelbaum*, 3 A. B. R. 392, 98 Fed. 589 (D. C. N. Y.).

DIVISION 3.

PRACTICE WHERE FEDERAL EQUITY PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT IN WHICH A RECEIVER IS IN CHARGE OF THE ASSETS ARE PENDING IN THE SAME DISTRICT WHEREIN THE INVOLUNTARY BANKRUPTCY PETITION IS FILED.

§ 305. Bankruptcy Proceedings Absolute Precedence over Federal Equity Proceedings in Same District.—Where federal equity proceedings, not in bankruptcy, are pending in the same district where the involuntary bankruptcy petition is filed, the creditors have the absolute right to proceed with the bankruptcy proceedings regardless of expenses, delay or inconvenience or the fact that it would be to the best interests of the great majority of the creditors to have the assets administered in the United States Circuit Court.

Obiter, *Woolford v. Steel Co.*, 15 A. B. R. 36, 138 Fed. 582 (D. C. Del.): "If the petitions were not defective, the petitioners would have a right under the Bankruptcy Act to proceed to support them by evidence, and, if successful, to have the Diamond State Steel Company adjudged bankrupt, regardless of any delay, confusion or expense attending such a course."

But if the petition in bankruptcy is defective the court may take into account the unwisdom of the bankruptcy proceedings in passing upon an application for leave to amend and may refuse amendment where ordinarily it would have allowed amendment.²²

22. *Woolford v. Steel Co.*, 15 A. B. R. 36, 138 Fed. 582 (D. C. Del.).

CHAPTER VIII.

COMMENCEMENT OF PROCEEDINGS, SERVICE OF PROCESS AND RULE DAYS FOR PLEADINGS.

Synopsis of Chapter.

- § 306. Filing of Petition Commencement of Proceedings.
- § 307. Service of Process, According to Federal Equity Practice.
- § 308. Service by Publication.
- § 309. Provisions as to Service Directory, Not Mandatory.
- § 310. Apply to Partnership Petitions Filed by One Partner.
- § 311. Delay in Serving Subpœna.
- § 312. Manner of Service.
- § 313. Bankrupt's Waiver of Improper Service, etc.
- § 314. Voluntary Appearance.
- § 315. Answer Day.
- § 316. May Be Extended.

§ 306. **Filing of Petition Commencement of Proceedings.**—The filing of the petition is the commencement of proceedings.¹ It is the time of the filing of the petition, not that of the issuance nor service of the subpœna thereon that controls.² The petition is "filed" when delivered to the clerk and marked "filed" even though not delivered at the office nor during office hours.³ As previously noted (§ 190) in voluntary cases only one petition is to be filed, although it is to be accompanied by triplicate copies of the schedules; but in involuntary cases, on the other hand, the petition must be prepared and filed in duplicate—one for the court, the other for service on the alleged bankrupt.

§ 307. **Service of Process, According to Federal Equity Practice.**—Service of process shall be by service of the duplicate petition and subpœna according to federal equity practice, except that it is returnable within fifteen days; unless longer time be fixed by the judge.⁴

§ 308. **Service by Publication.**—If personal service is not available, then service is to be had by publication; and such publication is to be

1. In re Hicks, 6 A. B. R. 182, 107 Fed. 910 (D. C. Vt.). As to effect of delay in filing petition after same sworn to, see ante, footnote to § 282.

2. In re Appel, 4 A. B. R. 722, 103 Fed. 931 (D. C. Neb.); In re Lewis, 1 A. B. R. 458, 91 Fed. 632 (D. C. N. Y.); Shulte v. Patterson, 17 A. B. R. 99 (C. C. A. Iowa); In re Stein, 5 A. B. R. 288, 105 Fed. 749 (C. C. A.).

3. In re Wolf, 2 A. B. R. 322 (D. C. N. J.).

4. See Bankr. Act, § 18 (a): "Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpœna, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time."

in accordance with the federal equity practice relative to enforcing liens, except that the order shall, unless otherwise directed by the judge, be published not more than once a week for two consecutive weeks, the return day to be ten days after the last publication, unless the judge fixes a longer time.⁵

§ 309. **Provisions as to Service Directory, Not Mandatory.**—The provisions of Bankrupt Act, § 18 (a), as to service of process, are directory and not mandatory, and failure to proceed in accordance therewith will not render the adjudication void, although it may be irregular and subject to correction on error.⁶

§ 310. **Apply to Partnership Petitions Filed by One Partner.**—The provisions of Bankrupt Act, § 18 (a), as to service of process, etc., apply to partnership cases filed by one or more, but less than all, the partners. Where the nonjoining partner or partners can be found personal service must be had, but if personal service cannot be had, upon filing an affidavit to that effect, an order of publication will be made.⁷

§ 311. **Delay in Serving Subpoena.**—Long delay in serving the subpoena or in the bankrupt's entering of appearance does not necessarily affect jurisdiction.⁸

§ 312. **Manner of Service.**—Service shall be made in the same manner as in federal equity practice.⁹ Thus, in the absence of the respondent from his usual place of abode, service of the petition and subpoena, by delivering to and leaving a copy with some adult person who is a "member of or resident in his family" at such place, is good service.¹⁰ And publication in such case is unnecessary.¹¹

Thus, leaving the subpoena with the clerk of the hotel of which the alleged bankrupt is proprietor and where he usually resides, is valid service.¹² A foreign corporation having its principal place of business within the dis-

5. See remainder of Bankr. Act, § 18 (a): "But in case personal service can not be made, then notice shall be given by publication in the same manner and for the same time as provided by law for publication in suits to enforce a legal or equitable lien in the Courts of the United States except that, unless the judge shall otherwise direct, the order shall be published not more than once a week for two consecutive weeks and the return day shall be ten days after the last publication unless the judge shall for cause fix a longer time."

6. *In re Stein*, 5 A. B. R. 288, 105 Fed. 749 (C. C. A.).

7. *In re Murray*, 3 A. B. R. 601, 96 Fed. 600 (D. C. Iowa).

8. *In re Frischberg*, 8 A. B. R. 607 (D. C. N. Y.); *In re Stein*, 5 A. B. R. 288, 105 Fed. 749 (C. C. A.); *In re Lewis & Bro.*, 1 A. B. R. 458 (D. C. N. Y.); *Gleason v. Smith*, 16 A. B. R. 606, 145 Fed. 895 (C. C. A. Pa.).

9. As to the manner of service of process on a lunatic, see *In re Burke*, 5 A. B. R. 843 (D. C. Tenn.). As to the fees of marshal, see post, "Costs of Administration."

10. *In re Norton*, 17 A. B. R. 504, 148 Fed. 301 (D. C. N. Y.).

11. *In re Norton*, 17 A. B. R. 504, 148 Fed. 301 (D. C. N. Y.).

12. *In re Risteen*, 10 A. B. R. 494, 122 Fed. 732 (D. C. Mass.).

trict may be served by service upon the commissioner of corporations of the State where he is the duly appointed attorney of the corporation to receive service.¹³ But the writ of subpoena need not contain the special memorandum mentioned in Equity Rule 12.¹⁴ It is improper to serve a receiver in charge of the assets of the alleged bankrupt.¹⁵ Service on a director chosen at an adjourned session of the annual meeting is proper rather than upon one chosen at special meeting, the former not being ousted from office.¹⁶

§ 313. **Bankrupt's Waiver of Improper Service, etc.**—The bankrupt waives objections to the jurisdiction for failure to make proper service, and for improper verification of the petition, and that it was not filed in duplicate, by appearing and going on the stand to prove facts that would only be material on the merits.¹⁷

§ 314. **Voluntary Appearance.**—The bankrupt may, of course, voluntarily appear and consent to the adjudication.¹⁸ And this, although after long delay and when no subpoena has been served. But of course he may not consent thereto where he has not had his residence, domicile or principal place of business in the district the requisite period of time.

§ 315. **Answer Day.**—The bankrupt or any creditor may appear and plead to the petition within five days after the return day, or within such further time as the court may allow.¹⁹

§ 316. **May Be Extended.**—The time to answer may be extended by order of the court.²⁰ But the court must make the order and a mere extension of time by agreement is not operative unless all creditors consent, or unless, on notice to all, none object.²¹

13. *In re Magid Hope Silk Co.*, 6 A. B. R. 610, 110 Fed. 352 (D. C. N. Y.).

14. *In re Wing Yick Co.*, 13 A. B. R. 360 (D. C. Hawaii).

15. *In re Bay City Irrigation Co.*, 14 A. B. R. 370, 135 Fed. 850 (D. C. Tex.).

16. *In re Plasmon Co.*, 14 A. B. R. 487 (D. C. N. Y.).

17. *In re Smith*, 9 A. B. R. 98, 117 Fed. 961 (D. C. Conn.).

18. *In re Frichsberg*, 8 A. B. R. 607 (Special Master, N. Y., affirmed by D. C.). Bankruptcy proceedings may be instituted and process may issue though there may be a vacancy in the district judgeship at the time, *In re Urban and Suburban*, 12 A. B. R. 687 (D. C. N. J.).

19. Bankr. Act, § 18 (b).

20. Bankr. Act, § 18 (b).

21. *In re Simonson, et al.*, 1 A. B. R. 197, 92 Fed. 904 (D. C. Ky.).

CHAPTER IX.

INTERVENING OF CREDITORS IN OPPOSITION TO PETITION.

Synopsis of Chapter.

- § 317. Intervention of Creditors to Resist Petition.
- § 318. No Intervention to Contest Voluntary Petition.
- § 319. "At Any Time."
- § 320. Attaching Creditor, etc., May Intervene without Surrendering Property Attached.
- § 321. Mere Lienholder, unless Also Creditor, May Not Intervene.
- § 322. Objection to Improper Intervention, by Motion to Strike from Files.

§ 317. Intervening of Creditors to Resist Petition.—Creditors, and persons claiming to be creditors, may intervene to resist the adjudicating of the debtor to be a bankrupt, as well as to contend for it.¹

In *re* Billing, 17 A. B. R. 89 (D. C. Ala.): "It is often vital to the interests of creditors that the debtor's business, though in a critical condition, be not taken out of his control. The owner, left to the conduct of the business, may mend his fortunes, and save loss to the creditors, when a trustee or receiver could not take the business and do as well. In recognition of this interest of the creditor in his debtor's remaining in control of his own affairs, the statute authorizes the creditor to intervene in involuntary proceedings, to prevent his debtor from being put in bankruptcy, unless he be insolvent and has committed an act of bankruptcy."

But the right of intervention should not be abused where the debtor is clearly insolvent and has undoubtedly committed the act of bankruptcy urged.

Obiter, In *re* Billing, 17 A. B. R. 89 (D. C. Ala.): "This provision was intended to arm the creditor with effective means, placed directly in his own keeping, of assisting the debtor to resist an improper effort to force him into bankruptcy, and also to give the creditor like effectual means of preventing his debtor and petitioning creditors from colluding to bring about the adjudication, when the debtor is not insolvent and has not committed an act of bankruptcy, and is unwilling to institute voluntary proceedings. It was not within the contemplation of the statute, when the debtor is, in fact, insolvent, and has committed an act of bankruptcy, to give to the creditor the right to contest the adjudication, merely to keep alive a lien or levy, which would be destroyed if

1. Bankr. Act, § 18 (b): "The bankrupt or any creditor may appear and plead to the petition within five days after the return day, or within such further time as the court may allow."

Also, § 59 (f): "Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition."

Goldman v. Smith, 1 A. B. R. 266, 93 Fed. 182 (D. C. Ky.); *Ayres v. Cone*, 14 A. B. R. 739, 138 Fed. 783 (C. C. A. S. D.); In *re* Moench & Sons, 10 A. B. R. 590, 123 Fed. 965 (D. C. N. Y.). Instance, In *re* Taylor, 4 A. B. R. 515, 102 Fed. 728 (C. C. A. Ills.).

the petition be not defeated; for that is contrary to the spirit and purpose of the bankruptcy law. The contest of the petition for the latter purpose is an abuse of the statute."

§ 318. **No Intervention to Contest Voluntary Petition.**—Creditors may not so intervene in purely voluntary bankruptcies;² even if the voluntary petition be that of a partnership.³

§ 319. **"At Any Time."**—"At any time" in Bankrupt Act, § 59 (f), does not give creditors a right to appear and plead after the expiration of the five days or of the further time allowed by the court.⁴ The term "at any time" must of necessity have some limitation and clause 59 (f) should be construed in the light of clause 18 (b). And at any rate, after the trial and submission of the case, even though before the rendering of a verdict or decision, a creditor may not be allowed to appear and plead and to raise new issues.⁵

§ 320. **Attaching Creditor, etc., May Intervene without Surrendering Property Attached.**—An attaching or execution creditor may intervene and resist the petition without surrendering the property attached.⁶ It would be different were the attaching or execution creditor urging the adjudication for his attachment would be inconsistent with the adjudication—the facts he would rely on to establish the adjudication would show himself to be obtaining a lien by legal proceedings contrary to the very bankruptcy law he invokes. He might be a petitioning creditor but he would be obliged to abandon his attachment lien.⁷

§ 321. **Mere Lienholder, unless Also Creditor, May Not Intervene.**⁸—But a mere lienholder or other party in interest who is not at the same time a creditor, may not intervene.

In re Columbia Real Estate Co., 7 A. B. R. 441, 112 Fed. 643 (C. C. A. Ind.): "We are of the opinion from these provisions and their consistency with the general tenor of the act that the intention clearly appears that the only claimants who are entitled to hearing on the issue of involuntary bankruptcy, aside from

2. In re Carbone, 13 A. B. R. 55 (Ref. Wash.); In re Carleton, 8 A. B. R. 270, 115 Fed. 246 (D. C. Mass.).

3. In re Ives, 7 A. B. R. 692, 113 Fed. 911 (C. C. A. Mich.); In re Carleton, 8 A. B. R. 270, 115 Fed. 246 (D. C. Mass.).

4. In re Mutual Mercantile Agency, 6 A. B. R. 607, 111 Fed. 152 (D. C. N. Y.).

5. In re Mutual Mercantile Agency, 6 A. B. R. 607, 111 Fed. 152 (D. C. N. Y.).

6. In re Moench & Sons, 10 A. B. R. 590, 123 Fed. 965 (D. C. N. Y.). Inferentially, In re Taylor, 4 A. B. R. 515, 102 Fed. 728 (C. C. A. Ills.); [1867] In re Bergeron, Fed. Cases, No. 1,342; [1867] In re Hatje, Fed. Cases, No. 6,215; [1867] In re Mendelson, Fed. Cases, No. 9,420.

7. See ante, § 234, et seq.

8. But where one of the original three petitioning creditors turns out to be disqualified the court will not retain the case in order for other creditors to be brought in. In re Gillette, 5 A. B. R. 119, 104 Fed. 769 (D. C. N. Y.).

Bankrupt Entitled to Answer Intervening Petitions.—Bankrupt cannot be debarred of right to answer the intervening petitions. Obiter, In re Gillette, 5 A. B. R. 119, 127 Fed. 769 (D. C. N. Y.).

the bankrupt, are the creditors of the bankrupt; that creditors having security or priority are excluded therefrom to the extent of their security or priority, and can be recognized only in that issue for unsecured or unpreferred amounts; that even as a creditor one who is secured and stands alone on his security can neither invoke nor oppose an adjudication of involuntary bankruptcy; and surely that this claimant of the mere rights of a mortgagee, through transactions with third parties, who is not a creditor of the bankrupt, can have no standing therein as a party."

Nor may the receiver of the bankrupt corporation, who has been appointed in proceedings for dissolution of the corporation, intervene and defend that the corporation no longer exists but has been dissolved.⁹

§ 322. Objections to Improper Intervention, by Motion to Strike from Files.⁹—Objections to the improper intervention of creditors should be by motion to strike their petition from the files—not by demurrer.¹⁰

9. *In re Storck Lumber Co.*, 8 A. B. R. 86 (D. C. Md.).

10. *Neustadter v. Chic. Dry Goods Co.*, 3 A. B. R. 96, 96 Fed. 830 (D. C. Wash.).

CHAPTER X.

ANSWER, DEMURRER AND MOTION.

Synopsis of Chapter.

- § 323. Answer.
- § 324. Demurrer to Petition.
- § 325. Amendment after Demurrer Sustained.
- § 326. Who May Answer.
- § 327. Form of Answer.
- § 328. Time to Answer Amended Petition.
- § 329. Defective Denial Cured by Going to Proof.
- § 330. Allegations Not Denied Need Not Be Proved.
- § 331. Answer Denying Act Pleaded but Showing Facts Sufficient to Constitute Another Act.
- § 332. No Demurrer to Answer.
- § 333. All Defenses Available to Bankrupt.
- § 334. Motion.

§ 323. **Answer.**—Either the bankrupt or any creditor may within five days after the return day or within such further time as the court may allow appear and plead to the petition. He may file an answer, demurrer or a motion, as in other cases.

§ 324. **Demurrer to Petition.**—Demurrer may be filed to the petition, in accordance with the usual rules.¹

§ 325. **Amendment after Demurrer Sustained.**—Where a demurrer to a petition is sustained, the petition will not be dismissed without first giving the petitioners an opportunity to apply for leave to amend.²

§ 326. **Who May Answer.**—The bankrupt or any creditor may answer.³

§ 327. **Form of Answer.**—The rules with regard to answers follow the usual principles of pleading. The forms and orders of the Supreme Court indicate only the general form of the answer, and are not exclusive.⁴

§ 328. **Time to Answer Amended Petition.**—An alleged bankrupt has the right to a reasonable time to answer an amended petition.⁵

1. Instance, *In re Vastbinder*, 11 A. B. R. 118, 126 Fed. 417 (D. C. Pa.); *Bradley Timber Co. v. White*, 10 A. B. R. 329, 121 Fed. 779 (C. C. A. Ala.); *In re Hark Bros.*, 14 A. B. R. 400, 135 Fed. 603 (D. C. N. Y.); *In re Brett*, 12 A. B. R. 492, 130 Fed. 981 (D. C. N. J.). Obiter, *In re First Nat. Bank of Belle Fourche*, 18 A. B. R. 270 (C. C. A.).

2. *In re Brett*, 12 A. B. R. 492, 130 Fed. 981 (D. C. N. J.). Impliedly, *In re First Nat. Bank of Belle Fourche*, 18 A. B. R. 270 (C. C. A.).

3. Bankr. Act, §§ 18 (d), 18 (e).

4. *In re Paige*, 3 A. B. R. 679, 99 Fed. 538 (D. C. Ohio). See ante, § 26.

5. *Wilder v. Watts*, 15 A. B. R. 57, 138 Fed. 426 (D. C. S. C.).

Lockman v. Lang, 12 A. B. R. 497, 132 Fed. 1 (C. C. A. Colo.): "A single day is not a reasonable time for an alleged bankrupt who is not within the district, to answer an amended petition, which for the first time charges him with certain acts of fraud and bankruptcy."

§ 329. **Defective Denial Cured by Going to Proof.**—Defective denial is cured where the parties proceed to the taking of the proof.⁶ Thus, argumentative denials and denials of legal conclusions may be cured.⁷

§ 330. **Allegations Not Denied Need Not Be Proved.**—Allegations in the petition not denied by answer need not be proved.⁸

§ 331. **Answer Denying Act Pleaded but Showing Facts Sufficient to Constitute Another Act.**—If the answer denies the specific act of bankruptcy alleged, but sets up by way of new matter facts sufficient to constitute a different act, for instance, an intentional preference, no reply being filed, adjudication will follow.⁹

§ 332. **No Demurrer to Answer.**—No demurrer to an answer will lie; the sufficiency of the answer can only be tested by setting the case for hearing upon the petition and answer.¹⁰ If the parties proceed on the demurrer without objection it will be taken as a setting of the case down for hearing on the petition and answer, and a waiver of right to replicate.¹¹

§ 333. **All Defenses Available to Bankrupt.**—The bankrupt may make all defenses that would have been available to him without bankruptcy, as well as those specially available to him by the particular provisions of the Bankruptcy Act.¹²

6. *Troy Wagon Works v. Vastbinder*, 12 A. B. R. 352, 130 Fed. 232 (D. C. Pa.).

7. *Troy Wagon Works v. Vastbinder*, 12 A. B. R. 352, 130 Fed. 232 (D. C. Pa.). In this case the court held, that a denial in general terms, that he did not "at any time commit any act of bankruptcy alleged" is sufficient as a denial of insolvency where the petitioners so regard it and proceed to the taking of the proof.

8. *In re Elmira Steel Co.*, 5 A. B. R. 488, 109 Fed. 456 (Special Master N. Y.); *In re Taylor*, 4 A. B. R. 515, 102 Fed. 728 (C. C. A. Ills.).

9. *Brinkley v. Smithwick*, 11 A. B. R. 500, 126 Fed. 686 (D. C. N. Car.). Act charged in petition was transfer to hinder, etc.; answer denied the intent and act and stated it was a sale for cash and that the cash was all used to pay some creditors, leaving the rest unpaid, although insolvent. Held, to state a good ground for adjudication, as being a preference.

10. *Goldman v. Smith*, 1 A. B. R. 266, 93 Fed. 182 (D. C. Ky.).

11. *Goldman v. Smith*, 1 A. B. R. 266, 93 Fed. 182 (D. C. Ky.).

12. **Instances of Defenses Raised.**—Denial of ownership of property claimed to have been preferentially transferred and allegation that it was on consignment. *Troy Wagon Wks. v. Vastbinder*, 12 A. B. R. 352, 130 Fed. 232 (D. C. Pa.).

Jurisdiction of bankruptcy court over assets of the debtor's estate in the hands of a state receiver is not a question for consideration upon the petition for adjudication of bankruptcy. *In re Kersten*, 6 A. B. R. 516, 110 Fed. 929 (D. C. Wis.).

Creditors may not be deprived of their rights to an adjudication on the

In *re Paige*, 3 A. B. R. 679, 99 Fed. 538 (D. C. Ohio): "The forms and orders in bankruptcy prescribed by the Supreme Court of the United States indicate the form, in substance, of the answer to be filed by the alleged bank-

ground that it will not benefit them, In *re Hee*, 13 A. B. R. 8 (D. C. Hawaii); nor on the ground that it will be against the best interests of the great majority of the creditors, *Woolford v. Steel Co.*, 15 A. B. R. 36, 138 Fed. 582 (D. C. Del.): "If the petitions were not defective, the petitioners would have a right under the Bankruptcy Act to proceed to support them by evidence, and, if successful, to have the Diamond State Steel Co. adjudged bankrupt, regardless of any delay, confusion or expense attending such a course." General denial puts in issue the existence of \$500 of debts to petitioning creditors.

And if stipulation of counsel does not admit such indebtedness proof must be made, In *re West*, 5 A. B. R. 734 (C. C. A.).

Dissolution of the corporation does not defeat the operation of the bankrupt act, In *re Storck Lumber Co.*, 8 A. B. R. 86, 114 Fed. 860 (D. C. Md.).

Validity of petitioning creditor's debt is a valid issue, In *re Ferguson*, 11 A. B. R. 371, 127 Fed. 407 (D. C. Pa.).

But compare, *Gage & Co. v. Bell*, 10 A. B. R. 701, 124 Fed. 371 (D. C. Tenn.): "The court is not now prepared to say that such proceedings are not admissible, but it very well may be said that a petitioning creditor, having a debt provable on the face of it, ought not to be compelled by the defendant debtor to enter into litigation about it, legal and equitable, and antecedently to establish it by overthrowing all defenses, real or fabricated, that the debtor may choose to set up by pleadings specially framed to present such issues. It is in effect tantamount to holding that a creditor with a disputed debt cannot be a petitioning creditor in bankruptcy; or, at least, not until he has cleared away all dispute and controversy, and established his debt by a judgment at law; for it would be, in effect, a requirement to do this, even if he must get such a judgment or its equivalent in the bankruptcy proceedings. And the result is that before we can inquire whether a debtor is insolvent, and has committed an act of bankruptcy, we must engage in a preliminary work of litigation in law and equity, and, possibly, even in admiralty as well, with each petitioning creditor, in order that we may know beforehand whether the debtor has any defense he may possibly make to the creditor's claim of debt. This is converting the language of the statute, 'three or more creditors having provable claims,' into a requirement that there shall be 'three or more creditors having proved and established debts,' before they may file the petition. Section 59b. If a debt is wholly wanting in existence, if it has been paid, for example, or if it has been fabricated for the purpose, of course the defendant should be allowed to show that fact in some form. But if it be a reasonably fair and honest claim of debt, which is provable in the sense that it is a claim that the court of bankruptcy after adjudication will hear and establish, if proved, the creditor should not be bound before the adjudication to so prove and establish it, but should be allowed to rely upon its provable quality, *prima facie*, to support an involuntary petition in bankruptcy."

Denial of Authority of Person Acting for the Petitioning Creditors.—Authority of attorney to appear for the petitioning creditors cannot be denied by answer, but only by rule upon the attorney himself.

Gage v. Bell, 10 A. B. R. 696, 124 Fed. 371 (D. C. Tenn.): "The defendant cannot, by answer or plea, set up want of authority in the plaintiff's attorney, but he must make a rule upon him to show his authority supported by affidavit as to the facts. * * * The reasons for this rule are well illustrated by this case. The courts could not conveniently do the business of litigation if either litigant could capriciously embody in his pleadings the collateral matter of the authority of the attorneys, respectively, to appear and file their pleadings. Every litigation would degenerate into a preliminary inquiry about the attorney's dealings with his client."

Authority of president of corporation to institute bankruptcy proceedings against debtor or to join in one, In *re Winston*, 10 A. B. R. 171, 122 Fed. 187 (D. C. Tenn.).

Claim of Petitioning Creditor Illegal as Based on Gaming Consideration.—*Hill v. Levy*, 3 A. B. R. 374, 98 Fed. 94 (D. C. Va.).

rupt. The law does not contemplate that the respondent shall be confined to that particular form, and set out in his answer only such facts as are suggested by the order. * * * The respondent denies insolvency, but sets up, with great particularity, defenses and counterclaims which he alleges show him to have been solvent at the times charged, and when the act of bankruptcy was committed."

§ 334. **Motions.**—Motions, as in other cases may be filed.

CHAPTER XI.

PROVISIONAL REMEDIES.

Synopsis of Chapter.

- § 335. Provisional Seizure of Property and Remedies of Creditors during Pendency of Petition.

DIVISION 1.

- § 336. Provisional Seizure on Affidavit and Bond.
§ 337. Referee, in Absence of Judge, to Issue Warrant.
§ 338. Allegations for Provisional Seizure Not to Be Made in Petition Itself.
§ 339. Affidavit Must Be Made.
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- § 372. Warrant Not Proper Where Bankrupt Already Departed.
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DIVISION 4.

- § 377. Receivers.
- § 378. Receivership Available Any Time before Appointment of Trustee.
- § 379. Appointment by Referee before Adjudication.
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- § 381. Notice of Application.
- § 382. Bond of Receiver.
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- § 384. But One Ground, "Absolute Necessity for Preservation of Estate."

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- § 385. Powers and Functions of Receivers, in General.
- § 386. Receivers May Sell Perishable Assets.
- § 387. May Continue Business, but Only for "Limited Period."
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- § 389. Power to Borrow and Issue Receiver's Certificates.
- § 390. May Make Seizure, under Statute, Instead of Marshal.
- § 391. May Not Seize Property Held Adversely.
- § 392. May Compel Surrender of Property Not Held Adversely
- § 393. Whether May Maintain Independent Plenary Suits to Recover Property.
- § 394. May Not Sue for Money Judgment for Debt.
- § 395. Receiver Going into Other District than That of Appointment.
- § 396. Security for Costs and Bond for Injunction by Receiver.
- § 397. Effect of Dismissal of Petition on Receivership.
- § 398. Costs and Expenses of Receiver Taxable against Petitioning Creditors.

DIVISION 5.

- § 399. Creditors' Independent Plenary Actions Pending Adjudication.
- § 400. Must Be for Benefit of All.
- § 401. Independent Plenary Suits by Creditors Not Maintainable in United States District Courts:
- § 402. No Suit to Maintain Statu Quo for Filing Bankruptcy Petition.

§ 335. Provisional Seizure of Property and Remedies of Creditors during Pendency of Petition.—During the period intervening between the filing of the petition and the adjudication, opportunity occurs for the

bankrupt to dispose of the assets, selling them or removing them or hiding them or wasting them. Likewise abundant opportunity exists for third persons, with or without the connivance of the bankrupt, to make way with property belonging to the estate, and otherwise to defeat creditors.

Creditors, however are not helpless in this contingency. They have several remedies available to them upon proper showing being made. They may seize property in the hands of the bankrupt by process issued in the same case, resembling the ordinary process of attachment before judgment; they may have restraining orders issued in the same case; they may arrest and detain the bankrupt for examination; they may have a receiver appointed in the same case to act in their behalf; or they may start independent suits themselves, as if bankruptcy had not intervened, and later may be reimbursed out of the estate for their proper expenses in so doing.

DIVISION 1.

A. PROVISIONAL SEIZURE OF PROPERTY.

§ 336. **Provisional Seizure on Affidavit and Bond.**—To cover the period of the pendency of the petition §§ 69 and 3 (e) of the statute provide for a species of attachment to issue for the seizure of the property, the warrant for seizure issuing upon the filing of an affidavit which alleges the commission of an act of bankruptcy and neglect of the property of the debtor and the giving of a bond, similarly to the procedure in ordinary attachment cases where property of the defendant is seized before judgment and held to await the outcome of suit.¹

In re Williams, 9 A. B. R. 736, 120 Fed. 34 (D. C. Ark.): "It confers on the creditors the right to institute proceedings against insolvent or fraudulent debtors, in order that the estate may be administered by the bankruptcy court

1. **Application to Be by Creditors, Not Receiver.**—The application should be made by creditors rather than by a receiver, In re Sunseri, 18 A. B. R. 234 (D. C. Pa.).

Section 69 covers substantially the same ground and reads as follows: "A judge may, upon satisfactory proof, by affidavit, that a bankrupt against whom an involuntary petition has been filed and is pending has committed an act of bankruptcy, or has neglected or is neglecting, or is about to so neglect his property that it has thereby deteriorated, or is thereby deteriorating, or is about thereby to deteriorate in value, issue a warrant to the marshal to seize and hold it subject to further orders. Before such warrant is issued and petitioners applying therefor shall enter into a bond in such an amount as the judge shall fix, with such sureties as he shall approve, conditioned to indemnify such bankrupt for such damages as he shall sustain in the event such seizure shall prove to have been wrongly obtained. Such property shall be released, if such bankrupt shall give bond in a sum which shall be fixed by the judge, with such sureties as he shall approve, conditioned to turn over such property, or pay the value thereof in money to the trustee, in the event he is adjudged a bankrupt, pursuant to such petition."

Clause E of § 3 reads as follows: "Whenever a petition is filed by any person for the purpose of having another adjudged bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or applicant shall file in the same court a bond with at least two good and sufficient sureties who shall reside within the jurisdiction of

and an equal distribution of the assets had. But in order to prevent a fraudulent disposition of the property pending the proceedings, it permits a seizure of the assets before the hearing, upon certain allegations and the execution of a bond to pay the damages which the debtor may sustain by reason of the seizure if upon a final hearing it is adjudged that the same was wrongful, in the same manner as in ordinary cases when the same object is sought by resort to proceedings by attachment."

§ 337. Referee, in Absence of Judge, to Issue Warrant.—The referee may, on receipt of the certificate of the district clerk that the judge is absent, exercise the powers of the judge for the taking possession and releasing of the bankrupt's property pending adjudication.²

§ 338. Allegation for Provisional Seizure Not to Be Made in Petition Itself.—The application for the warrant is a separate proceeding from that for the adjudication of bankruptcy, and should not form part of the petition.³

§ 339. Affidavit Must Be Made.—Although §§ 3 (e) and 69, Bankr. Act, are not identical, yet, in substance, they are so; and, although an affidavit is not mentioned in § 3 (e), yet the "application" there mentioned presumably must be supported by affidavit. More than likely the two sections should be read together and not as if they related to distinct proceedings. Nevertheless it is possible that, where receivers are appointed under § 3 (e) to make the seizure, the affidavit need not contain the recitals prescribed in § 69.

§ 340. Affidavit to Be Specific as to Facts Constituting Act of Bankruptcy and Neglect of Property.—The affidavit for the warrant should be specific and contain allegations of fact sufficient to prove the act of bankruptcy alleged and the neglect of property complained of.

In re Kelly, 1 A. B. R. 308, 91 Fed. 504 (D. C. Tenn.): "Affidavits under this § 69 of the Bankrupt Act should be as specific as possible in their statements of all the essential facts—indeed, should be quite as fully satisfactory in the exhibition of the proof of the act of bankruptcy as the testimony to be produced at the hearing of the petition for adjudication in a contested case—so that the court may see precisely, from those facts, whether or not an act of bankruptcy

said court to be approved by the court, or a judge thereof, in such sum as the court shall direct, conditioned for the payment, in case such a petition is dismissed, to the respondent, his or her personal representatives, all costs, expenses, and damages occasioned by such seizure, taking and retention of the property of the alleged bankrupt.

"If such a petition be dismissed by the court or withdrawn by the petitioner, the respondent or respondents shall be allowed all costs, counsel fees, expenses, and damages occasioned by such seizure, taking or detention of such property. Counsel fees, costs, expenses and damages shall be fixed and allowed by the court, and paid by the obligors in such bond."

2. See Bankr. Act, § 38 (3); In re Knopf, 16 A. B. R. 439, 144 Fed. 245 (D. C. S. C.).

3. In re Kelly, 1 A. B. R. 306, 91 Fed. 504 (D. C. Tenn.).

has been committed, or whether the alleged bankrupt has been neglecting his property, so that it is deteriorating in value, etc. It is a formidable thing to seize a man's property so summarily before he is heard, and should never be done upon the mere opinions of witnesses as to whether an act of bankruptcy has been committed, but only on a full showing of the facts of the case."

In *re Sunseri*, 18 A. B. R. 231 (D. C. Pa.): "I do not think the court should authorize such seizure in any case except upon a petition very clearly and definitely setting forth all the facts, not merely suspicions, and after exacting proper security."

But it is not necessary to allege that the property to be seized is not exempt from seizure.⁴

§ 341. Bond to Be Given.—A bond must be given to protect the bankrupt and creditors interested in the event the seizure was wrongly obtained.⁵ And where seizure is by a receiver and a bond is not given the receivership should be vacated.⁶

§ 342. Neither Affidavit nor Bond Can Be Waived by Bankrupt.—The bankrupt cannot waive the filing of the affidavit nor the giving of the bond. Although the bond is in terms given to respond to the bankrupt for his damages in case the seizure is wrongful, yet it may inure to others for whom the bankrupt cannot waive.

In *re Sarsar*, 9 A. B. R. 577, 120 Fed. 40 (D. C. Tenn.): "This application must be refused, as the court cannot permit it to issue except upon compliance with the conditions of the statute. It is sufficient to say that the statute does not expressly authorize any waiver of the requirements of this section by the bankrupt, nor does it seem to contemplate that they may be waived. It is true that the statute, in terms, states that the condition of the bond shall be to indemnify the bankrupt for such damages as he shall sustain in the event the seizure shall prove to have been wrongfully obtained, but non constat that this bond may not inure to the benefit of any one interested in the property of the bankrupt which should be wrongfully seized, and that, at least in a court of equity, one so injured might be subrogated to the rights of the bankrupt in that behalf."

§ 343. Need Not Be Signed by Petitioners.—The bond need not be signed by the petitioners.⁷

§ 344. Surety Company Bond Sufficient.—A surety company bond is sufficient (under the United States Act of 1894) although only one surety is on it and that surety does not reside in the district.⁸

4. *Hoffschlaeger Co. v. Young Nap*, 12 A. B. R. 510 (D. C. Hawaii).

5. *Beach v. Macon Grocery Co.*, 8 A. B. R. 751, 116 Fed. 143 (C. C. A. Ga.); In *re Haff*, 13 A. B. R. 354, 135 Fed. 742 (C. C. A. N. Y.); In *re Sunseri*, 18 A. B. R. 234 (D. C. Pa.); impliedly, In *re Sears, Humbert & Co.*, 10 A. B. R. 389 (Ref. N. Y.); impliedly, In *re Sarsar*, 9 A. B. R. 576, 120 Fed. 40 (D. C. Tenn.); In *re Knopf*, 16 A. B. R. 446, 144 Fed. 245 (D. C. S. C.).

6. In *re Haff*, 13 A. B. R. 354, 135 Fed. 742 (C. C. A. N. Y.).

7. In *re Sears, Humbert & Co.*, 10 A. B. R. 389 (Ref. N. Y.).

8. In *re Sears, Humbert & Co.*, 10 A. B. R. 389 (Ref. N. Y.).

§ 345. **Premium.**—The premium for such bond has been held not to be a proper item of taxable costs;⁹ but undoubtedly it is a proper charge where allowed or prescribed by rule of court.

§ 346. **Receiver May Be Appointed to Make Seizure.**—A receiver may be appointed instead of the marshal to make this seizure.¹⁰

The order should in terms provide that he should not take possession until the filing and approval of the bond required of the petitioning creditor by Bankr. Act, § 3 (e).¹¹ And the order should fix the time within which the petitioning creditors' bond should be given.¹² The receiver before adjudication of bankruptcy should not be appointed, without notice to the bankrupt; unless it is alleged and appears that to give notice of the application would in all probability defeat the very object of the appointment, in which event notice may be dispensed with.¹³

In *re Francis*, 14 A. B. R. 676, 136 Fed. 912 (D. C. Penna., affirmed sub nom. *Latimer v. McNeal*, 16 A. B. R. 43, 142 Fed. 451, C. C. A. Pa.): "The act does not expressly require that notice shall be given the alleged bankrupt before the appointment shall be made, but, as a rule, from the institution of proceedings in a suit until final judgment, every step is preceded with notice, and it is laid down as a general proposition that notice must be served upon the party before a receiver can be appointed, except (1) where the defendants or parties in interest have absconded, or are beyond the jurisdiction of the court, or cannot be found; (2) where there is imminent danger of loss or great damage, or irreparable injury, or the gravest emergency, or when by notice the very purpose of a receiver may be rendered wholly nugatory—as where the property may be removed without the jurisdiction of the court, or it is being collected, and the proceeds wrongfully appropriated. In such cases the court will lay its hand upon the property, through the appointment of a receiver, for the purpose of maintaining the status quo until the issues may be determined as to the right of ownership."

§ 347. **On Dismissal, Property to Be Returned without Deduction for Care.**—In case the petition is dismissed the receiver must return the property to the defendant intact and no costs nor expenses can be charged against the defendant for the custody and care.¹⁴

§ 348. **Respondent Allowed Expenses, Counsel Fees and Damages on Dismissal.**—In case the petition is dismissed by the court or with-

9. In *re Hoyt*, 9 A. B. R. 574, 119 Fed. 987 (D. C. N. Car.). But compare note, In *re Sears, Humbert & Co.*, 10 A. B. R. 393 (Ref. N. Y.).

10. See post, division 4 of this chapter, § 390. *Beach v. Macon Grocery Co.*, 8 A. B. R. 751 (C. C. A. Ga.). See inferentially, In *re Sears, Humbert & Co.*, 10 A. B. R. 389 (Ref. N. Y.); inferentially, In *re Haff*, 13 A. B. R. 354 (C. C. A. N. Y.); In *re Francis*, 14 A. B. R. 676 (D. C. Pa.).

11. In *re Haff*, 13 A. B. R. 354, 135 Fed. 742 (C. C. A. N. Y.).

12. In *re Haff*, 13 A. B. R. 354, 135 Fed. 742 (C. C. A. N. Y.).

13. *Latimer v. McNeal*, 16 A. B. R. 45, 142 Fed. 451 (C. C. A.), quoted post, § 381. See post, § 381.

14. In *re Sears, Humbert & Co.*, 10 A. B. R. 389 (Ref. N. Y.).

drawn by the petitioners, the respondent shall be allowed all costs, counsel fees, expenses and damages occasioned by such seizure, taking or detention of property.¹⁵

In *re Ghiglione*, 1 A. B. R. 581, 93 Fed. 186 (D. C. N. Y.): “* * * the last paragraph of subd. e above quoted applies only to cases arising under the first paragraph of that subdivision, and where the application ‘to take charge of and hold the property of the alleged bankrupt’ prior to adjudication has been granted and the bond given. The allowance of ‘counsel fees’ in addition to costs can rest only on express statutory provision. It is contrary to the ordinary Federal practice, and seems to have been designed to afford a fuller measure of indemnity to the defendant than is ordinarily afforded in legal proceedings in the federal courts, for an unjustifiable interference with his property. Such interference may at times be ruinous, and by breaking up a man’s business make him insolvent when he was not insolvent before. It is an available weapon which may be misused, and is therefore justly guarded by special provisions for the most complete indemnity to the accused. Ordinary cases of involuntary proceedings, not accompanied by such injurious interference, fall as respects costs under the provisions of Rule XXXIV, which does not allow counsel fees in addition to costs.”

Hoffschlaeger Co. v. Young Nap, 12 A. B. R. 526 (D. C. Hawaii): “The counsel fee allowed in proceedings for seizing and holding the property of the presumed bankrupt is for special services and is a distinct matter.”

Under § 983, U. S. Rev. Stat., allowing amounts paid witnesses to be taxed as costs, the affidavit must show that they have been actually paid.

The allowance of counsel fees is by special provision of the statute in cases of seizures.¹⁶

§ 349. Costs, Expenses, Counsel Fees and Damages Confined to Those Incident to Seizure.—The costs, counsel fees, expenses and damages, taxable under the bonds are to be strictly confined to those incident to the seizure.¹⁷

Selkregg v. Hamilton Bros., 16 A. B. R. 476, 144 Fed. 557 (D. C. Pa.): “The bond as it is to be remembered, is given solely for the purpose of indemnifying the alleged bankrupts for taking their property out of their hands, before there has been an adjudication against them; and it is only by failing to keep this in view, that any confusion arises. The master has lost sight of it slightly, in holding, that, as noted above, the respondents are entitled to such costs as

15. Bankr. Act, § 3 (e); In *re Hines*, 16 A. B. R. 541, 144 Fed. 147 (D. C. Ore.); In *re Williams*, 9 A. B. R. 739, 120 Fed. 34 (D. C. Ark.); *Nixon v. Fidelity & Deposit Co.*, 18 A. B. R. 174 (C. C. A. Mont.); In *re Nixon*, 6 A. B. R. 693 (D. C. Mont.). This case of In *re Nixon* was a case of the dismissal of a petition as to two of five persons alleged to be partners. *Selkregg v. Hamilton Bros.*, 16 A. B. R. 474, 144 Fed. 557 (D. C. Pa.); In *re Smith*, 16 A. B. R. 480 (D. C. Okla.).

16. *Hoffschlaeger Co. v. Young Nap*, 12 A. B. R. 526 (D. C. Hawaii); In *re Hines*, 16 A. B. R. 541, 144 Fed. 147 (D. C. Ore.); In *re Williams*, 9 A. B. R. 736, 120 Fed. 34 (D. C. Ark.); In *re Ghiglione*, 1 A. B. R. 580, 93 Fed. 186 (D. C. N. Y.). Compare, In *re Phila., etc., Co.*, 11 A. B. R. 444 (D. C. Pa.). Compare, In *re Morris*, 7 A. B. R. 709, 115 Fed. 591 (D. C. Pa.).

17. In *re Smith*, 16 A. B. R. 478 (D. C. Okla.).

would be allowed to a party in equity, in case of a dismissal. These costs, no doubt, are to be taxed in their favor, against the petitioning creditors, by the clerk, in the main proceedings. But they do not come in here, where we are fixing the responsibility of the bondsmen, both principals and sureties, which is another matter. The costs to be covered in the latter case are those which are strictly incident to the seizure proceedings, and ordinarily in any event would not amount to much. Where, as is often the case, application for a warrant to the marshal, like that for the appointment of a receiver, is heard *ex parte*, there would be nothing more than those for the filing of the moving papers, taken care of at the time by the parties."

Thus, the counsel fees taxable are simply those incident to the seizure. And none may be allowed for resisting the petition.¹⁸

In *re Smith*, 8 A. B. R. 56, 113 Fed. 993 (D. C. Ga.): "* * * the only counsel fees the court is authorized to fix and allow in this case is for services of counsel to the respondent performed in proper efforts to secure the discharge of the property from the writ of seizure; and for services rendered in opposing the petition and securing its dismissal no counsel fees can be allowed in this proceeding."

§ 350. Allowance Only to Respondents at Time Bond Given—Subsequent Respondents May Move for New Bond.—The only liability for costs upon a bond given under Bankr. Act, § 3 (e), is to those who were respondents when the bond was given. Those who subsequently become respondents and wish to be protected may move for a new bond.¹⁹

§ 351. After One Recovery under § 3 (e), No Second Recovery under § 69 (a) Even though "Damages" Not Included in First Suit.—After one recovery has been had under Bankr. Act, § 3 (e) on the bond, a second suit under § 69 (a) is not maintainable for the "damages" for the seizure, even though "damages" were not included in the first action. The cause of action is single—"for costs, counsel fees, expenses and damages"—and may not be split.²⁰

§ 352. No "Seizure," No Counsel Fees, Expenses nor Damages.—Where there is no seizure of property, no counsel fees, expenses nor damages may be allowed the defendant.²¹ But, of course, costs are to be allowed defendant, if the petition is dismissed.²²

18. In *re Selkregg*, 16 A. B. R. 474, 144 Fed. 557 (D. C. Pa.).

19. In *re Spalding*, 17 A. B. R. 667 (C. C. A. N. Y.).

20. *Nixon v. Fidelity & Deposit Co.*, 18 A. B. R. 174 (C. C. A. Mont.).

21. In *re Williams*, 9 A. B. R. 736, 120 Fed. 34 (D. C. Ark.); In *re Morris*, 7 A. B. R. 709, 115 Fed. 591 (D. C. Penn.); In *re Ghiglione*, 1 A. B. R. 580, 93 Fed. 186 (D. C. N. Y.); impliedly, *Selkregg v. Hamilton*, 16 A. B. R. 476 (D. C. Pa.); impliedly, In *re Smith*, 16 A. B. R. 478 (D. C. Okla.); impliedly, In *re Spalding*, 17 A. B. R. 667 (C. C. A. N. Y.).

22. In *re Morris*, 7 A. B. R. 709 (D. C. Penna.). Compare, In *re Williams*, 9 A. B. R. 736, 120 Fed. 34 (D. C. Ark.). Inferentially, In *re Spalding*, 17 A. B. R. 667 (C. C. A. N. Y.).

An injunction restraining certain persons paying money to the bankrupt does not amount to a "seizure" within the meaning of this section.²³ Nor does an injunction restraining the sheriff or alleged bankrupt from disposing of the alleged bankrupt's stock of goods pending the hearing upon the petition for adjudication amount to such a "seizure;" nor is the injunction bond liable for counsel fees, damages, etc., assessable upon a bond given under Bankr. Act, § 3 (e).²⁴

§ 353. Only Damages for "Seizure," Not for Instituting Bankruptcy Proceedings.—Thus, also, only damages for the seizure of the property are allowable, not damages for instituting the bankruptcy proceedings themselves.²⁵

Selkregg v. Hamilton Bros., 16 A. B. R. 476, 144 Fed. 557 (D. C. Pa.): "But here again, the result of the institution of the proceedings in bankruptcy is not to be confounded with the seizure under the warrant to the marshal. The one was no doubt calculated to affect the credit, and so may have worked the financial injury of the firm, in a way that may make the petitioning creditors liable to action. But these consequential damages are quite different from those due to the taking possession of their canning factory, by which their business was directly interfered with, if that was in fact the case. Both steps may have combined to work their injury, but each, in its own way, and only that which is directly attributable to the one which we are considering is recoverable for here."

And even damages for loss of credit by the seizure may be mitigated by the debtor's own conduct.

§ 354. "Malicious Prosecution" for Wrongful Seizure.—The bond is not the only recourse of the debtor in case he is not adjudged bankrupt. In proper cases he may institute suit for malicious prosecution.²⁶

§ 355. Property Claimed Adversely Not to Be Seized.—The warrant of seizure does not authorize the seizure of property claimed adversely and in the actual possession of an adverse claimant.²⁷

^{23.} *In re Williams*, 9 A. B. R. 736, 120 Fed. 34 (D. C. Ark.).

^{24.} *In re Hines*, 16 A. B. R. 541 (D. C. Ore.).

^{25.} *In re Smith*, 16 A. B. R. 478 (D. C. Okla.).

^{26.} *Wilkinson v. Goodfellow-Brooks Shoe Co.*, 141 Fed. 218 (D. C. Mo.); *obiter*, *Selkregg v. Hamilton Bros.*, 16 A. B. R. 476, 144 Fed. 557 (D. C. Pa.); *obiter*, *In re Haff*, 13 A. B. R. 354 (C. C. A. N. Y.); [1867] *Sonneborn v. Stewart*, Fed. Cas. 13,176, reversed in 98 U. S. 187, because facts showed probable cause; *King v. Sullivan*, 92 S. W. (Tex.) 51; [Eng.] *Brown v. Chapman*, 3 Barr. 1418.

^{27.} See post, subject, "Summary Proceedings to Recover Property," § 1813. *In Rockwood*, 1 A. B. R. 272, 91 Fed. 363 (D. C. Iowa); *Beach v. Macon Grocery Co.*, 8 A. B. R. 751, 116 Fed. 143 (C. C. A.). See also, 11 A. B. R. 104. But see erroneous decision *contra*, *In re Knopf*, 16 A. B. R. 432 (D. C. S. C.).

Better practice to notify holder, unless great exigency exists. *In re Sunseri*, 18 A. B. R. 234 (D. C. Pa.): "It may be added that in all such proceedings, unless the property is of an exceedingly perishable nature or the circumstances

Obiter, Bardes v. Bank, 4 A. B. R. 163, at page 176, 178 U. S. 538: "The powers conferred on the courts of bankruptcy by clause 3 of § 2, and by § 69, after the filing of a petition in bankruptcy, and in case it is necessary for the preservation of property of the bankrupt, to authorize receivers or the marshals to take charge of it until a trustee is appointed, can hardly be considered as authorizing the forcible seizure of such property in the possession of an adverse claimant, and have no bearing upon the question in what courts the trustee may sue him." But as to this obiter, see *Bryan v. Bernheimer*, 5 A. B. R. 631, 181 U. S. 188, where the court says: "But the remark 'can hardly be considered as authorizing the forcible seizure of such property in the possession of an adverse claimant' was an inadvertence, and upon a question not arising in the case then before the court, which related exclusively to jurisdiction of a suit by the trustee after his appointment."

In re Kolin, 13 A. B. R. 533 (C. C. A. Ills.): "The court and the parties seem to have overlooked the ruling of this court in *Boonville Nat. Bk. v. Blakey*, 6 A. B. R. 13, 43, 107 Fed. 891, that a receiver is a mere custodian of property taken from the possession of the bankrupt until a trustee is appointed; that he does not exercise the powers of a trustee, and while he may take appropriate measures incident to the protection of the property in his custody, and, in case of perishable property may, under the direction of the court, sell the same when necessary, yet he is not authorized, nor can the bankruptcy court properly direct him, to take possession of property held and claimed adversely by third parties, or to institute actions for the recovery of property claimed to belong to the bankrupt's estate."

In re Sunseri, 18 A. B. R. 235 (D. C. Pa.): "When property alleged to have been disposed of by the bankrupt in fraud of his creditors is in the hands of third parties and a seizure thereof properly made under authority of the court, if such third parties set up an adverse claim to said property, which is more than merely colorable, and said parties are not merely the agent or representative of the bankrupt, the court can proceed no further than the ascertainment of these facts, but must relegate the parties to some proper plenary action."

In re Ward, 5 A. B. R. 215, 217, 104 Fed. 985 (D. C. Mass.): "* * * the jurisdiction of this court over plenary suits, and its jurisdiction by summary process and pending adjudication, to seize property in the hands of a third party and alleged to belong to the bankrupt, stand and fall together. *In re Hammand* they were said to stand together. *In Bardes v. Bank* the opinion was expressed that they fall together. For these reasons, I think the District Court is without jurisdiction to take property alleged to belong to the bankrupt out of the pos-

of the case particularly urgent, it would be better before any order for seizure were granted to give the party in whose hands the property is alleged to be prior notice, and an opportunity to be heard on a rule to show cause."

Compare, *In re Young*, 7 A. B. R. 14, 111 Fed. 158 (C. C. A. Ark.), a case rightly decided but wrongly reasoned. The property seized was actually in the possession of the bankrupt and the right to seize it summarily was therefore unquestioned. See post, § 1794. The court also seems to consider that the Supreme Court in its case of *Bryan v. Bernheimer*, 181 U. S. 188, 5 A. B. R. 623, had acknowledged an error in its previous case of *Bardes v. Bank*, 178 U. S. 524, 4 A. B. R. 163. There was no such error and the two cases are clearly and necessarily distinguishable. *Bryan v. Bernheimer* related to seizures of property in the constructive custody of the bankruptcy court—a proceedings not tolerated in any jurisdiction; whilst *Bardes v. Bank* denied the right of the bankruptcy court to proceed summarily to seize property held all the time by adverse claimants.

Compare, *Mather v. Coe*, 1 A. B. R. 504 (D. C. Ohio). But compare, obiter, contra, *In re Rochford*, 10 A. B. R. 608, 124 Fed. 182 (C. C. A. S. Dak.).

session of a third party, as well temporarily and by summary process, as permanently and by plenary suits. * * *

"Counsel for the petitioners urged that the Supreme Court passed only upon the jurisdiction of this court over plenary suits, and that the jurisdiction by summary process was left undisturbed. It would be strange, however, if a court be without jurisdiction to determine the title or to affect the control of property by a plenary suit, where all parties must be fully heard, and yet has jurisdiction on summary process, and without hearing, to take possession of the same property or to restrain its use. I do not understand that the Supreme Court has held that the District Court may do by summary process that which it is forbidden to do in a plenary suit."

Compare, *obiter*, *McNulty v. Fenigold*, 12 A. B. R. 338, 129 Fed. 1001 (D. C. Penna.): "This applies to the powers of receivers or the marshal to take charge of property of bankrupts in the possession of third persons after the filing of the petition, and until it is dismissed or the trustee is qualified, when that is absolutely necessary for the preservation of the estate (*Bryan v. Bernheimer*, 181 U. S. 188, 5 Am. B. R. 623), and would be a proceeding in bankruptcy, as distinguished from a controversy at law or in equity, within the true interpretation of § 23 (*In re Rochford*, 10 A. B. R. 608, 124 Fed. 182)."

In re Kelley, 1 A. B. R. 306, 91 Fed. 504 (D. C. Tenn.): "Warrant cannot be issued directing the marshal to seize property in the possession of third persons under claim of title."

And the warrant of seizure does not authorize the summary seizure of such property, even though such adverse claimant in possession is being proceeded against as one of the members of the partnership sought to be adjudicated bankrupt, if, in fact such person is not a partner.²⁸

§ 356. Property in Actual Possession of Bankrupt, though Claimed by Another, Seizable.—But property claimed adversely and yet in the actual custody of the bankrupt, although as "agent" or "custodian" of the adverse claimant, may be summarily seized.²⁹

Before adjudication in bankruptcy has taken place though after petition filed, officers of court in possession under legal process are adverse claimants representing their several creditors, under and by virtue of a legal lien that has not yet been nullified, and such officers are not subject at such time to summary process from the bankruptcy court.³⁰

Property summarily taken by the receiver or marshal from the possession of an adverse claimant must not be sold without the claimant's consent,³¹ and where property is taken from the possession of an adverse claimant, without his consent, by a receiver in bankruptcy under an erroneous order which the claimant successfully resists on appeal, he is entitled to a return of the property without charge of any kind against either it or him.³²

28. *In re Nixon*, 6 A. B. R. 693, 110 Fed. 633 (D. C. Mont.).

29. *In re Moody*, 12 A. B. R. 718, 131 Fed. 525 (D. C. Iowa); *In re Bender*, 5 A. B. R. 632, 106 Fed. 873 (D. C. Ark.).

30. *In re Andre*, 13 A. B. R. 132 (C. C. A. N. Y.). Inferentially, *Mather v. Coe*, 1 A. B. R. 504, 92 Fed. 333 (D. C. Ohio).

31. *Beach v. Macon Grocery Co.*, 8 A. B. R. 751, 116 Fed. 143 (C. C. A. Ga.).

32. *Beach v. Macon Grocery Co.*, 8 A. B. R. 751, 116 Fed. 143 (C. C. A. Ga.).

§ 357. **Officer Making Seizure, to Determine Ownership at Own Risk.**—Responsibility of determining ownership of the property seized rests upon the marshal who may be liable for wrongful seizure.³³

§ 358. **Compensation and Expenses of Marshal or Receiver on "Seizure."**—It has been held, that the marshal is entitled to reasonable compensation where he makes the seizure under Bankr. Act, § 2 (3).³⁴ And also to reimbursement of his expenses.³⁵ And it has been likewise held that the receiver is entitled to reasonable compensation when he makes the seizure, and that the amount thereof is within the discretion of the court and is not limited by § 2 (5) which prescribes merely the compensation for continuing the business.³⁶

DIVISION 2.

RESTRAINING ORDERS AND INJUNCTIONS BEFORE ADJUDICATION.

§ 359. **Jurisdiction to Enjoin after Filing of Petition and before Adjudication.**—The bankruptcy court has power between the time of the filing of the petition and the adjudication of bankruptcy (as well as afterwards), to enjoin all persons within its jurisdiction from doing any act that will interfere with the due administration of the bankruptcy act.³⁷

In re Hornstein, 10 A. B. R. 308, 122 Fed. 266 (D. C. N. Y.): "It is plain that the judge of a court of bankruptcy may lawfully grant such restraining order, operative on and binding litigants in the State Court, although strangers to the bankruptcy proceedings, as may be necessary for the enforcement of the pro-

33. See note to In re Rockwood, 1 A. B. R. 272.

34. In re Adams Sartorial Co., 4 A. B. R. 107, 101 Fed. 215 (D. C. Colo.).

35. In re Smith, 16 A. B. R. 480, 146 Fed. 923 (D. C. Okla.).

36. In re Kirkpatrick, Receiver, etc., 17 A. B. R. 594, 148 Fed. 684 (C. C. A. Mich.).

37. See post, "Restraining Orders after Bankruptcy Court Has Assumed Jurisdiction," § 1903, et seq.

As to enjoining legal proceedings where the state court has acquired jurisdiction, see post, § 1904, et seq.

Apparently, In re Jersey Island Packing Co., 14 A. B. R. 690, 138 Fed. 625 (C. C. A. Calif.); In re Globe Cycle Works, 2 A. B. R. 447 (Ref. N. Y.). Obiter, Beach v. Macon Grocery Co., 8 A. B. R. 751, 116 Fed. 143 (C. C. A.).

In re Eastern Commission & Importing Co., 12 A. B. R. 305, 129 Fed. 847 (D. C. Mass.): In this case the bankruptcy court granted an injunction pending adjudication in bankruptcy, restraining an attaching creditor from proceeding to judgment against the bankrupt—the bankrupt having pledged some of its own property with the surety upon the redelivery bond that had been given to secure a release of the property attached. Indirectly therefore the bankrupt estate would be depleted by the attachment, so that it was proper to issue the restraining order.

Instance of restraining order, subsequently dissolved on the facts, In re Latimer, 15 A. B. R. 461, 141 Fed. 665 (D. C. Pa.). Apparently (but not clear whether before adjudication), In re Currier, 5 A. B. R. 639 (Ref. N. Y.).

Instance, In re Kleinhans, 7 A. B. R. 604, 113 Fed. 107 (D. C. N. Y.), restraining landlord from prosecuting summary proceedings in the state court to oust the receiver from occupancy of the premises of the bankrupt.

visions of the Bankrupt Act. This court has no hesitation in holding that express power is given by the Act of Congress to courts of bankruptcy to enjoin all persons within its jurisdiction, whether litigants in a State court or elsewhere, from doing any act that will interfere with or prevent the due administration of the Bankruptcy Act. If this is not true, how frail and worthless is the law. In the face of a statute conferring the power, comity does not require the courts of the United-States to compel persons whose rights are seriously jeopardized by proceedings in a State court to resort thereto for protection. This restraining order was properly granted, and must be upheld, if the petitioners had the right to institute this proceeding in involuntary bankruptcy."

In *re Krinsky Bros.*, 7 A. B. R. 535, 112 Fed. 972 (D. C. N. Y.): "Those who deal with a bankrupt's property in the interval between the filing of the petition and the final adjudication, do so at their peril. * * * and the moment it was suggested that proceedings had been instituted in this court, it was his duty to have paused and ascertained the status of the matter."

In *re Weinger, Bergman & Co.*, 11 A. B. R. 424, 126 Fed. 875 (D. C. N. Y.), wherein an order restraining replevin proceedings was granted, after the filing of the petition and before adjudication, the court saying, "The fact that the bankruptcy court may not have yet made an adjudication and that no receiver nor trustee has yet been appointed, in my opinion, is immaterial."

In *re Goldberg*, 9 A. B. R. 156, 117 Fed. 692 (D. C. N. Y.): "Until the question of bankruptcy is determined, further proceedings in the action should be stayed, and until 12 months thereafter in case Goldberg is adjudged a bankrupt. Clearly the alleged purchaser at the sale should not be permitted to take or remove the property, if lawfully he may be prevented, nor should the sheriff be permitted to sell."

"It is claimed that such action should proceed to judgment, and a sale of the property attached be permitted; the distribution of the proceeds only being enjoined. There is no reason or necessity for such a course. If Goldberg is adjudged a bankrupt, the trustee will take and dispose of the property. If not so adjudged, these attaching creditors will proceed with their action. The right to the injunction sought in this case is plain. In *re Lesser*, 3 A. B. R. 758, 99 Fed. 513; *Bear v. Chase*, 3 A. B. R. 748, 99 Fed. 920. Indeed, the act itself suggests this as the proper remedy in such a case. Bankruptcy Act, § 11a; § 67f; § 2 (15)."

In *re Hines*, 16 A. B. R. 541, 144 Fed. 147 (D. C. Ore.): "The only purpose of the injunction was to restrain the debtor, and the sheriff, who had custody of the stock of goods, from disposing of them during the pendency of the proceedings under the petition to have the debtor adjudged a bankrupt; the purpose being to have the matter remain in statu quo until it could be ascertained whether or not the defendant was in reality a bankrupt, and whether his property should be taken charge of by the bankruptcy court."

Obiter, *Beach v. Macon Grocery Co.*, 8 A. B. R. 751, 116 Fed. 143 (C. C. A. Ga.): "The sixty-ninth section of the Bankrupt Law provides a mode of protecting the alleged bankrupt's estate pending the adjudication of an involuntary bankrupt, and * * * the bankruptcy court can deal with the property of said Asa N. Beach through seizure by the marshal; or, under the court's general equity powers, the court can otherwise protect the property by the appointment of a receiver, or through an injunction, * * * an order on motion and notice may be made by the bankruptcy court restraining and enjoining Julia M. Dixon from disposing of or removing or encumbering any of the property described in the ancillary bill until the trial of the issue * * * in involuntary bankruptcy."

Apparently (but not clear whether before adjudication) In re Smith, 8 A. B. R. 56, 113 Fed. 993 (D. C. Ga.): "There can be no question of the power of the court between the time an involuntary petition in bankruptcy is filed and the selection of a trustee to make proper orders to protect and guard the bankrupt's estate for the benefit of creditors, as may be proper and right under the facts presented. Of course, the court will not unduly interfere with property claimed by third persons, and will not interfere at all with bona fide sales for fair consideration, and which are not obnoxious to the provisions of the bankruptcy act."

Apparently (but not clear whether before adjudication) In re Ball, 9 A. B. R. 276, 118 Fed. 672 (D. C. Vt.): "This stock of goods is a part of the estate to be administered by the trustees, upon which the petitioner has only a lien, which, to its lawful extent, is to be respected and adjusted in the proceedings. A sale by her upon the mortgages, as threatened, would defeat this right, and confessedly waste the estate and wrong the general creditors, while in administration by the trustee her claims will be saved to her, by being left to rest upon the proceeds. The injunction should therefore be continued pending the administration, which will leave the goods for the trustee, as a part of the estate, to be proceeded with under direction of the referee."

§ 360. No Injunction before Bankruptcy Petition Filed, to Preserve Status Quo.—In one case it has been held that the bankruptcy court has jurisdiction before the filing of any bankruptcy petition to issue injunctions to preserve the status quo until a bankruptcy petition can be filed.³⁸ But in other cases in which the State Court's authority was invoked, such jurisdiction before the filing of the bankruptcy petition has been denied.³⁹

Ellis v. Hays Saddlery & Leather Co., 8 A. B. R. 109 (Kans. Sup. Ct.): "The National Bankruptcy Act of 1898 went into effect on July 1st of that year, but its operation was suspended so that involuntary proceedings against a debtor could not be commenced until November 1st. In August, 1898, a failing merchant gave a chattel mortgage on his stock of goods to secure a debt owing to the mortgagee, and the latter took possession. A general unsecured creditor (the plaintiff) then brought suit to enjoin a removal of the goods or their sale, alleging that the mortgage was executed in fraud of the Bankrupt Law, and praying that the property be held in statu quo, until November 1st, when proceedings in bankruptcy, which plaintiff alleged it intended to file against its debtor, could be made available. Held, that no cause of action for equitable relief was stated in the petition, and that a decree granting an injunction must be reversed."

Clothing Co. v. Hazle, 6 A. B. R. 265 (Mich.): "It is apparent that the object of this bill was merely to preserve an estate until a time should come when it could be administered under the new law, which at the time the bill was filed did not authorize the Federal courts to interfere. It is claimed that as these courts were powerless to protect creditors under the Bankruptcy Act, the State courts must have the power. This does not impress us as being a sound theory. The rights and remedies in such cases, under the State law, were settled. They existed and were open at this time. But counsel say that they might be super-

³⁸. *Blake v. Valentine*, 1 A. B. R. 372, 89 Fed. 691 (D. C. Calif., distinguished in *In re Ogles*, 1 A. B. R. 683, 93 Fed. 426).

³⁹. *Vietor v. Lewis*, 1 A. B. R. 667, 53 N. Y. Supp. 944, 38 App. Div. 316. See also, post, § 402.

seded or supplemented for the four months following July 1st by another remedy so that they might, if they chose, avail themselves of a protective remedy afforded by the Bankrupt Act. We see no better reason why this should be than that an injunction should heretofore have been issued, in any case of fraud and danger, to impound the estate until creditors' claims should mature, judgment be obtained, execution issued and returned, to the end that a creditors' bill might be effectively filed. The exigency is as great in such a case as this, yet no one has heard of such a proceeding being permitted."

And such jurisdiction, on principle, does not exist.

§ 361. Injunction Issues in Case Itself, but No Part of Bankruptcy Petition.—The petition for the injunction should be filed and the injunction be issued in the bankruptcy proceedings themselves.⁴⁰ But the allegations and prayer for an injunction should not be a part of the petition in bankruptcy itself, for fear of multifariousness.⁴¹

§ 362. Comity Requires Resort First to State Court, Except in Exigency.—Where the property involved is already in the custody of the state court, comity usually requires resort to the state court first; but summary proceedings, may, in the court's discretion, be taken directly, and in the first instance, in the bankruptcy court.⁴²

§ 363. Notice of Hearing for Injunction.—Notice of the filing of the petition for the injunction should be given;⁴³ unless for good cause shown dispensed with. But verbal notice of the order of injunction will subject the person restrained thereby to punishment for contempt for disobedience thereof.⁴⁴

§ 364. Bankrupt May Be Restrained.—The bankrupt may be restrained from disposing of the property.⁴⁵

Indeed, it is preferable, on account of the saving of expense, to resort to an injunction rather than a receivership, wherever an injunction is available.

§ 365. Likewise Adverse Claimants in Possession.—Adverse claimants in possession of property, may, before adjudication, on proper showing, be restrained by the bankruptcy court from disposing of property claimed to belong to creditors, notwithstanding proceedings to

40. In re Globe Cycle Works, 2 A. B. R. 447 (Ref. N. Y.); impliedly, In re Jersey Island Packing Co., 14 A. B. R. 689, 138 Fed. 625 (C. C. A. Calif.).

41. See Mather v. Coe, 1 A. B. R. 504, 92 Fed. 333 (D. C. Ohio). As to proper practice, see course pursued in Philips v. Turner, 8 A. B. R. 172, 114 Fed. 726 (C. C. A. Miss.).

42. Inferentially, In re Hornstein, 10 A. B. R. 308, 122 Fed. 266 (D. C. N. Y.).

43. Beach v. Macon Grocery Co., 8 A. B. R. 751, 116 Fed. 143 (C. C. A. Ga.).

44. In re Krinsky Bros., 7 A. B. R. 535, 112 Fed. 875 (D. C. N. Y.). As to fees of marshal, see post, "Costs of Administration," § 2129, et seq.

45. Impliedly, In re Hines, 16 A. B. R. 441, 144 Fed. 147 (D. C. Ore.).

actually recover it may not be instituted by the receiver.⁴⁶ And adverse claimants in possession who come into such injunction proceedings and litigate the merits of the original transaction have thereby consented to the jurisdiction, such that upon an adverse adjudication thereon they may be ordered to surrender the property.⁴⁷

And secured creditors may be enjoined from selling out their securities, even though by the terms of the agreement of pledge they might have such remedy;⁴⁸ although, where sale by the pledgee is authorized by the terms of the agreement of pledge, injunction would be granted only in cases of oppression or fraud.⁴⁹

§ 366. Also Court Officers in Possession.—Receivers, assignees, sheriffs and other court officers may meantime be restrained from disposing of assets of the estate in their possession.⁵⁰

§ 367. Restraining Order Ineffectual Out of District of Issuance.—Undoubtedly the restraining order would be ineffectual to restrain parties outside the district. It would seem that the proper practice, where it becomes necessary to protect property located in another state, prior to adjudication of bankruptcy, would be for the creditors themselves to bring suit.⁵¹

§ 368. Who May Petition for Injunction—Receiver—Creditors—Bankrupt.—The petition may be filed by the receiver;⁵² or by creditors.⁵³

The petition also may be filed by the bankrupt in the interest of the estate.

Obiter, Blake v. Valentine, 1 A. B. R. 378, 89 Fed. 691 (D. C. Calif.): "But all the authorities which discuss this question are to the effect, as stated in *Bump. Bankr.* (10th Ed.) 229, that before the appointment of an assignee (or

46. *In re Currier*, 5 A. B. R. 639 (Ref. N. Y.).

47. *Philips v. Turner*, 8 A. B. R. 171, 114 Fed. 726 (C. C. A. Miss.).

48. Impliedly, *obiter, In re Mertens*, 14 A. B. R. 226, 231, 134 Fed. 104 (D. C. N. Y.), quoted *supra*.

49. See post, § 761.

50. *In re Lengert Wagon Co.*, 6 A. B. R. 535, 110 Fed. 927 (D. C. N. Y.); *In re Globe Cycle Works*, 2 A. B. R. 447 (Ref. N. Y.); *In re Goldberg*, 9 A. B. R. 158, 117 Fed. 692 (D. C. N. Y.). Apparently, *In re Hornstein*, 10 A. B. R. 308, 122 Fed. 266 (D. C. N. Y.). Under what circumstances court proceedings will not be enjoined, see "Subject of Conflict of Jurisdiction," post, § 1580, et seq.; also, § 1636.

51. *In re Schrom*, 3 A. B. R. 352, 97 Fed. 760 (D. C. Iowa, distinguished in 9 A. B. R. 744).

52. *In re Barrett*, 12 A. B. R. 626, 132 Fed. 362 (D. C. Tenn.); impliedly, *In re Hornstein*, 10 A. B. R. 311, 122 Fed. 266 (D. C. N. Y.).

53. Impliedly, *In re Currier*, 5 A. B. R. 639 (Ref. N. Y.).

Impliedly, *In re Jersey Island Packing Co.*, 14 A. B. R. 689, 690, 138 Fed. 625 (C. C. A. Calif.). In this case the court upheld a petition by unsecured creditors filed simultaneously with an involuntary petition in bankruptcy, to restrain the proposed sale of all the assets of the bankrupt under a trust deed. Instance, *In re Latimer*, 15 A. B. R. 461, 141 Fed. 665 (D. C. Pa.).

trustee) proceedings for an injunction to protect the property of the bankrupt may be instituted by the bankrupt or the petitioning creditor." This authority is incorrect, however, in holding that suits may be instituted before the filing of the bankruptcy petition, to hold matters in statu quo.

§ 369. **Verification.**—The petition for the injunction may be verified by attorney.⁵⁴

§ 370. **Injunction Bond and Damages on Bond.**—Undoubtedly, the court has authority to dispense with the giving of the customary injunction bond. Certainly so, if it may do so in independent plenary suits instituted by the receiver or trustee, as held in some cases.⁵⁵

Impliedly, In re Williams, 9 A. B. R. 736, 740, 120 Fed. 34 (D. C. Ark.): " * * * as the restraining order was granted without any bond, under the general equity powers conferred on the courts by § 2 of the Bankrupt Act. In equity cases, when an injunction is granted without a bond, only taxable costs can be allowed."

The same damages are not allowed on the injunction bond that are allowed on the bond for warrant to marshal to seize property, discussed in the preceding division.

In re Hines, 16 A. B. R. 541, 144 Fed. 147 (D. C. Ore.): "The injunction bond which was given in the present case cannot, under any process of reasoning, take the place of the bond intended to be executed under § 3e. Indeed, in the present instance, the property of the debtor was not taken into custody. * * * The conditions of the injunction bond are widely different from those prescribed for the bond to be given under § 3e, and if I were to look at the bond alone I could not adjudge, under its conditions, the relief demanded by way of costs; but, it not having been intended for that purpose, the defendant could in no way be entitled to the relief which he seeks under § 3e, because the relief there provided for can only be had upon the bond contemplated by the section. I must hold, therefore, that the plaintiff is not entitled under his cost bill to the attorney's fees prayed for, nor to the keeper's fees, damages, or expenses claimed by Hines for attending court."

DIVISION 3.

ARREST, DETENTION AND EXTRADITION OF THE BANKRUPT.

§ 371. **Arrest and Detention of Bankrupt, for Examination.**—The Judge may, at any time after the filing of a petition by or against a person, and before the expiration of one month after the qualification of the trustee, upon satisfactory proof by the affidavits of at least two persons that such bankrupt is about to leave the district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy, issue a warrant to the mar-

⁵⁴. In re Goldberg, 9 A. B. R. 156, 117 Fed. 692 (D. C. N. Y.).

⁵⁵. In re Barrett, 12 A. B. R. 626, 132 Fed. 362 (D. C. Pa.).

shal, directing him to bring such bankrupt forthwith before the court for examination.

If upon hearing the evidence of the parties it shall appear to the court or a judge thereof that the allegations are true and that it is necessary, he shall order such marshal to keep such bankrupt in custody not exceeding ten days, but not imprison him, until he shall be examined and released or give bail conditioned for his appearance for examination, from time to time, not exceeding in all ten days, as required by the court, and for his obedience to all lawful orders made in reference thereto.⁵⁶

§ 372. Warrant Not Proper Where Bankrupt Already Departed.—The warrant cannot be issued for the purpose of procuring the return or as the basis for the extradition of a bankrupt who has already departed.⁵⁷

§ 373. Writ of Ne Exeat Also Available.—Arrest and detention under § 9 (b) are not the exclusive method of detaining the bankrupt. A writ of "ne exeat regno" may be issued in aid of the bankruptcy proceedings.⁵⁸

Hoffschlaeger Co. v. Young Nap, 12 A. B. R. 510 (D. C. Hawaii): "The counsel for the plaintiff, however, said that they had moved for the writ, not under § 9 (b) but under § 2, subd. 15."

Although the writ of ne exeat cannot be issued unless a suit in equity is commenced, yet bankruptcy proceedings are held to be such a suit.⁵⁹

And it may be issued where the specific bankruptcy provisions of § 9 (b) for the detention of the bankrupt are inadequate, or the remedy under such provisions has already expired or is about to expire.

In *re Cohen*, 14 A. B. R. 355, 136 Fed. 999 (D. C. Ills.): "No power can be exercised which does not clearly reside in the Act. But Congress intended to give, and, in my judgment, the above quoted language does give, every judicial power known to the law which the court may find necessary for the proper enforcement of the Bankrupt Act. * * * Certainly the writ of ne exeat is a

⁵⁶. Bankr. Act, § 9 (b).

⁵⁷. In *re Ketchum*, 5 A. B. R. 532, 108 Fed. 35 (C. C. A. Tenn.). See post, § 375.

⁵⁸. In *re Lipke*, 3 A. B. R. 569, 98 Fed. 970 (D. C. N. Y.); *Lewis v. Chainwald*, 48 Fed. 500. Inferentially, In *re Ketchum*, 5 A. B. R. 532, 537, 108 Fed. 35 (C. C. A. Tenn.); In *re Cohen*, 14 A. B. R. 355, 36 Fed. 999 (D. C. Ills.).

Sufficiency of affidavit and process where the writ ne exeat regno is employed. *Hoffschlaeger Co. v. Young Nap*, 12 A. B. R. 510 (D. C. Hawaii): "Petition for a writ of ne exeat is sufficiently supported by a sworn affidavit by one holding the positions of secretary, treasurer and manager of the plaintiff corporation, containing the allegations of respondent's indebtedness in a fixed amount for goods sold and delivered, or respondent's action in securing passage for himself and family on a steamer about to depart for a foreign land and that such departure would prejudice plaintiff's interest in such indebtedness."

"The order for process to issue was made on a separate piece of paper; it recited 'In the above case let the writ issue, etc.' This was sufficient, it being filed with the papers in the case and there being no uncertainty about its connection with the case."

"Plaintiff was allowed 24 hours to file the bond required by the order for process and it was filed in that time. This was sufficient."

⁵⁹. In *re Lipke*, 3 A. B. R. 569, 98 Fed. 970 (D. C. N. Y.).

judicial power known to the law. * * * It gives the power to issue any necessary writ 'agreeable to the usages and principles of law.' The writ provided for in § 717 is of time-honored usage. Originally it was based upon the principle that the law might require a party to be restrained within the king's realm. Surely it is equally in accordance with the principles of law that the court may for proper cause restrain a party within such territory that the hand of the court may without embarrassment be laid upon him when he is wanted. I think this power is clearly given by § 716, Rev. St., as one of the equity powers of a bankruptcy court, and, if there could be any doubt on that subject, it is removed by the enactment of § 2, subd. 15, of the Bankrupt Law. * * *

"The respondent had been previously arrested and examined before the court as provided for in § 9 (b) * * * and the ten days time limit fixed in § 9 (b) being about to expire this application is urged under the authority of § 2 (15) of the Bankrupt Act and §§ 716, 717, U. S. Rev. Stat."

§ 374. Extradition.—The bankruptcy court has jurisdiction to extradite bankrupts from their respective districts to other districts.⁶⁰

And whenever a warrant for the apprehension of a bankrupt shall have been issued, and he shall have been found within the jurisdiction of a court other than the one issuing the warrant, he may be extradited in the same manner in which persons under indictment are extradited from one district within which a district court has jurisdiction, to another.⁶¹

Section 2 (14) refers to the same power that is stated more explicitly in § 10 (a).⁶²

This remedy of extradition is available not only immediately upon the filing of the bankruptcy petition, but also later at any time during the pendency of the bankruptcy proceedings.

§ 375. Not to Be Based on Warrant under § 9 (b) Issued after Bankrupt's Departure.—There is no jurisdiction to issue a warrant of arrest under § 9 (b) after the bankrupt has departed from his district and settled in another, as a basis for extradition proceedings to bring the bankrupt before the court for examination.⁶³

§ 376. Not Available Merely to Procure Return for Examination.—And extradition will be refused where its object and ground is the examination of the bankrupt.⁶⁴

DIVISION 4.

RECEIVERS.

§ 377. Receivers.—After the filing of the petition and before adjudication and, for that matter, at any time before the appointment of the trustee, the bankruptcy court may appoint a receiver to act in behalf of creditors.

60. Bankr. Act, § 2 (14).

61. Bankr. Act, § 10 (a).

62. *In re Ketchum*, 5 A. B. R. 532, 108 Fed. 35 (C. C. A. Tenn.).

63. *In re Ketchum*, 5 A. B. R. 532, 108 Fed. 35 (C. C. A. Tenn.). Ante, § 372.

64. *In re Hassenbusch* (unreported), affirmed in 108 Fed. 35, 47 C. C. A. 177.

Under the old law of 1867 there was an officer called the messenger whose duty it was upon the filing of a bankruptcy petition to go out and take into his custody the bankrupt's property; but there is no such officer provided under the present law. The present law, however, in § 2, clause 3, provides even more wisely for this contingency, by authorizing the court, by which is meant either the judge or the referee, to

"appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified."⁶⁵

In *re Kleinhans*, 7 A. B. R. 604, 113 Fed. 107 (D. C. N. Y.): "The question presented here is not whether the receiver obtained title to the property of the alleged bankrupts by virtue of his appointment, but rather whether the bankruptcy court obtained such jurisdiction over the res at the time of filing the involuntary petition to have H. Kleinhans & Co. adjudged bankrupt as to justify this court's intervention in an attempt on the part of the lessors to oust the receivers and officers of this court to the detriment of the bankrupt estate, from the possession of the leased premises. Counsel for lessors contend that by § 70 of the Bankrupt Act, a trustee of a bankrupt's estate is vested by operation of law with the title of the bankrupt as of the date of the adjudication, and that in the absence of an express provision of the Bankrupt Act vesting title in the receiver as of the date when a petition is filed, it must be held that the title continues in the alleged bankrupts until a trustee is appointed; and therefore the process of the State court to remove for non-payment of rent ought not to have been enjoined. This contention is unsound. Coincident with the filing of a petition in bankruptcy, either voluntary or involuntary, a court of bankruptcy acquires control over the estate of a bankrupt or person charged with acts of bankruptcy. It may immediately seize and lay claim to all property either in the actual possession of the bankrupt or such as may be reduced to possession. Power is conferred on the court to appoint marshals or receivers to take charge of the property of bankrupts. Section 2, subd. 3, Bankrupt Act. It is the immediate duty of the receiver of the property to preserve the estate intact, and to conserve the assets and estate of the bankrupt, pursuing the course pointed out by the act which will best promote and further the interests of the creditors. True, the receiver here is not vested with a title to the property of which he becomes custodian, nor does any provision of the Bankrupt Act vest him with powers similar to that of a trustee appointed by the creditors. The property, however, corporeal and incorporeal, either comes into his possession as an officer of the court, or such right to possession is obtained as will tend to retain intact the actual and visible assets of the bankrupt, to the end that, when an adjudication is made, the trustee may be vested not merely with the bankrupt's title to the property, but that he may have and receive the actual possession of all assets in the control of the bankrupt at the instant that the protection of the court was invoked."

Boonville Nat'l Bk. v. Blakey, 6 A. B. R. 13, 107 Fed. 891 (C. C. A. Ind.): "The authority for the appointment of a receiver in bankruptcy proceedings comes from the act and is limited by the act. The order of the court appointing him cannot be broader than the statute. The receiver is a statutory receiver, and not a general receiver. The latter is appointed by a court of chancery by

65. In *re Florcken*, 5 A. B. R. 802, 107 Fed. 241 (D. C. Calif.); In *re Kolin*, 13 A. B. R. 533, 134 Fed. 557 (C. C. A. Ills.).

virtue of its inherent power, independent of any statute. His authority is derived from, and his duty prescribed by, the order of appointment, and he is called a common-law receiver. *Herring v. Railroad Co.*, 105 N. Y. 340, 12 N. E. 763. A statutory receiver is one appointed in pursuance of special statutory provisions. He derives his power from the statute, and to it must look for the duty imposed upon him. He possesses such power only as the statute confers, or such as may be fairly inferred from the general scope of the law of his appointment. We are therefore referred to the Bankrupt Act (30 Stat., Ch. 541) to ascertain the powers of the bankruptcy court to appoint a receiver, and the extent of the power which the act confers upon him. By § 2, cl. 3, the courts of bankruptcy are invested with authority to 'appoint receivers or the marshals upon application of parties in interest, in case the court shall find it absolutely necessary for the preservation of estates, to take charge of the property of the bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified,' and to (§ 2, cl. 5) authorize the business of the bankrupts to be conducted for limited periods by receivers and marshals or trustees, if necessary, in the best interests of the estates. These are the sole provisions of the act which authorize a receiver and define his duties. There is, however, another provision which may properly be considered in this connection. In § 69 it is provided that before adjudication upon an involuntary petition, when it shall appear to the judge that the property of the alleged bankrupt is being neglected, so that it will deteriorate in value, a warrant may be issued to the marshal to seize and hold the property subject to further order, upon the petitioning creditors giving bond to indemnify the alleged bankrupt for the damages he shall sustain if such seizure shall be proved to have been wrongfully obtained, and the property, when seized, shall be released upon bond filed by the alleged bankrupt conditioned to turn over the property or its value in money to the trustee in the event of adjudication of bankruptcy. * * * We can now discover, as we think, the general purpose of this law. It was that the property of the bankrupt should be vested in a trustee, to be selected by creditors; that such officer should have the general control and management of the estate, and the right to recover for the benefit of creditors all property transferred in fraud of the act. It contemplated that between the filing of the petition and the adjudication of bankruptcy an emergency might arise with respect to the care of bankrupt's property; and in involuntary cases for the protection of the property in the interval between the filing of the petition and the adjudication, the bankruptcy court was authorized to direct the marshal to seize and hold the property pending adjudication. So, also, in voluntary or involuntary cases, when it was found absolutely necessary for the preservation of an estate, the court should appoint a receiver or the marshal to take charge of the property of the bankrupt until the petition is dismissed or the trustee is qualified. It plainly was not contemplated that the receiver or the marshal so designated should supersede the trustee or exercise the general powers conferred upon a trustee. There is no such power specifically conferred or any provision in the act from which such power can reasonably be implied. Such temporary receiver, whether he be the marshal or another, is not a trustee for the creditors, but is a caretaker and custodian of the visible property pending adjudication and until a selection of a trustee. If in any sense a trustee, he is trustee for the bankrupt, in whom is the title to the property until it passes by operation of law as of the date of adjudication to the trustee selected by the creditors. The duty required and the power conferred clearly are that the receiver or the marshal should take possession of property that would otherwise go to waste, and hold it and preserve it, so that it might come to the trustee, when selected, without needless injury.

There might also be an occasion when the business of the bankrupt ought not, in the interest of the creditors, to be temporarily suspended, as for example in the case of a hotel or other business, where the value of the good will required that it should be kept a going concern until the trustee should be appointed, and for a limited time after the trustee was appointed, that he might dispose of it profitably for the creditors."

In *re Benedict*, 15 A. B. R. 232, 140 Fed. 55 (D. C. Wis.): "The primary purpose of the bankruptcy court, and its first duty in point of time, is to collect and bring into custody the assets of the estate, and preserve the same until a trustee is qualified to take title thereto. To this end the Act of 1898 provides in case of necessity for the appointment of a receiver, who is practically a custodian. (Sec. 2, subd. 3.) The conditions now obtaining in every department of industry, and the wide scope of modern enterprise, render the prompt assembling of assets at once important and difficult. Business is largely conducted by great corporations, whose investments and operations are not confined to a single State or district, but often involve transactions and holdings in many States. When an involuntary petition is filed against such corporation, it is not uncommon that the assets are widely scattered. In the instant case the alleged bankrupt has stocks of goods in four different cities in this district. The several steps provided by the Bankrupt Act to secure an adjudication and the selection of a trustee involve considerable delay, although no opposition develops. This delay may be indefinitely prolonged by a demand for a jury trial and a final review by writ of error. Time must be allowed to assemble the creditors who are to select a trustee. From twenty days to four months may be designated as the usual period for these primary proceedings, although one case has been brought to my attention where two years were consumed in litigation before a trustee was chosen. In the meantime, what will become of these widely scattered assets situate beyond the territorial limits of the court of original jurisdiction? There seems to be no one whose duty it is to give any attention to such property. A dishonest bankrupt, having access, may dissipate or dispose of it, or entangle the title with liens and complications. It will be subjected to peril from theft as well as from fire, there being no custodian to protect or insure it. Unless some way can be devised under the Bankrupt Act to husband these scattered assets, the law discloses a structural weakness which seriously impairs its efficiency. * * * Naturally, the first question for consideration is whether such receiver has extraterritorial authority. The difficulty encountered at the threshold lies in the limitation placed by the Bankrupt Act upon the jurisdiction of the courts by the language, 'within their respective territorial limits,' etc. It is difficult to see how such jurisdiction, so qualified, can be enlarged by an order. Any act by such receiver in Wisconsin pursuant to such order would amount to an attempted exercise of jurisdiction outside the territorial limits. The process and authority * * * are entirely inoperative in this district, and do not warrant the Illinois receiver to discharge any official function whatever in this district."

§ 378. Receivership Available Any Time before Appointment of Trustee.—The provisional remedy of receivership is not limited, it is to be borne in mind, to the period before the adjudication; but is available at any time before the appointment of a trustee.

§ 379. Appointment by Referee before Adjudication.—Before adjudication, upon receipt of the certificate of the District Clerk of the

Judge's absence or inability to act, and of the reference of the matter on that account, the referee may appoint the receiver.⁶⁶

§ 380. Appointed by Referee after Reference.—After reference of the case to the referee in charge of the particular case, the application for the appointment of the receiver, like all other proceedings, should be made to the referee and not to the judge.⁶⁷ But, of course, the referee must wait until the certificate of reference has been actually received, before proceeding to act in the matter.⁶⁸

§ 381. Notice of Application.—Notice to the creditors is not necessary;⁶⁹ nor is notice to the bankrupt necessary after adjudication of bankruptcy;⁷⁰ but notice to the bankrupt is necessary before adjudication, except in cases where it is alleged and shown that to give notice would likely defeat the very objects of the appointment.⁷¹

Obiter, Latimer v. McNeal, 16 A. B. R. 45, 142 Fed. 451 (C. C. Pa.), affirming *In re Francis*, 14 A. B. R. 675: "We are, indeed, clearly of opinion that, except in rare cases a receiver ought never to be appointed without notice to the alleged bankrupt. Furthermore there occur well-recognized instances of such urgency as to dispense with notice; as where irreparable loss or injury is impending; or where notice might defeat the very purpose of the receiver-ship."

And the appointment of a receiver without notice is not the depriving of the bankrupt of his property without due process of law.⁷²

Latimer v. McNeal, 16 A. B. R. 45, 142 Fed. 451 (C. C. A. Pa.): "Now, as respects the matter of notice, it will be observed that the bankrupt act does not expressly require notice to be given the bankrupt before the appointment of a receiver, under the provision quoted. Such appointment, moreover, does not deprive the bankrupt of his property without due process of law, for the appointment is essentially for the temporary custody of his property with a view to its preservation."

§ 382. Bond of Receiver.—The receiver should give bond.⁷³

Obiter, In re Erie Lumber Co., 17 A. B. R. 708, 150 Fed. 817 (D. C. Ga.): "These merchants, however, are not wholly without remedy. The bonds of the receivers, each in the amount of \$7,500, are on file. They are conditioned

66. Bankr. Act, § 38 (4) (3). *In re Kelly Dry Goods Co.*, 4 A. B. R. 528, 102 Fed. 747 (D. C. Wis.).

67. Gen. Order No. XII. *In re Florcken*, 5 A. B. R. 802, 107 Fed. 241 (C. C. Calif.); impliedly, *In re Moody*, 12 A. B. R. 718, 131 Fed. 525 (D. C. Iowa).

68. *In re Florcken*, 5 A. B. R. 802, 107 Fed. 241 (D. C. Calif.).

69. *In re Abrahamson & Bretstein*, 1 A. B. R. 44 (Ref. N. Y.).

70. *In re Abrahamson & Bretstein*, 1 A. B. R. 44 (Ref. N. Y.).

71. *In re Francis*, et al., 14 A. B. R. 676, 136 Fed. 912 (D. C. Pa., affirmed sub nom. *Latimer v. McNeal*, quoted ante, § 346).

72. See ante, § 346.

73. **Suit on Bond.**—The receiver may be sued on his bond for failure to perform his duties, as, for instance, by persons selling him goods on credit when he has exceeded his authority in buying on credit. *Obiter, In re Erie Lumber Co.*, 17 A. B. R. 708, 150 Fed. 817 (D. C. Ga.).

for the faithful performance by the receivers of their duty; and those who have losses because these officers of the court have disregarded its orders and contracted debts in excess of the authority granted them may bring actions on these bonds to redress the wrongs."

§ 383. **Bankrupt Quasi Trustee for Creditors.**—Pending the appointment of a receiver or trustee the bankrupt himself is quasi trustee of the estate.⁷⁴

In bankruptcy the creation of a receivership affects the parties somewhat differently from what it does in other branches of practice. In bankruptcy, a receiver is a mere custodian appointed to care for property of a destructible or removable nature and the receivership does not to any great extent fix priorities of rights or of liens as is usually the case in other branches of jurisprudence. Consequently the great strife that usually occurs over the validity and precise time of the appointment of a receiver is generally lacking in bankruptcy, for all preferences and legal liens, etc., within the entire four months of the adjudication are in the same situation, in general, and little is to be gained by setting the receivership aside unless it has been improvidently granted. Under the bankruptcy law a great many of the quick moves, by way of assignments, preferred mortgages, etc., made on the eve of a receivership are avoided by the mere filing of the petition itself and subsequent adjudication, and therefore the receivership does not figure in that regard.

§ 384. **But One Ground, "Absolute Necessity for Preservation of Estate."**—There is but one ground for the appointment of a receiver in bankruptcy—such appointment must be "absolutely necessary for the preservation of the estate."⁷⁵ Inasmuch as the right to appoint a receiver is based upon the authority conferred by the statute, the application should state as ground for the appointment that it is "absolutely necessary for the preservation of the estate that a receiver be appointed," and the affidavit in support of the application should state facts that will make it evident that a receiver is absolutely necessary.

And the affidavit should be positively sworn to else its averments will not, alone, support the appointment of a receiver.

In *re Rosenthal*, 16 A. B. R. 448, 144 Fed. 548 (D. C. N. J.): "The only facts presented to the referee in the present case were those contained in Abraham Rosenthal's petition, and they were merely that he and Michael Rosenthal were partners in the silk manufacturing business; that on November 1, 1905, the

74. In *re Wilson*, 6 A. B. R. 287, 289, 108 Fed. 197 (D. C. Va.); inferentially, In *re Allen*, 3 A. B. R. 38, 96 Fed. 512 (D. C. Calif.). Obiter and inferentially, *Blake v. Valentine*, 1 A. B. R. 378 (D. C. Calif.). *Marsh v. Heaton*, 1 Low. 278. See post, § 1121.

75. Bankr. Act, § 2 (3); *Bryan v. Bernheimer*, 5 A. B. R. 623, 181 U. S. 188; In *re Rosenthal*, 16 A. B. R. 448, 144 Fed. 548 (D. C. N. J.). Obiter, In *re Becker*, 3 A. B. R. 412, 98 Fed. 407 (D. C. Pa.), quoted post, § 385. Obiter, In *re Cornice & Roofing Co.*, 13 A. B. R. 586, 133 Fed. 958 (D. C. Ky.).

firm made an assignment to William Schmidt for the benefit of their creditors; that Schmidt thereupon took possession of their property, the estimated value of which was about \$8,000; that he and Michael Rosenthal were about to file their petition in voluntary bankruptcy; that he 'verily believes that it will be to the benefit of all persons in interest that a receiver of this court do forthwith, seize and take possession of all property belonging to said partnership and now in the hands of said assignee.' There is no intimation in the petition that the assignee is doing anything prejudicial to the interests of creditors or in conflict with the provisions of the Bankruptcy Act. Nor, in the order made, is there any finding that it is absolutely necessary for the preservation of the bankrupts' estate that a receiver be appointed. It follows that the referee's order must be set aside and the petition on which it was made be dismissed."

Improvident and unnecessary appointments of receivers Congress sought earnestly to guard against. The appointment must not only be "necessary" but "absolutely" necessary. The law was framed in a manifest spirit of economy (see ante, § 24) and the expense of a receivership should be avoided, if at all possible. Resort to injunction should rather be had wherever such remedy will be adequate.

An assignment for creditors or a receivership is not a good ground in and of itself before adjudication; for the assignment or receivership is not nullified until adjudication and the custody of the state court, without its own consent, may not be disturbed until then.

Contra, obiter, *In re Etheridge Furn. Co.*, 1 A. B. R. 112, 92 Fed. 329* (D. C. Ky.): " * * * if after an involuntary petition in bankruptcy is filed against the assignor based upon the assignment, the Court of Bankruptcy may and ought to appoint a receiver to take charge of the assigned property."

SUBDIVISION "A".

FUNCTIONS OF RECEIVERS.

§ 385. **Powers and Functions of Receivers, in General.**—Receivers in bankruptcy derive their powers from the bankruptcy act and are limited thereby. The object of their appointment is the preservation of the property so as to prevent its deterioration, waste, or loss.⁷⁷

In re Kelly Dry Goods Co., 4 A. B. R. 530, 102 Fed. 747 (D. C. Wis.): "The purpose of the appointment of a receiver in bankruptcy is one of mere temporary custody, and the duties are of the utmost simplicity."

In re Benedict, 15 A. B. R. 232, 140 Fed. 55 (D. C. Wis.): "The Act provides in case of necessity for the appointment of a receiver, who is practically a custodian."

Obiter, *In re J. C. Winship Co.*, 9 A. B. R. 641, 120 Fed. 93 (C. C. A. Ills.): "The receiver had no interest. He was a mere caretaker. He had no title."

In re Kolin, 13 A. B. R. 533, 134 Fed. 557 (C. C. A. Ills.): "The court and the parties seem to have overlooked the ruling of this court in *Booneville National Bank v. Blakey*, 6 A. B. R. 13, 43, 107 Fed. 891, that a receiver is a mere custodian of property taken from the possession of the bankrupt until a trustee is appointed; that he does not exercise the powers of a trustee, and while he may

⁷⁷. Bankr. Act, § 2 (3) (5); *Boonville Nat'l Bk. v. Blakey*, 6 A. B. R. 13, 107 Fed. 891 (C. C. A. Ind.).

take appropriate measures incident to the protection of the property in his custody, and, in case of perishable property may, under the direction of the court, sell the same when necessary, yet he is not authorized, nor can the bankruptcy court properly direct him, to take possession of property held and claimed adversely by third parties, or to institute actions for the recovery of property claimed to belong to the bankrupt's estate."

But compare, broader rule, *In re Fixen & Co.*, 2 A. B. R. 821, 96 Fed. 748 (D. C. Calif.): "Courts of Bankruptcy have authority not only under the special provisions of § 2 of the Bankruptcy Act, but also by virtue of their general equity powers, to appoint receivers."

Thus, perhaps, receivers may not sell assets other than perishable assets, except when authorized to conduct the business.⁷⁸

Compare, *In re Becker*, 3 A. B. R. 412, 98 Fed. 407 (D. C. Penna.): "Objection is raised to a receiver's power to sell the property of the bankrupt. The objection is based upon the language of clause 3 of § 2, which authorizes courts of bankruptcy to appoint receivers, 'for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition, and until it is dismissed or the trustee qualified.' It is argued that this limits the power of receivers and forbids them to do more than hold possession of the bankrupt's property during a certain interval. I do not think the argument is sound. The clause restricts the power of the court to appoint, confining it to cases of absolute necessity, and then goes on to state the purpose for which the appointment may be originally made. But, after a receiver has once gone into possession, it may become necessary to sell the property for the very purpose of preserving it, or its value—which is, of course, the essential matter—either in whole or in part. In such event, I think the court has ample power to order or confirm a sale, either under the power to preserve, implied by clause 3 itself, or under clause 7 of the same section, which empowers the court to 'cause the assets of the bankrupt to be collected, reduced to money and distributed.'"

And, in general, no order of sale, other than that implied in the leave to conduct the business, should be entered until after adjudication, except in cases of perishable property.⁷⁹

§ 386. Receivers May Sell Perishable Assets.—Receivers may be ordered to sell perishable assets;⁸⁰ and may be ordered so to do by the referee upon receipt of a certificate from the district clerk of the judge's absence.⁸¹

78. Inferentially, *In re Kelly Dry Goods Co.*, 4 A. B. R. 528, 102 Fed. 747 (D. C. Wis.); inferentially, obiter, *In re Kolin*, 13 A. B. R. 533, 134 Fed. 557 (C. C. A. Ills.).

79. Inferentially, *In re Kelly Dry Goods Co.*, 4 A. B. R. 528, 102 Fed. 575 (C. C. A. Ills.). In this case, however, the court did not set aside the sale ordered by the referee, because a fair sum was realized and no damage done.

All Persons Dealing with Receiver Chargeable with Notice of Limitations of Authority.—All persons dealing with the receiver are chargeable with notice of the limitations of the receiver's authority. Thus, that he may borrow money but may not buy goods on credit, *In re Erie Lumber Co.*, 17 A. B. R. 687 (D. C. Ga.).

80. Gen. Ord. No. XVIII.

81. *In re Kelly Dry Goods Co.*, 4 A. B. R. 528, 102 Fed. 747 (D. C. Wis.).

§ 387. May Continue Business, but Only for "Limited Period."

—Receivers (and later on, trustees also) may be authorized to continue the business of the bankrupt;⁸² but the business may not be conducted for more than a "limited" period. The term "limited period" is ambiguous. It may mean either a short period or a definite period. Probably it means both a short and also a definite period; or successive short and definite periods, to prevent the long drawn out continuance of business involving creditors and risking their moneys for years.

But the conducting of the business may only be done when it is for the best interests of the estate, and the application and the order must show that it is for the best interests of the estate that the business be conducted.

§ 388. Expense of Continuing Business.—The expense of continuing the business may not be charged against the fund to the detriment of a prior lienholder thereon, without his consent, acquiescence or participation.⁸³

But may be so charged if the lienholder consents to the continuance of the business.⁸⁴

§ 389. Power to Borrow Money, and Issue Receiver's Certificates.

—And when authorized by order of the court, receivers may borrow money and issue receiver's certificates.

In *re Erie Lumber Co.*, 17 A. B. R., 689, 150 Fed. 817 (D. C. Ga.): "Now, § 2 (5) * * * expressly vests courts of bankruptcy with the power to 'authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interest of the estates.' There was, therefore, no doubt of the power of the court to take the action it did. Authorized to operate the property through its receivers, it was equally competent for the court to raise on the credit of the values in hand the funds immediately necessary for its operation. Here was a large saw mill plant, with

^{82.} Bankr. Act, § 2 (5): "Courts of bankruptcy shall have power to authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals or trustees, if necessary in the best interests of the estate, and allow such officers additional compensation for such services but not at a greater rate than in this Act allowed trustees for similar services." Instance, In *re Richards*, 11 A. B. R. 581, 127 Fed. 772 (D. C. Mass.).

^{83.} In *re Bourlier Cornice & Roofing Co.*, 13 A. B. R. 585, 133 Fed. 958 (D. C. Ky.). See post, subject of "Costs of Administration," §§ 1996, 2036. In *re Erie Lumber Co.*, 17 A. B. R. 687 (D. C. Ga.).

^{84.} See post, subject of "Selling Free from Liens," § 1996. In *re Erie Lumber Co.*, 17 A. B. R. 687 (D. C. Ga.).

Damages for Receiver's Breach of Contract.—Receivers are personally responsible for breach of their own contracts in the conducting of the business, and may be sued therefor.

In *re Erie Lumber Co.*, 17 A. B. R. 707 (D. C. Ga.): "If the receivers were guilty of any breach of contract with him, none of the creditors having interest in the fund are responsible for it. The receivers are each sui juris and personally responsible for any wrong ex contractu or ex delicto which they may have committed. The claim is unliquidated, and, even if liquidated, would as against antecedent liens have little or no superior dignity to a claim of a general creditor."

planing mill, veneering mill, large orders for its products, all belonging to a class of business which at the time and since then has been most notably prosperous. * * *

"It is, however, urged that the court may provide for the priority of receivers' certificates only in case of a railway or quasi public corporation. In view of the act of bankruptcy authorizing the continuance of a private corporation through a receiver, we do not think that this is true. The power to continue business implies the power to make debts, and to provide for their payment, which must include the power to borrow money for urgent necessities and for direct operating expenditures."

§ 390. May Make Seizure, under Statute, Instead of Marshal.—A receiver, instead of the marshal, may be appointed to make the seizure under § (3) of § (69).⁸⁵

§ 391. May Not Seize Property Held Adversely.—The receiver may not seize property held and claimed adversely by third parties.⁸⁶

§ 392. May Compel Surrender of Property Not Held Adversely.—Jurisdiction exists in the bankruptcy court to order surrender, by summary process, to the receiver of property in the hands of the bankrupt, or in the hands of the bankrupt's agent, or in the hands of any one not adversely interested therein;⁸⁷ likewise, if in the hands of a levying officer, where the levy has been nullified by the adjudication. And, in one case, it has been held likewise so, of the proceeds of sale in the hands of the judgment creditor under a lien levied within the four months, where the sale was made after adjudication.⁸⁸

§ 393. Whether May Maintain Independent Plenary Suits to Recover Property.—Whether receivers may institute and maintain independent plenary suits to recover specific property has been variously decided, the contention arising over the apparent conflict between the principle that a receiver in bankruptcy has no title except that of a custodian and that his functions are limited by the statute on the one hand, and the manifest necessity, on the other hand, for some one to act in behalf of all creditors in the period elapsing between the filing of the petition and the election of the trustee.

⁸⁵. See ante, § 346, et seq.

⁸⁶. *Booneville Nat'l Bk. v. Blakey*, 6 A. B. R. 13, 107 Fed. 891 (C. C. A. Ind.). But it is to be noted that this was not an action to recover specific property but for a money judgment. *Beach v. Macon Grocery Co.*, 8 A. B. R. 751, 116 Fed. 143 (C. C. A. Ga.). *Obiter*, In re Kolin, 13 A. B. R. 533, 134 Fed. 557 (C. C. A. Ills.). *Contra*, In re Barrett, 12 A. B. R. 626, 132 Fed. 362 (D. C. Tenn.).

⁸⁷. In re Muncie Pulp Co., 14 A. B. R. 70, 139 Fed. 546 (C. C. A. N. Y.); impliedly, In re Lebrecht, 14 A. B. R. 445, 135 Fed. 878 (D. C. Tex.).

⁸⁸. In re Breslauer, 10 A. B. R. 33, 121 Fed. 910 (D. C. N. Y.).

Some cases hold that receivers may institute plenary suits to recover, as well as to defend possession of, property belonging to the estate.⁸⁹

In *re Fixen & Co.*, 2 A. B. R. 822, 96 Fed. 745 (D. C. Calif.): "A receiver in bankruptcy has power not only to take charge of property which is voluntarily turned over to him, but to institute legal proceedings to recover property belonging to the bankrupt."

Other cases hold that receivers have not such power and cannot take possession of property held and claimed adversely by third parties nor institute actions for the recovery of property claimed to belong to the bankrupt's estate.⁹⁰

The true rule doubtless is that, before adjudication at any rate, the receiver would not have the right to pursue third parties by plenary action, unless under the exceptional circumstances of their having gotten property away from him that was once in his custody; this being so because the bankruptcy case itself, before adjudication, is concerned not with property but with the status of a person; and a receiver therein would therefore not be in the position of a court officer seeking possession of assets in controversy, for the title to the assets does not pass until the adjudication. It is also possible that a distinction might exist between suits involving the assertion of those rights which are peculiarly conferred by the Bankruptcy Act and which depend upon the adjudication, such as suits to recover preferential transfers void under § 60 (b); and those suits common to all creditors.

§ 394. May Not Sue for Money Judgment for Debt.—But the rule is settled that receivers may not institute suits in personam to recover money judgments upon mere debts.⁹¹

§ 395. Receiver Going into Other District than That of Appointment.—And it has been held that receivers may not go out of the jurisdiction of their appointment and institute actions, nor do any other official act.⁹²

^{89.} In *re Barrett*, 12 A. B. R. 626, 132 Fed. 362 (D. C. Tenn.). Obiter, In *re Kelly*, 1 A. B. R. 306, 91 Fed. 504 (D. C. Tenn.).

And will not when suing in the Federal Court in the same district, be required to give security for costs nor to become personally liable therefor unless it is shown the receiver is acting in bad faith, or unreasonably or oppressively; certainly not where there are assets in the bankrupt estate; nor even where there are no assets except when it is due to indemnify adversary. In *re Barrett*, 12 A. B. R. 626, 132 Fed. 362 (D. C. Tenn.).

^{90.} *Title & Trust Co. v. Pearlman*, 16 A. B. R. 463, 144 Fed. 550 (D. C. Pa.); obiter, In *re Kolin*, 13 A. B. R. 533, 134 Fed. 557 (C. C. A. Ills.); In *re Schrom*, 3 A. B. R. 352, 97 Fed. 760 (D. C. Iowa); *Beach v. Macon Grocery Co.*, 8 A. B. R. 751 (C. C. A. Ga.); *Booneville Nat'l Bk. v. Blakey*, 6 A. B. R. 13, 107 Fed. 891 (C. C. A. Ind.).

^{91.} *Booneville Nat'l Bk. v. Blakey*, 6 A. B. R. 13, 107 Fed. 891 (C. C. A. Ind.), evidently reversing *Blakey v. Booneville Bk.*, 2 A. B. R. 459; inferentially, obiter, In *re Kolin*, 13 A. B. R. 533, 134 Fed. 557 (C. C. A. Ills.).

^{92.} In *re Schrom*, 3 A. B. R. 352, 97 Fed. 760 (D. C. Iowa).

In re Benedict, 15 A. B. R. 232, 140 Fed. 55 (D. C. Wis., citing *Booth v. Clark*, 17 How. 327, and *Hale v. Allinson*, 188 U. S. 56): "In *Great Western Mineral & Manufacturing Co. v. Harris*, 198 U. S. 561, Mr. Justice Day, delivering the opinion, fully sustains the authority and reasoning of this early case, and commits the court again to the doctrine that the receiver in whom the title to assets has not been vested, but who relies upon his authority as an officer of the court, has no authority to do any official act outside the jurisdiction of the court appointing him."

But the reverse is probably the better law, namely, that no ancillary jurisdiction exists, but that receivers might be authorized to go into other jurisdictions to protect assets. The state law of Wisconsin refuses comity to receivers in many instances where recognized by most other States, and the Federal decision in *In re Benedict* is perhaps colored by the local law.

Thus, the better rule is that they may, when authorized by the court appointing them, go into other districts and there institute actions.

But even so, they may only do so when specially authorized by the court appointing them.

In re National Mercantile Agency, 12 A. B. R. 189 (D. C. Pa.): "As is well known a receiver has such power only as the court that appoints him chooses to give and unless he is authorized to leave the court of original jurisdiction and sue elsewhere, he is not competent to bring such a suit."

And authority so to do before adjudication was refused a receiver in one case.⁹³

§ 396. Security for Costs and Bond for Injunction by Receiver.—Security for costs will not be required where action is brought in the federal court of the same jurisdiction, nor will the receiver be required to become personally liable therefor, in the absence of bad faith or unreasonableness in bringing the suit; certainly not where there are assets in the bankrupt estate, nor even where there are no assets unless it is due to the adversary to indemnify against costs.⁹⁴

Injunction bond need not be given, unless the court in its discretion deems it necessary.⁹⁵

§ 397. Effect of Dismissal of Petition on Receivership.—The dismissal of the petition before adjudication would probably have the same effect upon a receivership as in other equity cases; unless, perhaps, the receiver were appointed under § 69, or § 3 (e), as to which, see ante, § 344, et seq.

Thus the court has jurisdiction, notwithstanding the proposed dismissal, to determine the ownership of property in its custody.⁹⁶

93. In re Schrom, 3 A. B. R. 352, 97 Fed. 760 (D. C. Iowa).

94. In re Barrett, 12 A. B. R. 626, 132 Fed. 362 (D. C. Tenn.).

95. In re Barrett, 12 A. B. R. 626, 132 Fed. 362 (D. C. Tenn.).

96. In re J. C. Winship Co., 9 A. B. R. 641, 120 Fed. 93 (C. C. A. Ills.).

The effect of such dismissal, at any rate, is a subject of judicial action and may not be determined by mandamus.⁹⁷

§ 398. Costs and Expenses of Receiver Taxable against Petitioning Creditors.—Where a receiver has been appointed, the costs and expenses of the receivership are taxable against the petitioning creditors.

In *re Lavoc*, 15 A. B. R. 290 (C. C. A. N. Y.): "The question presented for review is whether petitioning creditors are liable for the expenses of a receivership in a case where, upon commencing a proceeding against a debtor to have him adjudicated a bankrupt, they have applied to the court and obtained the appointment of a receiver of his property, and the proceeding is subsequently dismissed as unfounded, the receiver meanwhile having entered upon his duties, taken charge of the property, and incurred expenses."

"There is no express provision in the Bankruptcy Act which authorizes the court of bankruptcy to compel petitioning creditors to pay the costs of a receivership under such circumstances, and the power of the court must, therefore, rest upon its implied authority to require those to bear the expenses of a proceeding which they have instituted without sufficient cause, and in the course of which they have invoked its assistance and asked it to put its machinery in motion for their benefit in such a way that expenses will accrue which must be borne either by them or the adverse party. Courts of equity frequently exercise this power in advance of taking action and in the absence of any statutory authority. Thus, in granting an injunction, it is common practice to require the plaintiff to give a bond or make a deposit in the registry to secure the adverse party against loss if the process be subsequently vacated. The precise question, however, has been considered frequently and determined by the courts. * * *

"Upon authority and because the principle is so just and reasonable, we adopt it and apply it to the case in hand."

Beach v. Macen Grocery Co., 11 A. B. R. 110, 125 Fed. 513 (C. C. A. Ga.): "The petitioners who instituted the proceedings and secured the appointment of a receiver are properly and equitably chargeable with the costs and expenses incurred by their wrongful application. In the event of their insolvency, any expenses incurred by the receiver should fall on him, and not on the defendants. He need not become receiver unless he chooses, or he may require a bond of indemnity before accepting the position. In a case, therefore, where the receiver has been wrongfully appointed, and the order subsequently vacated, it would be more equitable that the receiver himself should sustain the loss or expenses of the receivership paid by him than that they should be taxed to the successful defendants."

And it has been held, that the court may order the defeated party to pay the costs and punish him for contempt for failure to do so.

In *re Lavoc*, 15 A. B. R. 293, 142 Fed. 960 (C. C. A. N. Y.): "As the court below had competent power to make the order directing the payment of the receiver's expenses, it also had power to enforce its lawful order by a proceeding for contempt (Bankrupt Act, § 2, subd. 13). It is doubtful whether the enforcement of the contempt proceeding is equivalent to the imprisonment for

⁹⁷. *Edinburg Coal Co. v. Humphreys*, 13 A. B. R. 593, 134 Fed. 839 (C. C. A. Ills.).

debt within the meaning of § 990 of the United States Revised Statutes (*Muel-ler v. Nugent*, 184 U. S. 1, 13, 7 A. B. R. 224), and whether that section is not by implication repealed, so far as it conflicts with the express provision to the contrary, in the Bankrupt Act. However this may be, § 990 has no application to a case in which imprisonment for failure to obey the lawful order of the court is permitted by the laws of the State. By the law of this State, § 1241, Code of Civil Procedure, disobedience of an order is punishable as for a contempt of the court where it requires the payment of money to the court or to an officer of the court. The order under review being one requiring the payment to the receiver of the expenses incurred by him, can, therefore, be enforced by the usual punishment for contempt. *O'Gara v. Kearney*, 77 N. Y. 423-426; *Devlin v. Hinman*, 161 N. Y. 115."

It seems, however, a severe, and unusual, rather than usual, remedy to enforce the payment of costs by imprisonment for contempt.

DIVISION 5.

CREDITORS' INDEPENDENT PLENARY ACTIONS PENDING ADJUDICATION.

§ 399. Creditors' Independent Plenary Actions Pending Adjudication.—After the filing of the petition and before adjudication, creditors may institute suits for the recovery of property fraudulently transferred or concealed by the bankrupt either before or after the filing of the petition; and will thereafter, in case bankruptcy supervenes, and their proceedings thereby be annulled, or the lien of the proceedings be preserved for the benefit of all creditors, be reimbursed for all their expenses if such suits shall have resulted in the recovery of the property for the creditors.⁹⁸

This clause was added by the amendment of 1903, and was added no doubt chiefly to protect creditors during the time intervening between the filing of the petition and the adjudication against fraudulent transfers and concealments which could not be reached under warrant to the marshal or receiver to seize property, such warrants not operating to authorize the seizure of property held adversely by third parties but only of property in the possession of the bankrupt, or his agent; some cases as before noted having also denied to receivers, before adjudication, the power to institute proceedings or plenary actions to such end.

Until adjudication, creditors of course are entitled (and also were entitled before the Amendment of 1903) to make use of all the usual and ordinary remedies of creditors in the State or Federal Courts to recover property, for in case there be ultimately no adjudication, their right to sue in the ordinary tribunals would be undoubted. Justly, creditors should not be deterred from making use of these ordinary remedies for their protection by the fear that subsequent bankruptcy will not only rob them of

⁹⁸. Bankr. Act, § 64 (b) (2): "And, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expenses of such recovery" shall be entitled to priority of payment from the bankrupt estate.

all special advantage but also throw the costs of suit upon them; consequently, this amendment to § 64 (b) (2) allowing them reimbursement was wise and opportune.

Even without the special provision of the Amendment of 1903 to § 64 (b) (2), creditors would be entitled, pending the hearing on an involuntary petition, to maintain independent plenary actions for the recovery of property.⁹⁹

Obiter, Title & Trust Co. v. Pearlman, 16 A. B. R. 464, 144 Fed. 550 (D. C. Pa.): "It is further urged, that, unless power to sue is possessed by the receiver in a case of this kind, there will be a miscarriage of justice, the Pennsylvania statute requiring that proceedings to invalidate a sale in bulk, such as the one that is here complained of, shall be brought within ninety days from its consummation. But assuming this to be the case, it affords no argument for the existence of the power unless it is otherwise deducible. Even if there be this lapse in the law, we are not authorized, out of mere necessity, to raise up something to cover it. The truth is, however, that there is no such difficulty as is assumed. A sale of the character of that in question is made fraudulent and voidable by the local law as against creditors, and creditors therefore have the right themselves to take steps to avoid it. Ordinarily this would be by judgment and execution against the property alleged to have been fraudulently disposed of upon a sale of which the purchaser would be in shape to test the title of the alleged fraudulent vendee. But in requiring proceedings to be begun within ninety days after the consummation of the sale, of necessity something more direct and speedy is contemplated, it being practically impossible within that time to bring action and obtain judgment in order to do so. Neither would an attachment lie, under the Act of 1869 (Pa.), the fraud which justifies it having to be actual, and not merely constructive. *Stewers Pork Packing Co. v. Sheener*, 15 District 141. Under the circumstances the only relief available to general creditors is by bill, and this must therefore be regarded as intended to be given. *Houseman v. Crossman*, 177 Pa. 453. And if this be so any creditor would be entitled to sue on behalf of himself and others, either before or after the institution of proceedings in bankruptcy, such suit, if after, being ancillary thereto, no trustee having yet been chosen. *In re Schrom*, 3 Am. B. R. 352. This remedy being open, the argument drawn from the necessity for authority on the part of a receiver to sue is effectually disposed of."

In re Ward, 5 A. B. R. 215, 219, 104 Fed. 985 (D. C. Mass.): "It is further urged that, if this court be without jurisdiction to keep from concealment or dissipation the property of the bankrupt in the hands of a third party pending adjudication, there will seldom be left much for the trustee to distribute among the creditors. This may be true, but the situation is created by Congress, not by the Court."

§ 400. Must Be for Benefit of All.—Probably, only those proceedings taken for the benefit of all creditors are strictly entitled to the benefits of

⁹⁹. *Obiter*, *Horner-Gaylord Co. v. Miller & Bennett*, 17 A. B. R. 257, 147 Fed. 295 (D. C. W. Va.). This decision is in error, however, in holding that the bankruptcy court may maintain such plenary action. Compare, *In re Schrom*, 3 A. B. R. 352, 97 Fed. 760 (D. C. Iowa, distinguished in *In re Williams*, 9 A. B. R. 744). It is not clear but what the court in this case, however, was advocating ancillary bankruptcy proceedings rather than a resort by creditors to their ordinary remedies pending the hearing upon petition for adjudication. Compare, to same effect, *In re Adams*, 1 A. B. R. 104 (Ref. N. Y.).

§ 64 (b) (2). Yet the benefits of that section have been extended to cases operating to the advantage of all creditors although not so intended.¹⁰⁰ Thus, where an attachment lien, dissolved as to the attaching creditor by the debtor's bankruptcy, is preserved for the benefit of all creditors under § 67 (f) the lien for the costs also is preserved.¹⁰¹

§ 401. Independent Plenary Suits by Creditors Not Maintainable in U. S. District Courts.—Independent plenary suits by creditors may not be brought in the bankruptcy courts at all, either before or after adjudication. The jurisdiction conferred by the Amendment of 1903 upon the Bankruptcy courts to entertain plenary actions against adverse claimants is limited to cases where the status of the debtor as a bankrupt has become established, so for that reason, alone, such suits would not be maintainable before adjudication. But, further than that, the Amendment of 1903 confers jurisdiction only in suits by "trustees," so that neither before nor after adjudication have creditors the right to resort to the bankruptcy courts in independent plenary suits.¹⁰²

Viquesnay v. Allen, 12 A. B. R. 406, 131 Fed. 21 (C. C. A. W. Va.): "* * * and the amendment if applicable here, likewise applies only to suits by trustees in bankruptcy."

§ 402. No Suit to Maintain Status Quo for Filing Bankruptcy Petition.—Before the filing of a bankruptcy petition creditors may not obtain restraining orders either in the State or Bankruptcy Courts to preserve the status quo upon the ground that they are about to institute bankruptcy proceedings or will institute them as soon as possible.¹⁰³ However, of course, such object may be the real object, but the application for the restraining order must be upon other grounds. Creditors under § 64 (b) may be allowed their costs and expenses where the effect of such prior action is to aid in the recovery of assets.

100. Compare, *In re Francis-Valentine Co.*, 2 A. B. R. 522, 94 Fed. 793 (C. C. A. Calif.).

101. *Receivers v. Staake*, 13 A. B. R. 281, 133 Fed. 717 (C. C. A. Va., affirmed sub nom. *First Nat'l Bk. v. Staake*, 15 A. B. R. 639, 202 U. S. 141); *First National Bk. v. Staake*, 15 A. B. R. 639, 202 U. S. 141 (affirming 13 A. B. R. 281).

102. *Contra*, *Horner-Gaylord Co. v. Miller & Bennett*, 17 A. B. R. 257, 147 Fed. 295 (D. C. W. Va.). See post, § 1715. Nevertheless, the bankruptcy court has jurisdiction to enjoin, pending the petition: *In re Jersey Island Packing Co.*, 14 A. B. R. 690, 138 Fed. 625 (C. C. A. Calif.).

103. See ante, § 360.

CHAPTER XII.

TRIAL.

Synopsis of Chapter.

§ 403. Trial, in General, by Court.

§ 404. But Court May Submit Issue of Fact to Jury.

§ 405. Jury's Verdict, in General, Advisory.

§ 406. Except That on Issues of Insolvency and Commission of Act, Right Absolute.

§ 407. But Jury Demandable by Virtue of Statute, Not Constitution.

§ 408. Jury Confined, Where Demandable, to Two Issues.

§ 409. Jury Trial Not Available to Intervening Creditors.

§ 410. To Be Conducted According to Common Law.

§ 411. Demand for Jury.

§ 412. Reference to Master Where Jury Not Demanded.

§ 413. Trial to Be "Impartial."

§ 403. **Trial, in General, by Court.**—After the issues are made up the case is set down for hearing. Bankruptcy proceedings, as already noted (ante, § 20), are a branch of equity jurisprudence; and the hearings in general are to be before the court, even as to the issue of bankruptcy.¹

§ 404. **But Court May Submit Issue of Fact to Jury.**—Any specified issue of fact may, of course, be submitted by the bankruptcy court, acting as the chancellor, to the jury, for determination.²

In *re Rude*, 4 A. B. R. 319, 101 Fed. 845 (D. C. Ky.): "Bankruptcy proceedings are equitable in character, and while the court, or, possibly, the referee, might have had a jury to pass upon the amount of the attorney's fee, that was a matter of discretion, and not of right. The court does not understand that in equitable proceedings parties have a right to have an issue tried out of chancery by a jury. Section 19 of the Bankrupt Act, and section 648 of the Revised Statutes in relation to trials in Circuit Courts, do not, in my judgment, affect this result."

But certain holdings are to the effect that the right in bankruptcy practice is confined to those issues mentioned in the statute.³

§ 405. **Jury's Verdict, in General, Advisory.**—In case the court thus submits an issue to the jury, the determination of the jury, ex-

1. Bankr. Act, § 18 (d): "If the bankrupt or any of his creditors shall appear within the time limited and controvert the facts alleged in the petition the judge shall determine as soon as may be, the issues presented by the pleadings without the intervention of a jury, except in cases where a jury trial is given by this act, and make the adjudication or dismiss the petition."

2. *Oil Well Supply Co. v. Hall*, 11 A. B. R. 738, 128 Fed. 875 (C. C. A. W. Va.); *Morss v. Franklin Coal Co.*, 11 A. B. R. 423, 125 Fed. 998 (D. C. Pa.); *In re Neasmith*, 17 A. B. R. 131, 147 Fed. 160 (C. C. A. Mich.); (1867) *Barton v. Barbour*, 104 U. S. 137.

3. *In re Herzikopf*, 9 A. B. R. 745, 118 Fed. 101 (C. C. A. Calif.). And *In re Neasmith*, 17 A. B. R. 131, 147 Fed. 160 (C. C. A. Mich.).

cept in the one statutory instance hereafter mentioned, is merely advisory and not binding on the court;⁴ and this exception is in cases where the Bankruptcy Act gives the respondent an absolute right to a jury trial.

Even after the bankrupt has waived the right of trial by jury the court may, of its own motion, direct the issues or any of them he may select to be tried by a jury. In this event the jury trial is not to be taken as being held under the provisions of the bankruptcy act, but as advisory merely, under the general powers of the court as a chancellor.

Oil Well Supply Co. v. Hall, 11 A. B. R. 738 (C. C. A. W. Va.): "It is very clear that the case below was not submitted to the jury under the provisions of the nineteenth section of the Bankruptcy Act (Act July 1, 1898, ch. 541, 30 Stat. 551 [U. S. Comp. Stat. 1901, p. 3429]). The respondents did not demand a jury. Indeed, the record states that a jury was waived. But the district judge, of his own motion, and for his own satisfaction, desired the aid of a jury in passing upon the question whether an act of bankruptcy had been committed, as charged in the petition. It is always within the discretion of a judge to seek the aid of a jury in solving a question of fact. In the court of chancery the chancellor can do this, either by ordering an issue out of chancery to be tried in the law court, or by impaneling a jury in his own court, and submitting the question to them himself. *Wilson v. Riddle*, 123 U. S. 615, 8 Sup. Ct. 255, 31 L. Ed. 280; *Idaho, etc., Co. v. Bradley*, 132 U. S. 509, 10 Sup. Ct. 177, 33 L. Ed. 433. In all such cases the verdict of the jury is advisory—not binding on the court, which must for itself determine the issues. This was the course pursued here. The judge presented the issue to the jury, but he afterwards adopted their conclusion, and gave effect to it by his own decree. This he need not have done if the jury trial had been had under the nineteenth section of the Bankruptcy Act. In carrying out his purpose to seek the aid of a jury, he used a jury in the court over which he was about to preside, and which best suited his convenience—the jury in the Circuit Court of Parkersburg. As the verdict of the jury was sought by himself to aid his conclusion, he could select any jury, especially as the jurors in the District and Circuit Courts of the United States can be used in every court."

§ 406. Except That on Issues of Insolvency and Commission of Act, Right Absolute.—There is one mandatory exception to the rule that the issues are all to be tried by the court: The debtor himself, resisting his adjudication as bankrupt, may, as a matter of absolute right, have the issues as to his insolvency and as to his having committed the act of bankruptcy charged, determined by a jury.⁵

⁴ *Oil Well Supply Co. v. Hall*, 11 A. B. R. 738, 128 Fed. 875 (C. C. A. W. Va.); *In re Neasmith*, 17 A. B. R. 131, 147 Fed. 160 (C. C. A. Mich.). The court is not restricted to the district court jury in such cases, so it appears, but may submit the issue to the Circuit Court jury, the two juries being interchangeable. *Oil Well Supply Co. v. Hall*, 11 A. B. R. 738, 128 Fed. 875 (C. C. A. W. Va.).

⁵ Bankr. Act, § 19 (a): "A person against whom an involuntary petition has been filed shall be entitled to have a trial by jury, in respect to the question of his insolvency, except as herein otherwise provided, and any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor at or before the time within which an answer may be filed. If such application is not filed within such time, a trial by jury shall be deemed to have been waived." *Blue Mtn., etc., v. Portner*, 12 A. B. R. 559, 131 Fed. 57 (C. C. A. Mo.).

Elliott v. Toeppner, 9 A. B. R. 50, 187 U. S. 327: "The proceedings in the administration of the bankrupt estate are equitable in their nature but the bankruptcy courts act under specific statutory authority and when on an issue of fact as to the existence of ground for adjudication a jury trial is demanded, it is demanded as of right, and the trial is a trial according to the course of common law."

It is demandable as of right even on the question as to whether the debtor has made a general assignment, although the issue of insolvency in that instance would be immaterial;⁶ and it is demandable upon the question of the existence of a receivership as an act of bankruptcy.⁷

§ 407. But Jury Demandable by Virtue of Statute, Not Constitution.—But it is demandable as of right solely by virtue of the Bankruptcy Act and not by virtue of any constitutional provisions.

In *re Christensen*, 4 A. B. R. 99, 101 Fed. 243 (D. C. Ia.): "It is equally well settled that proceedings in bankruptcy are of equitable cognizance, and therefore the provisions of the Seventh Amendment are not applicable thereto."

§ 408. Jury Confined, Where Demandable, to Two Issues.—The jury so demanded by the bankrupt may only consider the two issues: Whether the act of bankruptcy was committed and whether the bankrupt was insolvent—the other issues are to be determined by the court alone.⁸

§ 409. Jury Trial Not Available to Intervening Creditors.—None of the intervening creditors, however, have the right to demand a jury. It is a right personal to the bankrupt.

In *re Herzikopf*, 9 A. B. R. 745, 121 Fed. 544 (C. C. A. Calif.): "The argument for the appellants is that any defense which would be open to the bankrupt is open to all of his creditors, including the method of making it. The difficulty in the way of the appellants is that, except in certain specified particulars, within which the present case does not come, proceedings in bankruptcy are of an equitable nature (*Bardes v. Hawarden Bank*, 178 U. S. 524, 535, 4 A. B. R. 163, 20 Sup. Ct. 1000, 44 L. Ed. 1175), in respect to which, it must

6. See *Day v. Beck & Gregg Hdw. Co.*, 8 A. B. R. 175, 114 Fed. 834 (C. C. A. Ala.). Apparently, contra, *Simonson v. Sinsheimer*, 3 A. B. R. 824, 95 Fed. 948 (C. C. A. Ky.).

7. *Blue Mtn., etc., v. Portner*, 12 A. B. R. 559, 131 Fed. 57 (C. C. A. Mo.).

8. *Morss v. Franklin Coal Co.*, 11 A. B. R. 423, 125 Fed. 998 (D. C. Penna.). In this case the Court refused to permit the jury to pass on the issue as to whether the petitioners held provable claims.

Simonson v. Sinsheimer, 3 A. B. R. 824 (C. C. A. Ky.). But in this case the Court, obiter, limits the right to the mere question of insolvency; perhaps because in that case it was a mere question of law whether the act of bankruptcy (an assignment for the benefit of creditors) had been committed.

Obiter, in *re Neasmith*, 17 A. B. R. 131, 147 Fed. 160 (C. C. A. Mich.). Compare, same rule where one partner petitions for adjudication of the firm: In *re Forbes*, 11 A. B. R. 787, 128 Fed. 137 (D. C. Mass.).

Compare, where the question of membership of one of the respondents in a partnership was held to be involved in the question of insolvency: In *re Neasmith*, 17 A. B. R. 131, 147 Fed. 160 (C. C. A. Mich.).

be conceded, the right to a jury trial does not exist. Of course, in the exercise of the jurisdiction at law conferred on the bankruptcy courts, as, for instance, the power to 'arraign, try, and punish bankrupts, officers and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies, or corporations for violations of this act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted regulating trials for the alleged violation of laws of the United States,' there goes the concomitant right to trial by jury. But in proceedings not at law, but relating, as does the case at bar, to the question of the insolvency of the alleged bankrupt, and to acts of bankruptcy alleged to have been committed by him, it is quite clear, we think, that no right to a jury trial exists unless the Bankruptcy Act expressly or by necessary implication gives it. It is not claimed that it is expressly given to any creditor. It is given, with certain limitations, to the 'person against whom an involuntary petition has been filed' by the clause above quoted. But even the bankrupt is by the statute restricted in his right to a jury trial to the issues specifically mentioned, to-wit, his insolvency and any act of bankruptcy committed by him. These express limitations of the right to a jury trial clearly manifest, under the familiar maxims, 'Expressio unius est exclusio alterius,' and 'Expressum facit cessare tacitum,' the intention of Congress to withhold it from all others, and in all cases, in such of the proceedings in bankruptcy as are of an equitable nature."

§ 410. **To Be Conducted According to Common Law.**—If a jury trial be had on demand of the bankrupt it is to be conducted precisely as a jury trial is conducted according to the course of the common law.⁹ Thus, for instance, a general exception to a refusal to charge several requests cannot avail if any one of the requests was properly refused.¹⁰

§ 411. **Demand for Jury.**—If the bankrupt does not demand the jury, however, and demand it before or on the answer day, and demand it in writing, filed with the District Clerk, he will be deemed to have waived a jury trial.¹¹

§ 412. **Reference to Master Where Jury Not Demanded.**—Where a jury is not demanded, the judge may refer the issues to a master commissioner to take and hear the evidence and report his findings.¹²

9. *Elliott v. Toepfner*, 9 A. B. R. 50, 187 U. S. 327; *Duncan v. Landis*, 5 A. B. R. 649, 106 Fed. 839 (D. C. Pa.). Where each party asks the court to direct a verdict it is equivalent to a request for a finding of facts and if the court directs the verdict both parties are concluded on the findings of fact, see *Bradley Timber Co. v. White*, 10 A. B. R. 329, 121 Fed. 779 (C. C. A.).

10. *Bean-Chamberlain v. Standard Spoke & Nipple Co.*, 12 A. B. R. 610 (C. C. A. Mich.).

11. Bankr. Act, § 19 (a): " * * * upon filing a written application therefor at or before the time within which an answer may be filed. If such application be not filed within such time, a trial by jury shall be deemed to have been waived."

Bray v. Cobb, 1 A. B. R. 153, 91 Fed. 102 (D. C. N. Car.); *In re Neasmith*, 17 A. B. R. 131, 147 Fed. 160 (C. C. A. Mich.).

12. *In re Lavoc*, 13 A. B. R. 400, 134 Fed. 237 (C. C. A. N. Y.). Impliedly, *In re Rome Planing Mills*, 3 A. D. R. 766, 99 Fed. 137 (D. C. N. Y.).

Clark v. Am. Mfg. & Enamel Co., 4 A. B. R. 351, 101 Fed. 962 (C. C. A. W. Va.): "There was no error in the action of the lower court in referring the case, as it did, to a referee. * * * Upon the filing of an answer to an involuntary petition in bankruptcy, it is quite usual, and in many instances the only way that the court can proceed, to have one of its referees take the evidence, and report upon the various questions presented, returning to the court the evidence taken for its consideration."

And the findings of fact of the Special Master will not be disturbed unless clearly against the weight of the evidence.¹³

The bankrupt then, at the hearing or trial, is either adjudged bankrupt or adjudged not bankrupt.

§ 413. **Trial to Be "Impartial."**—The trial must be an "impartial" trial.

Bankr. Act, § 4 (b): "* * * be adjudged an involuntary bankrupt upon default or an impartial trial."

Why Congress qualified the word trial by the adjective "impartial" and prescribed that the trial must be "impartial" is hard to understand. The trial would be presumed to be impartial. Perhaps partiality is thus made a specific ground for reversal, although it is difficult to precisely define its limitations.

13. In re Rome Planing Mills, 3 A. B. R. 766, 99 Fed. 137 (D. C. N. Y.). Also, see post, § 2840, subject of "Review of Referee's Orders."

CHAPTER XIII.

DISMISSAL.

Synopsis of Chapter.

- § 414. Dismissal for Want of Jurisdiction.
- § 415. Dismissal after Hearing Merits.
- § 416. Dismissal as to Part.
- § 417. Costs on Dismissal after Hearing Merits.
- § 418. Costs on Dismissal for Want of Jurisdiction.
- § 419. On Dismissal, Ten Days Notice to Creditors to Be Given.
- § 420. On Dismissal after Hearing Merits, No Notice Requisite.
- § 421. Reinstatement, on Dismissal without Notice.
- § 422. No Dismissal if Any Petitioning Creditor Objects.

§ 414. **Dismissal for Want of Jurisdiction.**—The petition should be dismissed where jurisdiction is lacking. And the court should of its own motion dismiss the petition if it discovers it has been acting without jurisdiction.¹

In *re Columbia Real Estate Co.*, 4 A. B. R. 417, 101 Fed. 965 (D. C. Ind., affirmed by C. C. A., 7 A. B. R. 441): "Want of jurisdiction is a question that the court should consider whenever or however raised, even if the parties forbear to make it or consent that the case may be heard on its merits." Citing *Metcalf v. Watertown*, 128 U. S. 586.

This rule applies to voluntary petitions.²

When jurisdiction is challenged, it should be inquired into as soon as possible.³ The essential facts conferring jurisdiction must appear affirmatively and distinctly in the pleadings before the court will make adjudication; it is not sufficient that jurisdiction may be inferred argumentatively.⁴

§ 415. **Dismissal after Hearing Merits.**—If the debtor after hearing is adjudged not bankrupt the petition is dismissed; and the proceedings of course end there, except as the litigation may be prolonged in the higher courts by appeal or writ of error.⁵

§ 416. **Dismissal as to Part.**—The petition may be dismissed as to some and not all the alleged parties defendant.⁶

1. In *re Garneau*, 11 A. B. R. 679, 127 Fed. 677 (C. C. A. Ills.); In *re Waxelbaum*, 3 A. B. R. 395, 98 Fed. 589 (D. C. N. Y.).

2. In *re Waxelbaum*, 3 A. B. R. 395, 98 Fed. 589 (D. C. N. Y.); In *re Garneau*, 11 A. B. R. 679, 127 Fed. 677 (C. C. A. Ills.); post, § 431.

3. In *re Waxelbaum*, 3 A. B. R. 395, 98 Fed. 589 (D. C. N. Y.).

4. In *re Plotke*, 5 A. B. R. 175, 104 Fed. 964 (C. C. A. Ills.).

5. As to malicious prosecution of bankruptcy petition, see ante, § 354.

6. Instance, In *re Nixon*, 6 A. B. R. 693, 110 Fed. 633 (D. C. Mont.).

§ 417. **Costs of Dismissal after Hearing Merits.**—The Court will allow costs against the petitioning creditors on dismissal after a hearing on the merits.⁷ And where a receiver has been appointed, the costs and expenses of the receivership are taxable against the petitioning creditors.⁸

§ 418. **Costs on Dismissal for Want of Jurisdiction.**—On dismissal for want of jurisdiction over the class of persons proceeded against, the court is without power to award costs; and may not tax costs against the petitioning creditors.⁹

In *re Phila. & Lewes Transp. Co.*, 11 A. B. R. 444 (D. C. Pa.): "I see no reason why the rule which denies to a court the power to award costs, when a case is dismissed for want of jurisdiction (*Citizens Bk. v. Cannon*, 164 U. S. 319) should not prevail in a court of bankruptcy as well as in other jurisdictions."

§ 419. **On Dismissal, Ten Days Notice to Creditors to Be Given.**—If no adjudication takes place at all, either that the debtor is bankrupt or not bankrupt, but the petition is dismissed by the petitioning creditors, or by consent of parties, or for want of prosecution, ten days notice must be sent by mail to all creditors, of the application or intention to dismiss.¹⁰

In *re Plymouth Cordage Co.*, 13 A. B. R. 665, 135 Fed. 1000 (C. C. A. Okla.): "Notice is indispensable and an order of dismissal without notice is erroneous."

As to the assumed burdensomeness of the regulation complained of in the contra decision of *In re Levi & Klauber*, 15 A. B. R. 295 (C. C. A. N. Y.), it is to be observed first, that it cannot be much of a burden upon the de-

7. Gen. Ord. XXXIV: "In cases of voluntary bankruptcy, when the debtor resists an adjudication, and the court, after hearing adjudges the debtor a bankrupt, the petitioning creditor shall recover, and be paid out of the estate, the same costs that are allowed to a party recovering in a suit in equity; and if the petition is dismissed the debtor shall recover like costs against the petitioner." In *re Haesler-Kohloff Carbon Co.*, 14 A. B. R. 381, 135 Fed. 867 (D. C. Pa.); In *re Ghiglione*, 1 A. B. R. 580, 93 Fed. 186 (D. C. N. Y.); In *re Morris*, 7 A. B. R. 709, 115 Fed. 591 (D. C. Pa.).

8. See ante, "Receivers," ch. XI, div. 4.

It has apparently been held, that the court may order the defeated party to pay the costs and punish him for contempt for failure to do so. In *re Lavoc*, 15 A. B. R. 293 (C. C. A. N. Y.).

But there can be no counsel fees awarded on dismissal where there has been no seizure of property. See ante, § 398.

9. In *re Ghiglione*, 1 A. B. R. 581, 93 Fed. 186 (D. C. N. Y.); In *re R. H. Williams*, 9 A. B. R. 736, 120 Fed. 34 (D. C. Ark.).

10. See Bankr. Act, § 59 (g): "A voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors."

And Bankr. Act, § 58 (a): "Creditors shall have at least ten days notice by mail * * * of * * * (8) the proposed dismissal of the proceedings."

In *re Lederer*, 10 A. B. R. 492, 125 Fed. 96 (D. C. N. Y.); In *re Lewis*, 11 A. B. R. 683, 129 Fed. 147 (D. C. Del.); In *re Frischberg*, 8 A. B. R. 610 (Ref. N. Y.).

Contra, In *re Levi & Klauber*, 15 A. B. R. 295 (C. C. A. N. Y.). This case does not quote the statute correctly and the adoption of its ruling would in effect abrogate the two clear, unequivocal sections of the statute relative to dismissal of petitions. Section 59 does not provide that "an involuntary petition shall not be dismissed for want of prosecution by the petitioner or petitioners

defendant, for it rests within the power of the defendant easily to supply the required list of creditors and it is the clerk's or referee's duty to send the notices. The delay of ten days for giving the notice is no more than that to which an incidental adjournment would amount to. And it is to be observed second, that the same objections to giving ten days time do not exist now that existed under the law of 1867; for under the statute of 1867 the title passed as of the date of the filing of the petition and consequently the title of the bankrupt was put in doubt from the date of the filing of the petition, whilst by the law of 1898 title does not pass until the date of the adjudication, so that meanwhile the bankrupt may conduct his business in its usual course, title not being affected by the pendency of the petition against him before adjudication.

On the other hand, Congress inserted this new provision in two separate sections, repeating itself, as it were, to emphasize the fact that it meant what it said; and its language is clear and unambiguous, and when correctly quoted can lead to but one conclusion. Moreover the evils to which this provision is directed are so glaring and great that it seems strange any court should have sought to limit it by construction. Human nature must be taken as it is found. Under the ruling criticised, petitions in bankruptcy might be made instruments for acquiring preferences rather than for preventing them. The qualification that the court may refuse to dismiss on "suspicion" of collusion is an insufficient substitute for the positive direction of the statute and tends simply to produce uncertainty in litigation and a reliance upon the court's discretion, when the statute obviously intended to give the court no discretion. The purpose of §§ 59 (g) and 18 (g) undoubtedly is to prevent collusion and to enable creditors to exercise the right to come in if they desire.¹¹

In *re Lewis*, 11 A. B. R. 693, 129 Fed. 147 (D. C. Del.): "In the language employed in another connection by Judge Blodgett in the case of *In re Heffron*, Fed. Cases, No. 6,321, decided under the Bankruptcy Act of 1867. 'It would lead to underhand and secret negotiations between the debtor and a portion of the creditors and be a strong incentive for showing favors to a few creditors at the expense of the many.'

therein, or by consent of parties, until after notice to creditors." Such is not a correct quotation of the statute. The statute is so worded as to be free from the possibility of such construction. It reads as follows: "A voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors." Again, § 58 (a) provides that "Creditors shall have at least ten days notice by mail * * * of * * * (8) the proposed dismissal of the proceedings." It would be well to bear in mind the admonition of the court in *Swarts v. Siegel*, 8 A. B. R. 697, 117 Fed. 13 (C. C. A. Mo.): "Attempted judicial construction of the unequivocal language of a statute serves only to create doubt and to confuse the judgment. There is no safer nor better settled canon of interpretation than that when language is clear and unambiguous it must be held to mean what it plainly expresses, and no room is left for construction." The motion for dismissal should give a good reason. In *re Lewis*, 11 A. B. R. 683, 129 Fed. 147 (D. C. Del.).

11. *Obiter*, In *re Frichsberg*, 8 A. B. R. 607, 610 (Ref. N. Y.). *Obiter*, In *re Ryan*, 7 A. B. R. 562, 114 Fed. 373 (D. C. Pa.).

But an order dismissing the proceedings without notice to other creditors than merely to the petitioning creditors is not wholly void, and at best is a mere irregularity.¹² The court would have had jurisdiction to enter a dismissal on other grounds without notice, as upon failure of the petitioning creditors to prove their case, and the mere ground upon which the dismissal is made would not warrant a fatal disregard of it, as if void on its face.

§ 420. On Dismissal after Hearing Merits, No Notice Requisite.—On dismissal, after hearing the merits, no notice to creditors is requisite.

Neustadter v. Chic. Dry Goods Co., 3 A. B. R. 96, 96 Fed. 830 (D. C. Wash.): "It is my opinion that these provisions of the law relate to dismissals which in effect withdraw the cases without submission to the court for its decision upon the merits."

§ 421. Reinstatement on Dismissal without Notice.—Where dismissal is made without notice to creditors, creditors not notified may have the proceedings reinstated; but creditors not notified must not be guilty of laches, else their application for reinstatement of the proceedings will be refused.¹³

§ 422. No Dismissal if Any Petitioning Creditor Objects.—It is not discretionary with the court to dismiss the petition if any of the petitioning creditors objects, no matter if satisfied it would be for the best interests of the creditors to do so and that the parties are acting in good faith. The right of a creditor to proceed is an absolute right.

In re Cronin, 3 A. B. R. 552, 98 Fed. 584 (D. C. Mass.): "Is the condition altered by the fact that the majority of the petitioners have come to desire a dismissal of the petition, which dismissal is resisted by the minority? Will the assent of the majority of the petitioners enable the court to act for the interest of the creditors by dismissing the petition, or has the minority the right to insist upon an adjudication, if an act of bankruptcy has been committed? I think that in this case the right of the minority is absolute."

And no dismissal will be granted on the application of two of the petitioning creditors against the protest of the third;¹⁴ not even where the court is satisfied it would be for the best interests of creditors.¹⁵

^{12.} *Obiter*, *In re Jemison Mercantile Co.*, 7 A. B. R. 588, 112 Fed. 966 (C. C. A. Ala.); *obiter*, *In re Plymouth Cordage Co.*, 13 A. B. R. 665, 135 Fed. 1000 (C. C. A. Okla.). Compare, *obiter*, *Neustadter v. Chic. Dry Goods Co.*, 3 A. B. R. 96 Fed. 830 (D. C. Wash.).

^{13.} *In re Jemison Mercantile Co.*, 7 A. B. R. 588, 112 Fed. 966 (C. C. A. Ala.), distinguished in *In re Plymouth Cordage Co.*, 13 A. B. R. 625, 135 Fed. 1000 (C. C. A. Okla.).

^{14.} *In re Lewis*, 11 A. B. R. 683, 129 Fed. 147 (D. C. Del.); *In re Cronin*, 3 A. B. R. 552, 98 Fed. 584 (D. C. Mass.).

^{15.} *In re Cronin*, 3 A. B. R. 552, 98 Fed. 584 (D. C. Mass.).

CHAPTER XIV.

ADJUDICATION.

Synopsis of Chapter.

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- § 425. Default Adjudication by Referee in Judge's Absence or Inability.
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DIVISION 1.

ADJUDICATION IN GENERAL—DEFAULT ADJUDICATION—PREMATURE ADJUDICATION AND ADJUDICATION ON PLEADINGS.

§ 423. **Adjudication on Voluntary Petition, "Forthwith," on Involuntary, "Soon as May Be."**—Voluntary petitions, as previously noted (§ 195), are heard without delay and if in due form and jurisdiction be not lacking, adjudication is made forthwith, without right in any one to contest the issue, save and except the limited right of a nonjoining partner to contest the issue of insolvency on a petition filed by a copartner.

The involuntary petition, on the other hand, has to be set down for hearing. It is heard by the judge, as we have seen, with or without the intervention of a jury, as the case may be. It is to be heard "as soon as may be;"¹ although delay will not affect the court's jurisdiction to adjudicate.² The adjudication is then made, or the petition is dismissed.

§ 424. **Jurisdiction to Make Adjudication on Default.**—Jurisdiction is given specifically by Bankr. Act, § 4 (b) to make adjudications upon involuntary petitions on default; although undoubtedly such jurisdiction would exist by virtue of the general jurisdiction to adjudicate bankrupt elsewhere conferred by the law.³

§ 425. **Default Adjudication by Referee in Judge's Absence or Inability.**—If the judge is absent from the district, or the division of the district in which the petition is filed at the time of the filing of a voluntary petition; or, in the case of an involuntary petition, on the next day after the last day on which pleadings may be filed, and none have been filed, the clerk forthwith refers the case to the referee having jurisdiction, for adjudication;⁴ and the referee thereupon makes the adjudication.⁵

Of necessity the same rule would prevail if the judge were otherwise unable to act.

The "pleadings" of course refer to pleadings that raise an issue or are in opposition, not to pleadings that admit the allegations of the petition. Likewise, the filing of an answer admitting the allegations of the petition does not convert an involuntary case into a voluntary one nor permit an earlier reference to the referee.

1. Bankr. Act, § 18 (d).

2. In re Frichsberg, 8 A. B. R. 607 (Ref. N. Y.).

3. Bankr. Act, § 18 (e).

4. Bankr. Act, § 18 (f); In re Humbert Co., 4 A. B. R. 76, 100 Fed. 439 (D. C. Iowa).

5. Bankr. Act, § 38: "Referees respectively are hereby invested, subject always to a review by the judge; within the limits of their districts as established from time to time, with jurisdiction to (1) consider all petitions referred to them by the clerks and make the adjudications or dismiss the petitions."

In *re Humbert Co.*, 4 A. B. R. 76, 100 Fed. 439 (D. C. Iowa): "Under the provisions of § 18 of the act, the clerk cannot send a case of involuntary bankruptcy to the referee for adjudication, except in cases wherein no issue is made by the bankrupt or any creditor upon the facts averred in the petition, and the judge is absent from the district or division thereof wherein the case is pending on the next day after the last day on which pleadings may be filed; and these necessary conditions cannot be ascertained except by fixing a proper return day in the mode already pointed out, and then awaiting the lapse of the ten-day period allowed for filing pleadings in opposition to the petition for adjudication."

Of course, the referee does not make the adjudication if the petition is defective in showing jurisdiction. Under such circumstances the referee doubtless has jurisdiction, under § 38 (4), to require amendment of the petition, or even to enter a dismissal thereof, upon notice to creditors.

The referee may not, even in the absence of the judge, hear contested petitions.

In *re Humbert Co.*, 4 A. B. R. 77, 100 Fed. 439 (D. C. Iowa): "If a contest is made on behalf of the bankrupt or any of the creditors, then the issues presented thereby must be tried by or before the judge."

Jurisdiction to adjudge bankrupt on contested petitions may be exercised under § 18, Bankr. Act, only, by the "judge" as contradistinguished from the "court," which latter term may include the referee.

§ 426. Adjudication by Default a Judgment on Merits, Binding on All.—A default adjudication of bankruptcy is a judgment on the merits, and is conclusive upon all who, in the exercise of proper diligence, might have defended.⁶

In *re Billing*, 17 A. B. R. 86 (D. C. Ala.): "When, as here, the petition is filed by the proper parties, in the proper district, and makes all the jurisdictional allegations, and is uncontested, the failure to contest the petition by any person having the right, so to do, establishes the truth of the allegations of the petition. The law, thereupon, demands an adjudication of bankruptcy, which when thus rendered, is binding on all the world. Every creditor was conclusively charged with notice of the pendency of the proceeding and what was being done to bring about adjudication, and no creditor can be heard to set up want of knowledge or notice of the proceeding as an excuse for not controverting the petition before adjudication, or as a reason why it shall not bind him."

§ 427. Premature Adjudication on Bankrupt's Consent.—If the bankrupt enters appearance and files answer before the answer day and consents to an earlier hearing or consents to his own adjudication before answer day, and adjudication is thus had, such premature adjudication is voidable if any creditor appears on or before answer day; but if the time

6. In *re Gorman*, 15 A. B. R. 587 (D. C. Hawaii).

elapses for creditors to appear and none appear, the premature adjudication by the bankrupt's consent may not be attacked.⁷

In *re Columbia Real Estate Co.*, 4 A. B. R. 419, 101 Fed. 965 (D. C. Ind., affirmed 7 A. B. R. 441): "Nor can there be want of jurisdiction over the subject-matter because the adjudication was had on the same day that the petition and answer were filed. There is nothing in § 18 of the Bankruptcy Act which precludes a waiver of process, a voluntary appearance of the bankrupt, and an answer admitting bankruptcy on the day the petition is filed. An adjudication on a voluntary appearance and an answer admitting the averments of the petition would certainly conclude the bankrupt who entered the appearance and filed the answer. It may be when an adjudication has been made without service of process, and before the expiration of 15 days, that the creditors might, upon seasonable application, procure an order vacating the adjudication so far as to allow them to plead and be heard in opposition to the petition. But such right must be exercised with reasonable promptness after actual or constructive notice of the adjudication. In the present case neither the bankrupt nor any creditor is objecting to the adjudication. Their acquiescence shows that they are content."

But compare, *In re Humbert Co.*, 4 A. B. R. 76, 100 Fed. 439 (D. C. Iowa): "The return day having been thus fixed, then the case must remain in the clerk's office until the expiration of the ten days allowed to the bankrupt or any creditor to appear and contest the facts averred in the petition. A waiver on the part of the bankrupt of this period of time cannot deprive creditors of the right to appear in opposition to the petition, and until that time has elapsed it cannot be known whether a contest will or will not be made on behalf of creditors."

§ 428. **Adjudication on Pleadings.**—Adjudication may be had on the pleadings themselves, where attempted opposition fails to be sufficiently pleaded, in the same manner and under the same circumstances, in general, as in other cases. Such motion admits all the averments of the answer, properly pleaded;⁸ and the respondents are entitled to a final decree dismissing the petition if such a motion is overruled.⁹

DIVISION 2.

VACATING OF ADJUDICATION.

§ 429. **Jurisdiction to Vacate Adjudication.**—Jurisdiction to vacate adjudication exists; and the adjudication of bankruptcy, whether on vol-

7. Compare, *Day v. Beck & Gregg Hdw. Co.*, 8 A. B. R. 175, 114 Fed. 834 (C. C. A. Ala.), where the court held that "an involuntary adjudication of bankruptcy may be made before the expiration of the time allowed for filing an answer." But in this case the bankrupt was not consenting to the adjudication but was opposing it and had, indeed, filed an answer of denial and demand for a jury, which had been stricken off for lack of verification. He had all of the day on which the adjudication actually was rendered in which he might by law have filed his answer correctly. Also compare, *In re Elmira Steel Co.*, 5 A. B. R. 487, 109 Fed. 456 (Ref. N. Y.). For an instance of such premature adjudication, see, *In re Woods*, 13 A. B. R. 340, 133 Fed. 82 (D. C. Pa.).

8. *In re Waugh (Caskey)*, 13 A. B. R. 187, 133 Fed. 281 (C. C. A. Wash.).

9. *In re Waugh (Caskey)*, 13 A. B. R. 187, 133 Fed. 281 (C. C. A. Wash.).

untary or involuntary petition may be vacated on proper proceedings and for sufficient cause.¹⁰

§ 430. **Application to Judge, Not Referee.**—The application for the vacating of the adjudication must be made to the judge, not to the referee.¹¹

The referee simply has charge of the administration of the estate, *after* adjudication, and is not a competent court to declare an adjudication void. Nevertheless, if the record itself shows affirmatively that jurisdiction *does not* exist—not merely that it fails to set forth jurisdictional facts—then, possibly, being void on its face it might be disregarded even by the referee. But, in that event the referee would simply pause and refer the whole matter back to the judge; so, even in that event, it would still be true that the vacating would not be done by the referee but by the judge only.

§ 431. **May Vacate "After Term."**—The adjudication may be vacated after the expiration of the term of court wherein entered, for there are no terms of court in bankruptcy.¹²

In *re Ives*, 7 A. B. R. 694, 111 Fed. 495, 113 Fed. 911 (C. C. A. Mich., reversing 6 A. B. R. 653): "The petition shows that several terms of court intervened between the adjudication sought to be vacated and the filing of the petition, and it is urged that an adjudication in bankruptcy is under the control of the court only during the term at which it is made, and can be set aside or modified only during that term; that it, like all other judgments, passes beyond the power of the court when the term at which it was made closes, unless steps are taken during that term to vacate or correct it. The Supreme Court of the United States has, in strong language, expressed this view in all cases coming within the principle of the cases it was considering, when the expressions were made, and that view is not open to question. *Bronson v. Schulton*, 104 U. S. 410, 26 L. Ed. 797; *Phillips v. Negley*, 117 U. S. 665, 29 L. Ed. 1013. But, in § 2, the Bankruptcy Act seems to contemplate that from the filing of the petition to the closing of the estate, the proceeding shall be continuous, and a court of bankruptcy always open, like surrogate and probate courts, where estates are administered and which have no terms. It provides that matters arising in bankruptcy proceedings may be heard in vacation or term time, and orders allowing or disallowing claims may be reconsidered, closed estates reopened, and compositions and discharges set aside. It has been held by the Supreme Court that under the Bankruptcy Act of 1867, the District Court for all purposes of its bankruptcy jurisdiction, is always open, and has no separate terms; that the proceedings in a pending suit are, therefore, at all times open for re-examination upon application therefor in appropriate form, and that any order made in the progress of the case may be subsequently set aside and va-

10. Impliedly, In *re Ives*, 7 A. B. R. 692, 113 Fed. 911 (C. C. A. Mich.).

11. In *re Imperial Corp'n*, 13 A. B. R. 199, 133 Fed. 73 (D. C. N. Y.). Apparently contra, In *re Scott*, 7 A. B. R. 37 (Ref. Mass.). Apparently contra, In *re Clisdell*, 2 A. B. R. 424 (Ref. N. Y.).

12. In *re Jemison Mercantile Co.*, 7 A. B. R. 588, 112 Fed. 966 (C. C. A. Ala.). Compare, as to there being no terms in bankruptcy, In *re Worcester Co.*, 4 A. B. R. 496, 102 Fed. 808 (C. C. A. Mass.).

cated upon proper showing, provided rights have not become vested under it, which will be disturbed by its vacation; and it is held that application for such re-examination will not have the effect of a new suit, but of a proceeding in an old one. *Sandusky v. National Bank*, 23 Wall. 289, 23 L. Ed. 155. This language used in reference to the act of 1867 was said by this court to be applicable to the present Bankruptcy Act in *Re Lemon and Gale Co.*, 7 Am. B. R. 291, 112 Fed. 296. We are of opinion, therefore, that the question presented by the petition was open and the court below had power to determine it, although several terms of the District Court had expired since the adjudication."

And when jurisdiction is challenged, it should be inquired into as soon as possible.¹³

But, in general, the court may consider lack of jurisdiction, at any time, and however brought to its attention.

In *re Columbia Real Estate Co.*, 4 A. B. R. 411, 101 Fed. 965 (D. C. Ind., affirmed in 7 A. B. R. 441.): "Want of jurisdiction is a question that the court should consider whenever or however raised, even if the parties forbear to make it or consent that the case may be considered on its merits."

§ 432. Who May Move to Vacate—Court Sua Sponte.—The court, of its own motion, should vacate the adjudication and dismiss the proceedings, if it discovers it has been acting without jurisdiction.¹⁴

In *re Garneau*, 11 A. B. R. 679, 127 Fed. 677 (C. C. A. Ills.): "But, aside from that, it would be the duty of the court sua sponte, when it is led to suspect that its jurisdiction has been imposed upon, to inquire into the facts by some appropriate form of proceeding, and, for its own protection against fraud or imposition, to act as justice may require. *Morris v. Gilmer*, 129 U. S. 329."

And one not entitled to be heard as matter of right, may, nevertheless, be heard by the court, *ex gratia*, as *amicus curiæ*, where there is allegation of lack of jurisdiction over the subject-matter.¹⁵

§ 433. Any Party in Interest Competent.—Objection to the jurisdiction on the ground that the defendant is not of a class subject to bankruptcy may ordinarily be brought to the attention of the court by any party in interest at any stage of the proceedings.¹⁶

But see *In re Urban & Suburban*, 12 A. B. R. 687 (D. C. N. J.): "The unexplained delay of creditors asking leave to intervene for the sole purpose of moving to set aside an adjudication in involuntary proceedings, disentitles

^{13.} In *re Waxelbaum*, 3 A. B. R. 392, 98 Fed. 589 (D. C. N. Y.). See ante, § 414.

^{14.} In *re Columbia Real Estate Co.*, 4 A. B. R. 411, 101 Fed. 965 (D. C. Ind., affirmed in 7 A. B. R. 441); In *re Waxelbaum*, 3 A. B. R. 395, 98 Fed. 589 (D. C. N. Y.).

^{15.} In *re Columbia Real Estate Co.*, 4 A. B. R. 411, 101 Fed. 965 (D. C. Ind., affirmed in 7 A. B. R. 441); In *re Garneau*, 11 A. B. R. 679, 127 Fed. 677 (C. C. A. Ills.).

^{16.} *Obiter*, In *re Niagara Contracting Co.*, 11 A. B. R. 645, 127 Fed. 782 (D. C. N. Y.). Compare, also, In *re Columbia Real Estate Co.*, 4 A. B. R. 411, 101 Fed. 965 (D. C. Ind.).

them as matter of right to any vacation of the adjudication, but where want of jurisdiction is asserted, the court may consider their objections *ex gratia*.

"An adjudication will not be set aside as matter of favor upon petition of an intervening creditor to consider the objection that the bankrupt is not such a corporation as may be adjudged bankrupt, where it does not appear upon the face of the petition for adjudication whether or not the corporation was engaged principally in any of the pursuits mentioned in § 4 B."

Compare, also, *In re Mason*, 3 A. B. R. 599, 99 Fed. 256 (D. C. N. Car.): "Entire want of jurisdiction over the res may be taken advantage of at any time and attacked collaterally. But where objection goes only to the jurisdiction over the person, it must be taken promptly. A creditor cannot prove his debt, participate in election of trustee and distribution of assets, and then, upon application for discharge, object to jurisdiction on account of bankrupt's non-residence."

§ 434. And Only Such as Have Present Interest.—The only person who may move to vacate an adjudication is one who has an existing interest, not a mere possibility or probability of a future title.¹⁷ Thus, only creditors owning provable claims may move to vacate adjudication.

§ 435. Thus, Creditors Proper Parties.—Creditors although in general bound by the adjudication, may, unless guilty of laches, attack the adjudication on the ground of lack of jurisdiction.¹⁸

§ 436. Laches Bars Right.—But laches may bar the objector's right to a vacating of the adjudication, at least if lack of jurisdiction is not appar-

17. *In re Columbia Real Estate Co.*, 4 A. B. R. 411, 101 Fed. 965 (D. C. Ind., affirmed in 7 A. B. R. 441).

18. *In re Garneau*, 11 A. B. R. 679, 127 Fed. 677 (C. C. A. Ills.); *In re Scott*, 7 A. B. R. 39, 111 Fed. 144 (D. C. Mass.); also, 7 A. B. R. 35 (Ref. Mass.); *obiter*, *In re Hintze*, 13 A. B. R. 721, 134 Fed. 141 (D. C. Mass.).

And it has been held, that the burden of proof still rests upon the bankrupt to establish that he was a resident within the district. *In re Scott*, 7 A. B. R. 39, 111 Fed. 144 (D. C. Mass.). This holding is to be criticised because, where lack of jurisdiction is not apparent on the face of the petition, the burden of the attack assuredly rests on the attacking party.

The referee, it has been held, has jurisdiction to entertain an application for dismissal of petition after adjudication for lack of jurisdiction. *In re Scott*, 7 A. B. R. 35, 111 Fed. 144 (Ref. Mass.). Inferentially, *In re Clisdell*, 2 A. B. R. 424 (Ref. N. Y., reversed, on other grounds, in 4 A. B. R. 95). This holding is to be criticised, for the attack is one upon judgment and for matters dehors the record and it should be made either before the court originally rendering the judgment or before a court of competent equity jurisdiction to set aside judgments, the adjudication not being on its face so absolutely void as to permit it to be disregarded. The referee's jurisdiction is derivative and dependent wholly upon the adjudication and he has no business to go back of the adjudication until the order of reference is recalled or a court of competent jurisdiction has annulled the adjudication. But compare, as to collaterally attacking discharges filed after expiration of statutory time, *In re Fahy*, 8 A. B. R. 354, 116 Fed. 239 (D. C. Iowa). But compare, *In re Clisdell*, 2 A. B. R. 424 (Ref. N. Y., reversed by D. C.). Also compare, *In re Goodale*, 6 A. B. R. 495, 109 Fed. 783 (D. C. N. Y.).

The objection that the bankrupt is a nonresident of the State, will not be considered upon an application for discharge. *In re Goodale*, 6 A. B. R. 495, 109 Fed. 783 (D. C. N. Y.); compare, *In re Mason*, 3 A. B. R. 599, 99 Fed. 256 (D. C. N. Car.). See post, § 2447, "Discharge—Nature of Opposition."

ent on the face of the pleading and must be proved by evidence dehors the record. The application to vacate the adjudication must be promptly made.¹⁹

In *re* Worsham, 15 A. B. R. 672, 142 Fed. 121 (C. C. A. Okla.): "When a bankrupt and all of his creditors have recognized the validity and regularity of proceedings in a court of bankruptcy, have participated therein, and sought the benefit thereof, one of such creditors will not be heard long after the adjudication to object to the jurisdiction of the court upon the ground that the proceedings were instituted in a district in which the bankrupt did not reside or have his domicile or principal place of business for the greater portion of the preceding six months; nor upon the ground that a subpoena to the bankrupt was not issued, he having voluntarily waived the same and entered his appearance; nor upon the ground that the petition failed to allege that the bankrupt was not a wage-earner or a person engaged chiefly in farming or the tillage of the soil. And, for like reasons, he will not be permitted to otherwise contest the petition upon which the adjudication proceeded."

In *re* Niagara Contracting Co., 11 A. B. R. 645, 127 Fed. 782 (D. C. N. Y.): "Objections to the jurisdiction of the court ordinarily may be brought to the attention of the court by any party in interest at any stage of the proceeding. *German Savings Bank v. Franklin Co.*, 128 U. S. 526, 32 L. Ed. 519. In this case the lack of jurisdiction is not apparent upon the face of the petition to have the corporation adjudged bankrupt. Whether the court is without jurisdiction depends entirely upon facts which must first be proved. Under such circumstances, the application to open default in pleading must be promptly made, and upon sufficient cause shown in the moving papers."

In *re* Urban & Suburban, 12 A. B. R. 687 (D. C. N. Y.): "If creditors sleep upon their right to plead to a petition in involuntary bankruptcy until the time for pleading has expired and an adjudication in bankruptcy has been had, they will not be deemed to have any right to a vacation of the adjudication in order that they may then plead. When a creditor applies for an order to set aside such an adjudication for the mere purpose of pleading to the original petition, he must show satisfactory reasons for his delay. The unexplained delay of the interveners in this case disentitles them, as a matter of right, to any vacation of the adjudication."

But, even then, the court of its own motion might vacate the adjudication if it discovers it has been acting without jurisdiction.²⁰

§ 437. But Record of Adjudication Imports Jurisdiction and Need Not Recite All Jurisdictional Facts.—The record of the adjudication need not recite all the requisite jurisdictional facts; the adjudication, when made, imports their existence.²¹ For the silence of the record on the

19. *Obiter*, In *re* Ives, 7 A. B. R. 692, 111 Fed. 495, 113 Fed. 914 (C. C. A. Mich.); In *re* Billing, 17 A. B. R. 92 (D. C. Ala.); compare, In *re* Mason, 3 A. B. R. 599 (D. C. N. Car.), quoted ante, § 433; compare, In *re* Polakoff, 1 A. B. R. 358 (Master's Report, affirmed by D. C.); compare, to same effect, though differently reasoned, In *re* Hintze, 13 A. B. R. 721, 134 Fed. 141 (D. C. Mass.).

20. In *re* Garneau, 11 A. B. R. 679, 127 Fed. 677 (C. C. A. Ills.); In *re* Columbia Real Estate Co., 4 A. B. R. 411, 101 Fed. 965 (D. C. Ind.).

21. In *re* Elmira Steel Co., 5 A. B. R. 487, 109 Fed. 456 (Ref. N. Y.); *Edelstein v. U. S.*, 17 A. B. R. 652, 149 Fed. 636 (C. C. A. Minn.); In *re* First Nat'l Bk. of Belle Fourche, 18 A. B. R. 271 (C. C. A.), quoted post, this paragraph.

jurisdictional facts is different from affirmative showing thereon that the jurisdictional facts *do not exist*.²²

Thus, default adjudication of a corporation will not be vacated because the petition fails to show that it was a corporation of a class subject to bankruptcy, at any rate where the petition does not show that it was *not* of such class.

In *re Urban & Suburban*, 12 A. B. R. 689 (D. C. N. Y.): "The point of this objection is that it does not appear on the face of the petition that the company is a corporation principally engaged in trading or in any of the other pursuits mentioned in § 4b. * * * But neither does it appear that it is not such a corporation. Whether the petition would have been demurrable before adjudication of bankruptcy for this reason it is not necessary to consider."

In *re Columbia Real Estate Co.*, 4 A. B. R. 417, 101 Fed. 970 (D. C. Ind., affirmed in 7 A. B. R. 441): "If, as insisted by counsel, the bankruptcy court is in a technical sense a court of inferior and limited jurisdiction, every fact essential to its jurisdiction must affirmatively appear on the face of the record. It is true that the bankruptcy court is one of limited jurisdiction, and the constitution describes all courts of the United States, except the Supreme Court, as inferior courts. But the Circuit and District Courts of the United States as courts of bankruptcy are courts of record, and as such they are not inferior courts in the sense that jurisdiction must necessarily appear upon the face of the record. *Hays v. Ford*, 55 Ind. 52; *Bank v. Judson*, 8 N. Y. 254; *Skillem's Ex'rs v. May's Ex'rs*, 6 Cranch 267, 2 L. Ed. 574; *Ex parte Watkins*, 3 Pet. 193, 7 L. Ed. 650; *McCormick v. Sullivan*, 10 Wheat 192, 199, 6 L. Ed. 300; *Kennedy v. Bank*, 8 How. 586, 12 L. Ed. 1209.

"The essentials of a valid judgment are jurisdiction of the parties and of the subject matter. The latter is conferred by law; the former by service of process or in some other manner authorized by law, as by the voluntary appearance of the party during the progress of the proceedings. It is insisted that this court had no jurisdiction over the subject-matter, because the petition failed to allege that the Columbia Real Estate Company is a corporation 'engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits,' and because the adjudication was had within 15 days after the petition was filed upon the voluntary appearance and confession of the bankrupt, without service of process upon it. It is not necessary to decide whether the creditors' petition is insufficient upon demurrer or whether it is vulnerable to a direct attack on appeal or otherwise. The question is whether the adjudication of bankruptcy is an absolute nullity for the reasons stated. The power conferred upon the bankruptcy court as a court of record to adjudge a natural person or a corporation a bankrupt necessarily includes the power to determine whether the person or corporation is of the class specified in the act. The creditors' petition in this case follows form 3 of the forms in bankruptcy promulgated by the Supreme Court (18 Sup. Ct. xix.), and contains every essential averment required by that form. The adjudication recites that the petition of Henry A. Taylor and others 'that the Columbia Real Estate Company, a corporation, be adjudged a bankrupt within the true intent and meaning of the acts of Congress relating to bankruptcy, having been heard and duly considered, the said Columbia Real Estate Company is hereby declared and adjudged bankrupt accordingly.' The presumption which attaches to all judgments of courts of

22. In *re First Nat'l Bk. of Belle Fourche*, 18 A. B. R. 271 (C. C. A.).

record, as well as the direct finding that, upon due consideration had, the Columbia Real Estate Company is adjudged a bankrupt 'within the true intent and meaning of the acts of Congress relating to bankruptcy,' concludes all collateral inquiry as to whether or not the corporation was of a class subject to be adjudicated a bankrupt. It will be presumed that the court heard and determined that question, and it was not necessary to set out upon the face of the record the facts or the evidence upon which its conclusion was reached. * * *

"Nor can there be want of jurisdiction over the subject-matter because the adjudication was had on the same day that the petition and answer were filed. There is nothing in § 18 of the Bankruptcy Act which precludes a waiver of process, a voluntary appearance of the bankrupt, and an answer admitting bankruptcy on the day the petition is filed. An adjudication on a voluntary appearance and an answer admitting the averments of the petition would certainly conclude the bankrupt who entered the appearance and filed the answer. It may be when an adjudication has been made without service of process, and before the expiration of 15 days, that the creditors might, upon seasonable application, procure an order vacating the adjudication so far as to allow them to plead and be heard in opposition to the petition. But such right must be exercised with reasonable promptness after actual or constructive notice of the adjudication. In the present case neither the bankrupt nor any creditor is objecting to the adjudication. Their acquiescence shows that they are content."

In *re First Nat'l Bk. of Belle Fourche*, 18 A. B. R. 271 (C. C. A.): "The petition contained no statement that the Widell corporation was not engaged principally in a manufacturing pursuit and no showing that the court was without jurisdiction of the case; but it set forth the substance of a good cause of action, and it was impregnable to attack after the adjudication."

Nevertheless in the case, *In re Elmira Steel Co.* it is held, that an adjudication of a corporation is void where it is founded upon a petition that does not allege that the corporation was principally engaged in manufacture, trading, etc.

§ 438. Voluntary Bankrupt May Move to Vacate.—A voluntary bankrupt is a competent party to have his own adjudication vacated. Thus, where there is no estate, no claims proved and no trustee appointed the bankrupt may have adjudication vacated and withdraw his voluntary petition, although subsequent creditors acquiring liens on subsequently earned property may object.²³ But the adjudication should not be vacated and the voluntary petition dismissed on application of the bankrupt without notice to creditors;²⁴ nor unless all costs and expenses are paid.²⁵

§ 439. Who May Oppose Vacating.—Any party in interest may oppose the vacating of the adjudication. But subsequent creditors who

²³ In *re Hebbart*, 5 A. B. R. 8, 104 Fed. 322 (D. C. Vt.). The court in this case uses the phrase "withdraw the petition" although obviously the adjudication of bankruptcy must first be vacated.

²⁴ See ante, § 419.

²⁵ In *re Salaberry*, 5 A. B. R. 847, 107 Fed. 95 (D. C. Calif.).

Where a voluntary petition, after being filed, is withdrawn and subsequently amended and refiled, the date of the refiled controls as a basis for adjudication. In *re Washburn Bros.*, 3 A. B. R. 585, 99 Fed. 84 (D. C. Conn.).

have, since the adjudication, obtained liens on new property acquired since the adjudication, may not be heard in opposition to the vacating.²⁶ |

§ 440. Grounds for Vacating—No Provable Debt Sufficient Ground.—That there was no provable debt at the date of the adjudication is a sufficient ground for vacating the adjudication. Only debtors owing *provable* debts are entitled to be adjudged bankrupt.²⁷

In *re Yates*, 8 A. B. R. 69, 114 Fed. 365 (D. C. Calif.): This was a case where the only debt scheduled was a judgment rendered against the bankrupt in an action for wilful and malicious injury to the person, from which an appeal was taken before adjudication, the effect of which was to suspend the operation of the judgment. The court held the adjudication should be vacated and the proceedings dismissed because at the date of the filing of his petition there was no existing provable debt. The court says: "The appeal, therefore, from the judgment in the action of *Risdon v. Yates* suspended its operation, and may result in its reversal; and from this it follows that at the date of the adjudication in bankruptcy there was not, nor is there now, any certainty that the plaintiff in the action referred to will succeed in the recovery of any judgment against Yates. Such being the status of the claim for damages involved in that action, it is clear that Yates was not at the date of the filing of his voluntary petition a bankrupt, within the meaning of the law. Section 4 of the Bankruptcy Act provides that 'any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt.' In subdivision 11 of § 1 of that act the word 'debt' is defined as 'any debt, demand, or claim provable in bankruptcy.'"

§ 441. But That Only Debts Not Dischargeable, Insufficient.—It has been held that where the only debts are nondischargeable debts the adjudication should be vacated;²⁸ or as stated in another case, be vacated "in the discretion of the court."²⁹ But, manifestly, it cannot be laid down as a rule that the nonexistence of any dischargeable debt is sufficient ground for vacating. So long as any provable debts exist, although they may not be dischargeable, there may be good reason for the creditor or the bankrupt resorting to the bankruptcy remedies, to avoid preferences or legal liens, or to discover property applicable to the payment of the debts; for the sole object of bankruptcy is not discharge from debts.³⁰

§ 442. Voluntary Adjudication Vacated Where Involuntary Petition Pending.—An adjudication on a voluntary petition, before hearing had on a pending involuntary petition, where the four months limit for setting aside fraudulent or preferential or other voidable transfers will have elapsed and rendered the transfers unassailable if administration

26. In *re Hebbart*, 5 A. B. R. 8, 104 Fed. 322 (D. C. Vt.).

27. See ante, § 191.

28. In *re Maples*, 5 A. B. R. 426, 105 Fed. 919 (D. C. Mont.).

29. In *re Cololuca*, 13 A. B. R. 292 (D. C. Mass.).

30. See ante, "Introduction," § a.

be had under the voluntary proceedings, will be vacated and precedence be given to the involuntary petition.³¹

§ 443. **Disturbing of Vested Rights May Bar Vacating.**—The disturbing of vested rights acquired under the adjudication may prevent vacating.³² This doctrine certainly could not prevail where the record shows on its face affirmatively that jurisdiction did not exist.

DIVISION 3.

EFFECT OF ADJUDICATION IN SUBSEQUENT LITIGATION.

§ 444. **Adjudication as Res Adjudicata.**—The adjudication is binding upon all the world in subsequent litigations between the same adverse parties or their privies as to the status of the debtor as a bankrupt and perhaps also as to the commission of the act of bankruptcy adjudicated and all essential facts involved in the determination of those two issues; and is also binding upon all adverse parties actually engaged in the litigation and their privies likewise as to other essential facts therein contested, such as the validity and amount of the petitioning creditor's claims, etc.³³

Carter v. Hobbs, 1 A. B. R. 215, 92 Fed. 594 (D. C. Ind.): "The adjudication proceeds in rem, and all persons interested in the res are regarded as parties to the bankruptcy proceedings. These parties include not only the bankrupt and the trustee but also all the creditors of the bankrupt," including lienors.

In re Ulfelder Clothing Co., 3 A. B. R. 425, 98 Fed. 409 (D. C. Calif.): "She was the petitioner in the proceeding to have the Henry Ulfelder Clothing Company adjudged bankrupt, and, the alleged fact having been put in issue by the

31. In re Dwyer, 7 A. B. R. 532, 112 Fed. 777 (D. C. N. Dak.). See ante, § 301.

32. *Obiter*, In re Ives, 7 A. B. R. 992, 113 Fed. 611, 11 A. B. R. 643 (C. C. A. Mich.).

Insufficient Grounds for Vacating.—An adjudication of bankruptcy on one act of bankruptcy sufficiently pleaded and proved will not be set aside because other alleged acts were not sufficiently pleaded nor proved. In re Lynan, 11 A. B. R. 466, 127 Fed. 123 (C. C. A. N. Y.).

Default adjudication on written admission by board of directors of inability to pay debts and willingness to be adjudged bankrupt on that ground, where subsequently, new board of directors wish to retract admission: held, too late. In re Imperial Corporation, 13 A. B. R. 199, 133 Fed. 73 (D. C. N. Y.).

33. *Obiter*, In re Continental Corporation, 14 A. B. R. 538 (Ref. Ohio); compare, In re Skinner, 3 A. B. R. 163, 97 Fed. 190 (D. C. Iowa); compare, In re Columbia Real Estate Co., 4 A. B. R. 411, 161 Fed. 965 (D. C. Ind.); compare, In re Cornell, 3 A. B. R. 172, 97 Fed. 29 (D. C. N. Y.); compare, to same general effect, *Bear v. Chase*, 3 A. B. R. 746 (C. C. A. S. C.); compare, In re Harper, 13 A. B. R. 430 (D. C. Va.); compare, *Pepperdine v. Bk. of Seymour*, 10 A. B. R. 573 (St. Louis Court of Appeals). Compare, to same effect, under former Bankruptcy Acts: In re McKinley, 7 Ben. 562, Fed. Cas. 8,864; *Shawham v. Wherritt*, 7 How. 627; In re Wallace, Fed. Cas. 17,094; In re Banks, Fed. Cas. 958; *Morse v. Godfrey*, 3 Story 364, Fed. Cas. 9,856; *Rayl v. Lapham*, 27 O. 452: "The main purpose of the proceedings in bankruptcy is the proper distribution of the estate of the bankrupt among his creditors. Such proceedings are in rem, and actual notice to the creditors is not essential to the jurisdiction of the court." *Lewis v. Sloan*, 68 N. Car. 557; *Thornton v. Hogan*, 63 Mo. 143.

answer to her petition, it was incumbent upon her to prove that she had a legal demand against the corporation for at least \$500 in excess of securities held by her. Bankrupt Act, § 59, subd. b. Without proof of this fact, the corporation and creditor who appeared in opposition to the petition for involuntary adjudication would have been entitled to a dismissal of the proceeding. *In re Cornwall*, 9 Blatch. 114, Fed. Cas. No. 3,250; *Bank v. Moore*, 2 Bond, 170, Fed. Cas. No. 10,041; *In re Skelley*, 2 Biss. 260, Fed. Cas. No. 12,921. The question whether she was a creditor in that amount was therefore a material issue in that proceeding, and the decree therein undoubtedly establishes the fact that she was such creditor. The decree does not show upon its face the particular ground or particular claim of indebtedness upon which this adjudication was made, and in such a case it is competent to show, by extrinsic evidence not inconsistent with the record, the particular matter litigated upon the trial and determined by the judgment. * * * Now, in this case, it appears that upon the trial of the issues in the involuntary proceeding the same promissory note upon which Donie Ulfelder bases her present claim against the bankrupt corporation was offered in evidence to prove that she was a creditor of that corporation, and she relied upon no claim in proof of that fact; and the questions whether such note had been duly executed by the corporation and delivered upon a sufficient consideration were in controversy and litigated upon that trial. The inevitable conclusion from these facts is that the validity of the claim founded upon this promissory note was directly in issue in the proceeding in which the Henry Ulfelder Clothing Company was adjudged bankrupt, and it is equally clear that the decree therein was in favor of its validity, as the court, in adjudging that the petitioner was a creditor of the corporation, could have proceeded upon no other ground than that such note was a valid obligation of the corporation. May the same question be again drawn into controversy in the bankruptcy proceeding in which that decree was given? I think not. In considering the legal effect of this decree, there does not seem to be any reason for a departure from the well settled rule that matters which have been once litigated and determined by the judgment of a court cannot again be made the subject of legal contention, as between the parties to such judgment and their privies. The right to prosecute a proceeding in involuntary bankruptcy is one of the remedies which the law in the cases prescribed in the Bankruptcy Act gives to the creditor for the enforcement of his claim against his debtor, and in such a proceeding the question whether the petitioning creditor has a legal demand against the alleged bankrupt in such an amount as entitles him to maintain the action may be put in issue and tried, and the decision of that question in favor of the petitioning creditor is conclusive, as to the particular claim thus litigated, in all subsequent proceedings in the cause having relation to such claim, so long as the judgment remains in force. The law certainly does not contemplate that the petitioning creditor shall be required to establish the validity of a particular claim against the bankrupt more than once in the same proceeding, unless the court shall, upon some legal ground grant a new trial of such issue." This case, *In re Ulfelder*, is discussed in *Ayres v. Cone*, 14 A. B. R. 743, 750, 751; and in *Silvey Co. v. Tift*, 17 A. B. R. 16, 123 Ga. 804.

To same effect, *In re Virginia Hardwood Mfg. Co.*, 15 A. B. R. 136, 139 Fed. 209 (D. C. Ark.): "The mortgage in controversy was executed on the 26th of January, 1905, and withheld from record until the 13th of February, 1905. A petition in bankruptcy was filed against the bankrupt on the 5th of April, 1905, and on the 17th of May, 1905, it was adjudicated a bankrupt upon a trial before the court, in which the American National Bank, of which the pres-

ent claimant is president, resisted the adjudication on the ground that the bankrupt was not insolvent at the time the mortgage was executed or at the time the petition was filed. The judgment on which this claim is based was recovered on the 8th day of May, 1905, three days after the petition in bankruptcy was filed. It must be taken, therefore, as *res adjudicata* that the bankrupt was insolvent when the mortgage was executed."

But compare, *obiter*, *contra*, in *Neustadter v. Chic Dry Goods Co.*, 3 A. B. R. 28, 96 Fed. 830 (D. C. Wash.): "In this case the original petitioners and the defendant have by their opposition to the petition of the intervenors waived all their rights to assail the judgment, and it is contrary to good practice to permit new parties whose rights are in no way affected to come in now to disturb it. These intervenors are at liberty to commence a new and independent proceeding for the assertion of their rights, and this judgment be pleaded against them, for the reason that as they were not notified, the court did not have jurisdiction to render a judgment binding them."

Compare, to same general effect, *In re Hintze* 13 A. B. R. 721, 134 Fed. 141 (D. C. Mass.): "That a creditor, after adjudication upon a voluntary petition, may in some cases move to have the adjudication vacated because of the bankrupt's nonresidence, was decided by this court in *In re Scott*, 7 A. B. R. 39, 111 Fed. 114. But in that case the court expressly noted that the creditor had moved to vacate the adjudication as speedily as possible, and so had waived none of his rights. Here the creditor, by proving his claim, has assented to the adjudication, and has taken advantage thereof. The motion which he now urges is repugnant to his own action in the case. He contends that the bankrupt's residence so affects the jurisdiction of the court that nonresidence may be set up at any time by any person. But this is not so. Let us suppose that the court now tries the question of residence *de novo*, decides that the bankrupt resided within the district, and accordingly refuses to vacate the adjudication. The creditor cannot thereafter attack the adjudication on the ground of nonresidence, however jurisdictional a matter residence may be. As to him, the bankrupt's residence has become *res judicata*. So the adjudication in bankruptcy, here rendered upon a petition alleging residence, has made that residence *res judicata* for the purpose of this proceeding, and, as the proceeding was *in rem*, has determined the bankrupt's residence as against all the world. The injustice of binding a creditor, who has no notice of the proceeding, requires the court to reopen the question at the instance of such a creditor, who has not, expressly or by implication, assented to the adjudication. In *re Scott*, 7 A. B. R. 39. Where, however, the creditor, by proving his claim, has acquiesced in the adjudication, it is unjust to permit him to dispute that which the court had adjudged with his implied approval. As soon might the Circuit Court permit a defendant to deny the plaintiff's citizenship in a suit depending thereon, after judgment rendered upon a declaration containing all suitable allegations." The court in this case speaks of the adjudication being *res adjudicata*. This seems an unfortunate term to be used in this connection, for it was a motion to vacate an adjudication precisely to prevent its becoming *res adjudicata*. A better classification, it would seem would be to have based the denial on the laches of the creditor.

In re American Brewing Co., 7 A. B. R. 469, 112 Fed. 752 (C. C. A. Ills.): "But we are of opinion that the decision of the referee was correct, in holding that the adjudication in bankruptcy was binding upon the appellants, and conclusive upon the question of insolvency. The appellants, as well as the brewing company, were essentially parties to the petition. In that petition, as one of the grounds of bankruptcy, it was alleged that the American Brewing Com-

pany was insolvent, and was indebted in the sum of over \$900,000, and that within four months next preceding the date of the filing of the petition it committed an act of bankruptcy, in that it did on February 27, 1899, suffer or permit, while insolvent, Albert Magnus and August Magnus, partners doing business under the firm name of Magnus' Sons, to obtain a preference through legal proceedings, which preference consisted in the procurement by confession on the date aforesaid by said A. Magnus' Sons of a judgment in the Superior Court of Cook County, Ill., against said American Brewing Company, for the sum of \$10,050 and costs of suit; that upon said judgment an execution was issued out of said court to the sheriff, and was levied upon a large amount of personal property of said Brewing company. * * * The appellants had an opportunity of answering this petition, but neither they nor the American Brewing Company made any appearance or answer, and judgment went by default in accordance with the law and forms and practice prescribed by the Supreme Court in such cases. To say now that the judgment is not binding upon the question of insolvency is to run counter to well-established principles of law applicable to judgments. If it were necessary, in order to bind creditors by a judgment in bankruptcy, that they should appear and answer, as they always have a right to do, then an adjudication could be prevented simply by creditors abstaining from appearing in the proceedings. But it is well settled that the proceedings are in a large sense in rem, and are binding whether the bankrupt or creditors appear or not. * * *

"The Bankrupt Act (§ 18b) provides that the bankrupt or any creditor may appear and plead to the petition within ten days after the return day, or within such further time as the court may allow. And it is further provided in subdivision 'd' that, if the bankrupt or any of his creditors shall appear within the time limited and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings. And by subdivision 'e' it is further provided that if, on the last day within which pleadings may be filed, none are filed by the bankrupt or any of his creditors, the judge shall on the next day, if present, or as soon thereafter as practicable, make the adjudication or dismiss the petition. From this provision it is quite clear that, in order to bind creditors by an adjudication, it is not essential that they should appear. It is enough that they have the right and opportunity to appear, whether they appear or not. It was clearly the privilege, as well as the duty, of the appellants, if they wished to dispute the allegations in the petition that the confession of judgment on February 27th was an act of bankruptcy, to appear and controvert the facts so alleged. Not having done so, we think the return of the referee was right—that the judgment was binding upon them. They were not interested in several other acts of bankruptcy alleged, but they were interested in that, and it was their duty, as well as privilege, to defend against it. * * *

"A judgment by default is just as conclusive as adjudication between parties of whatever is essential to support the judgment as one rendered after answer and contest, and in such case facts are not open to further controversy if they are necessarily at variance with the judgment on the pleadings. * * * And in *Garner v. Bank (C. C.)*, 89 Fed. 636, it was held, in full accordance with the general doctrine of the cases, that a judgment which determines the right of a party, though by default, is a judgment on the merits, and is conclusive as to such right and all matters which properly belonged to the subject, and which the parties, in the exercise of reasonable diligence, might have brought forward therein. These cases are in line with the general doctrine on this subject, as appears by the adjudged cases."

Compare, to same effect analogously, *Hackney v. Hargreaves Bros.*, 13 A. B. R. 169, 68 Neb. 624: "The schedule was a part of the pleadings in the bankruptcy proceedings, and defendants in these actions are sought to be charged by the trustee as having been given an unlawful preference as creditors of the bankrupt. All the creditors of the bankrupt were parties to the bankruptcy proceedings. In *re Pekin Plow Co.*, 7 A. B. R. 369, 112 Fed. 309. In *re Fraizer*, 9 A. B. R. 21, 117 Fed. 746; In *re Beerman*, 7 A. B. R. 431, 112 Fed. 662." But, although the schedules are part of the pleadings yet perhaps they do not bind creditors. It is simply the **adjudications**, not the pleadings, that bind parties.

Especially is it binding where the party has actually intervened and contested the issue.³⁴

Thus, on the question of insolvency, *Savings Bk. v. Jewelry Co.*, 12 A. B. R. 784, 123 Iowa 432: "It is further made to appear that the plaintiff bank entered its appearance in the bankruptcy proceedings, and filed therein an answer to the petition, among other things denying the insolvency of Morgan. The issue thus made was tried, resulting in an adjudication of bankruptcy. Based on the conditions as thus made to appear, and as related to the question of insolvency, counsel for intervener invoke the doctrine of *res adjudicata*. Counsel for the bank essay to meet this contention by asserting that the bank was not a party to the bankruptcy proceeding, that the filing of its answer was a mere gratuity, and that it became in no way bound by the adjudication, except for the purpose of such bankruptcy proceedings. We may concede that the bank was not a necessary party to the proceedings, yet there could have been no other purpose in its appearance, save in protection of its mortgage interests. Manifestly, an adjudication of bankruptcy, involving of necessity a finding of

34. But see qualified statements of the rule:

1. "All creditors are parties and bound by the proceedings."

Bear v. Chase, 3 A. B. R. 751, 99 Fed. 920 (C. C. A. S. C.): "Upon the adjudication of the bankrupt, all creditors became parties to the bankruptcy proceedings by operation of law and particularly these creditors by whose acts the bankruptcy was caused."

2. All creditors seeking to prove claims.

In *re Keller*, 6 A. B. R. 350, 109 Fed. 118 (D. C. Iowa): "When a person appears in a bankruptcy proceeding for the purpose of proving up a claim, he becomes a party thereto, in such sense that the record in many particulars is evidence against him. Thus, the fact of the adjudication, the existence of claims proved up, and the like, may be shown by the record thereof; but, if issue is taken by the trustee on the right to prove up the claim, then the testimony of witnesses taken before the referee upon other issues, to which the claimant was not in fact a party, and when he was not present and could not exercise the right of cross-examination, is not admissible. In such cases the witnesses, including the bankrupt, must be recalled, unless the claimant consents to the use of the testimony as it appears in the proceedings."

But the creditors are parties irrespective of their appearance and proving of claims.

3. "Adjudication of involuntary bankruptcy raises no presumption of insolvency at any time prior to the filing of the petition."

In *re Chappell*, 7 A. B. R. 608, 113 Fed. 545 (D. C. Va.): "This is not a correct statement of the law. Where the adjudication is based on an act of bankruptcy, involving as an essential element insolvency at a previous date, that adjudication conclusively establishes insolvency as of that date. On the other hand the adjudication may not be *res adjudicata* on the subject of insolvency at all, as where it is not essential to prove insolvency in the proof of the act of bankruptcy relied on.

4. Default adjudication of bankruptcy is a judgment on the merits and is conclusive on all who might by the exercise of proper diligence have defended. In *re Gorman*, 15 A. B. R. 587 (D. C. Hawaii).

insolvency, would be one step gained in an attack on such mortgage interests. By appearing and filing an answer, the bank, in effect, intervened in the proceedings, and its right to do so was not challenged. Having contested in a court of competent jurisdiction, with the other creditors of Morgan the question of his insolvency, we are of the opinion it may not again, in any action involving that identical question, wage a similar contest with a trustee representing such creditors."

Breckons v. Snyder, 15 A. B. R. 116, 211 Pa. St. 176: "If it had not been given to the defendant in discharge of a debt, it was the bankrupt's money in the defendant's hands, which the trustee could recover for creditors. The adjudication was evidence of the bankrupt's insolvency at its date, and it was not necessary to prove insolvency at the trial."

Ayres v. Cone, 14 A. B. R. 739, 138 Fed. 778 (C. C. A. S. Dak.): "Under the Bankruptcy Act, 1898, any creditor may appear and join in an involuntary petition, or be heard in opposition thereto, and those not appearing are in contemplation of law represented by the alleged bankrupt to the extent of being concluded as to all matters directly in issue and determined by the order of adjudication."

But see *Montgomery v. McNicholas*, 15 A. B. R. 94, 138 Fed. 956 (D. C. Pa.): "The record of the verdict of the jury finding that [the bankrupt] committed an act of bankruptcy in that he transferred this liquor license with intent to hinder, delay and defraud his other creditors when he was insolvent, was offered in evidence by the plaintiff. The objection to its admission was sustained."

§ 445. But Better Rule, Adjudication Not Binding Except on Mere Status of Debtor as Bankrupt, unless Parties Actually Contest.—

Perhaps, indeed, the true rule is that the adjudication in bankruptcy, though to be sure it is in a proceedings in rem "binding on the whole world," is not binding on others than those actually engaged in the litigation, except as to the status of the debtor as a bankrupt; that the constructive presence of all creditors does not obtain except as to the subject of the debtor's status; that, therefore, except as to parties who have actually litigated the issues, the adjudication in bankruptcy is not binding in subsequent litigation on the matters of insolvency nor even on the matter of the commission of the very act of bankruptcy on which the adjudication is based; that the doctrine of *res adjudicata* does not apply, because the subjects of the two proceedings are different; in the proceedings on the bankruptcy petition, the subject being the status of the debtor, whilst on the subsequent litigation the subject is the property or a debt entitled to share in the property.³⁵

Silvey & Co. v. Tift, 17 A. B. R. 12, 123 Ga. 804: "An adjudication in bankruptcy is in the nature of a proceeding in rem, and the adjudication is in the nature of a decree in rem, so far as it fixes the status of the defendant in the proceeding as a bankrupt. Considered in the light of a proceeding in rem, the *res* involved is the status of the debtor, and the adjudication determines such status to be that of a bankrupt. All persons are bound by the adjudication to that effect; and this was true under the Act of 1867 as well as under the Act of 1898. If the court rendering the judgment had jurisdiction, such judgment could not be attacked collaterally, but only by a direct proceeding in a compe-

35. To same effect, *In re Continental Corp'n*, 14 A. B. R. 538 (Ref. Ohio).

tent court, unless it appeared that the decree was void in form, or that due notice was not given. *Lamp Chimney Co. v. Brass & Cooper Co.*, 91 U. S. 656, 23 L. Ed. 336; *Chapman v. Brewer*, 114 U. S. 158, 5 Sup. Ct. 799, 29 L. Ed. 83; *Shawhan v. Wherritt*, 7 How. 627, 12 L. Ed. 847 (under the Act of 1841); *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 192, 8 Am. B. R. 1, 22 Sup. Ct. 857, 46 L. Ed. 1, 113. Where a proceeding in rem is against a particular piece of property, as a vessel, for charges against it, it is generally taken into possession, and the property itself is treated as the defendant, liable for its own debts or defaults; and, after seizure, subsequent proceedings are had by citation to the world, of which the owner is at liberty to avail himself by appearing in the case. In the present case, however, there was no such proceeding in rem against the goods. The proceeding was to determine the status of Griffin as a bankrupt, and it neither was nor could have been commenced by a seizure of the property claimed by the defendants. *Mankin v. Chandler*, 2 Brock. 125, Fed. Cas. No. 9,030; *The Sabine*, 101 U. S. 388, 25 L. Ed. 982; *Freeman v. Alderson*, 119 U. S. 187, 7 Sup. Ct. 165, 30 L. Ed. 372. To illustrate further, proceedings to appoint an administrator are also in the nature of proceedings in rem, and, where the court has jurisdiction, are not subject to collateral attack. But it will not be contended that if a person applies for administration, and sets out in his petition that the entire estate of the decedent consists of a certain house and lot, the judgment appointing him would establish the title of the estate to the property, if in fact it belonged to another than the decedent. The judgment would establish the status of the applicant as an administrator, and that he was duly appointed, but would not determine the title to the property.

"There are two kinds of actions which are commonly spoken of as proceedings in rem. The first is a proceeding against the property without suit against its owner, treating the property as if it were the defendant, but with monition or notice giving any person claiming to be the owner an opportunity to appear. In this class of actions, which are strictly in rem, the judgment is against the property alone. The other class of proceedings in rem are proceedings to determine the status of some person or subject-matter. Such are judgments of outlawry, appointments of guardians, administrations, etc., where the proceeding is to determine status, not title to property. The res which makes it a proceeding in rem is the status, and the determination of status is not a conclusive judgment against third parties as to title. Sometimes a judgment in rem has been defined generally to be an adjudication pronounced upon the status of some particular subject-matter by a tribunal having competent authority for that purpose. *Stroupper v. McCauley*, 45 Ga. 74, 78; *Childs v. Hayman*, 72 Ga. 791, 796, 797; *Woodruff v. Taylor*, 20 Vt. 65. In the Act of 1898 it is provided that 'the bankrupt or any creditor may appear and plead to the petition within 10 days after the return day, or within such further time, as the court may allow.' Act July 1, 1898, ch. 541, § 18b (30 Stat. 551 [U. S. Comp. St. 1901, p. 3429]), 1 Fed. St. Ann., p. 583. The bankrupt and his creditors are those given an opportunity to appear and defend against the adjudication in bankruptcy. The defendants in the present case, however, do not claim to be creditors, or defend as such, but contend that they were defrauded out of certain goods, and upon discovering the fraud rescinded the trade and resumed possession of their own goods. To compel them to admit that they were creditors and received the goods as such would require them to waive their defense before they could make it. In some of the decisions creditors are spoken of as being privies of the bankrupt. Often, however, they claim against the debtor rather than as privies. To hold that creditors could, by the petition in bankruptcy and the adjudication, conclusively subject the property of third,

parties, and make it a part of the estate of the bankrupt, if in fact it was not so, would be to go far beyond the determination of his status. To put an extreme case, suppose that creditors should seek to have their debtor declared a bankrupt, and in their petition shall allege that he had conveyed a house and lot to a named person, as one among other grounds of the proceeding, when in fact the debtor had never owned the house and lot, and had never transferred it to the person named at any time. Clearly, an adjudication that the debtor was bankrupt would not invest him or his trustee with title to the property, or operate to take away the title of the real owner, who had never been sued or summoned into court, and who, perhaps, never heard of the proceedings. In such a case, to hold that the adjudication of bankruptcy against the debtor would take away the property of a third person and add it to his estate would approximate more nearly confiscation than adjudication. Suppose one should steal the property of another, and upon its discovery the real owner should resume possession; if later creditors of the thief should file a petition in bankruptcy against him, alleging that he had given a preference to the owner, surely an adjudication that the thief was a bankrupt would not vest the stolen property in him or the trustee. The object of the proceeding is to have the debtor adjudged to be a bankrupt, not to recover property from third parties. They cannot deny that he is a bankrupt, but they can deny that he owns their property. To adjudge A.'s status is not to adjudge B.'s property. * * *

"A slight consideration of the difference between the issues involved in a proceeding in bankruptcy and a suit to recover property from a person holding it adversely and claiming to be the owner will show that the two proceedings are not identical, and that the former is not conclusive of the latter, except as to determining the status of the bankrupt as such. The issue in the former proceeding is whether the debtor is or is not a bankrupt within the meaning of the Act of Congress. Where it is sought to recover property from one alleged to be a creditor who had received a preference, the proceeding rests upon § 60b of the Bankrupt Act, which reads as follows: * * * The various requisites to recovery under this section of the Act are quite different from the mere determination upon the proceedings in bankruptcy that the debtor is a bankrupt.

"The position may be further illustrated by considering a voluntary proceeding in bankruptcy. While differing from a proceeding in invitum, the adjudication there as to the status of the bankrupt would also be, to some extent, in the nature of a judgment in rem, so as to show that he was a bankrupt, but certainly it would not be pretended that a person voluntarily going into bankruptcy could possess himself of property which did not belong to him, or have the title to property claimed by third parties adjudicated to be his, no matter what allegation he might make in his petition or schedule. The adjudication in bankruptcy, therefore, conclusively determined the status of Griffin as a bankrupt, but did not conclude the defendants from making their defense on a suit by the trustee in bankruptcy against them to recover the property."

§ 446. Adjudication on Ground of Preference Not Binding on Issue of Reasonable Cause for Belief.—An adjudication on the ground of a preference, at any rate, is not binding in subsequent litigation to recover the preference, on the issue of the existence of reasonable cause for belief on the creditor's part,³⁶ for such issue is immaterial on the hearing upon the petition for adjudication.

³⁶. Whether adjudication is *res adjudicata* as to respondents relation being that of partners, query, *In re Hudson Clothing Co.*, 17 A. B. R. 826 (D. C. Me.).

Hussey v. Dry Goods Co., 17 A. B. R. 516 (C. C. A. Kas.): "It is contended that the adjudication which followed on that petition is *res adjudicata* of the present claim of the dry goods company. There is no merit in that contention. Conceding that under the authority of *In re American Brewing Co.*, 7 Am. B. R. 463, 112 Fed. 752, and *Ayres v. Cone*, 14 Am. B. R. 739, 138 Fed. 778, the dry goods company would be estopped from again litigating the issues raised by the creditors' petition, namely, whether Sowers was in fact insolvent, or whether he made the alleged transfer with intent to prefer the dry goods company, there is yet left the issue involved in the present case, whether at the time the transfer was made the dry goods company had reasonable cause to believe it was intended by Sowers as a preference, or, as simplified in this case, whether it then had reasonable cause to believe Sowers was insolvent. The giving of a preference by an insolvent as defined by § 60 (a) affords sufficient ground for an adjudication of bankruptcy against him, but is not sufficient to avoid the transfer constituting a preference as against the person receiving it. To accomplish the latter, it must be shown, additionally, that the one receiving it had reasonable cause to believe it was a preference. An issue of that kind was not and could not properly have been presented or tried in the petition for adjudication. In *re Rome Planing Mill* (D. C.), 3 Am. B. R. 123, 96 Fed. 812. The general rule is that the estoppel of a judgment extends only to those material matters in issue or to those without proof of which it could not properly have been rendered."

§ 447. Adjudication Not Binding as to Petitioning Creditors' Claims When Presented for Allowance.—But the adjudication is not binding upon those not actually parties to the litigation as to the amount nor validity of the petitioning creditors' claims when subsequently presented in the administration of the estate for allowance to share in dividends.³⁷

See dissenting opinion in *Ayres v. Cone*, 14 A. B. R. 748, 138 Fed. 778 (C. C. A. S. Dak.): "Did the adjudication of bankruptcy estop the objecting creditors and the trustee who represents them from contesting the allowance of the claim of the appellees and their right to share in the estate of the bankrupt? It is not material whether or not the adjudication estopped the bankrupt, and for that reason it is conceded that on March 28th, 1904, when Gentle was adjudged a bankrupt, 25 days after the filing of the petition in bankruptcy, the issue whether or not he was indebted to the appellees in the sum of \$5,861 became *res adjudicata* between the petitioning creditors and the bankrupt. The estoppel of that adjudication, however, did not arise until that day, which was 25 days after the rights of all creditors in the estate had become fixed, and it did not bind any one who was not a party to the litigation of the issues which that judgment determined.

"Although the bankrupt was thus debarred from subsequently contesting the claim, the adjudication against him gave the owners of that claim no right to any share in his estate or to any dividend from its proceeds. Their right to that share and to that dividend was conditioned by the express terms of the Bankruptcy Act by a subsequent proof of their claim by a written statement under oath (§ 57a) and by its allowance by the referee or by the court, and the trustee and other creditors were expressly granted the right to object to and to contest that allowance after the proof had been filed. Sections 57c, 57k, 30

³⁷. In *re Continental Corporation*, 14 A. B. R. 538 (Ref. Ohio).

Stat. 560; 561 (U. S. Comp. St. 1901, pp. 3443, 3444). Not only this, but the duty still rested upon the bankrupt to 'examine the correctness of all proofs of claims filed against his estate' (§ 7 [3], 30 Stat. 548 [U. S. Comp. St. 1901, p. 3425]), and, 'in case of any person having to his knowledge proved a false claim against his estate, disclose that fact immediately to his trustee' (§ 7 [7]), and the duty was imposed upon the trustee to defeat such a claim if possible. *Chatfield v. O'Dwyer*, 4 Am. B. R. 313, 101 Fed. 797, 799, 42 C. C. A. 30, 32.

"Identity of parties is as essential to an estoppel by res adjudicata as identity of causes of action. *Fowler v. Stebbins*, 136 Fed. 365 (decided at the last term). The objecting creditors were not named as defendants. They did not appear, answer, or take any part in the litigation which resulted in the adjudication of bankruptcy. Upon familiar principles, that litigation was therefore res inter alios acta as to them, and they were not bound by the determination of the issues which the parties might present in it, and which the Bankruptcy Act required to be litigated at another time and place. This rule is invoked and applied by the express provisions of that Act that the creditors may exercise the option to appear in and be barred by the adjudication (§ 18b-d, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429]), or to refrain from taking part in it and be free from it, and that they may object to and contest the allowance of claims of all other creditors, without exception (§ 57d). Since no exception of the claims of petitioning creditors from this right of other creditors to contest them was made by the Congress, the conclusive legal presumption arises that it intended to make none, and it is not the province of the courts to do so. *Webber v. St. Paul City Ry. Co.*, 38 C. C. A. 79, 82, 97 Fed. 140, 143; *Madden v. Lancaster Co.*, 12 C. C. A. 566, 573, 65 Fed. 188, 195; *McIver v. Ragan*, 2 Wheat. 25, 29, 4 L. Ed. 175; *Bank of State of Alabama v. Dalton*, 9 How. 522, 528, 13 L. Ed. 242; *Vance v. Vance*, 108 U. S. 514, 521, 2 Sup. Ct. 854, 27 L. Ed. 808.

"Moreover, the Bankruptcy Act has provided a time, a place, and a tribunal where all claims to share in the estate must be heard and allowed upon proofs of claims, and has given the right to all creditors to contest them there. From this provision the presumption necessarily arises that this time, place, and tribunal were to be exclusive, and that all creditors are relieved from the necessity of contesting claims to share in the estate at any other time or place. Petitioning creditors, like all others, are required to prove and secure an allowance of their claims in the face of the objections of other creditors, notwithstanding the adjudication of bankruptcy in their favor. The litigation upon their petition is not the time nor the place prescribed by the law for the trial of the question whether or not, or to what extent, their claims may share in the distribution of the estate of the bankrupt. The logical and inevitable conclusion from these considerations appears to me to be that, when the validity and extent of a petitioning creditor's claim is determined in the litigation upon the petition which results in the adjudication of bankruptcy, the bankrupt and those creditors, and those only who either voluntarily or involuntarily become parties to that litigation, are estopped by the determination there of the petitioner's claim, while all other creditors and the trustee who represents them, when the petitioning creditor's claim to share in the estate is subsequently presented to the referee or the court for allowance, are free to contest it upon its merits as it stood at the time of the filing of the petition in bankruptcy, regardless of the subsequent adjudication.

"Nor is this conclusion without authority to support it. The only direct decision upon the question sustains it. That is the decision of Judge DeHaven in *In re Henry Ulfelder Clothing Co.* (D. C.), 3 Am. B. R. 425, 98 Fed. 409, cited by the majority. There is an obiter dictum in the opinion in that case.

which will be subsequently considered, to the effect that the bankrupt is the representative of all the creditors in a litigation upon a petition for an adjudication in bankruptcy, and that the determination of any material issue between the petitioning creditor and the bankrupt in that litigation estops all the creditors, whether they are parties to the proceeding or not. The decision in the case, however, repudiates this novel theory, and sustains the position that the determination of the validity and extent of claims in such a proceeding binds only those creditors who are in their own persons parties to the litigation. The case was this: Donie Ulfelder filed a petition in bankruptcy against the Henry Ulfelder Clothing Company, a corporation in which she alleged that the corporation owed her \$2,000, that it was insolvent, and that it had committed an act of bankruptcy. The corporation and one of its creditors, Bernard Lowenstein, appeared and filed answers to this petition, in which they denied that the petitioner was a creditor of the corporation and that the corporation was insolvent. Upon the trial of these issues the petitioner introduced in evidence a promissory note of the corporation to her for \$2,200, to prove that she was its creditor, and two other promissory notes of the corporation, one to Henry Ulfelder for \$1,800 and one to A. Levy for \$1,440, for the purpose of proving its insolvency. The corporation and Lowenstein introduced evidence tended to show that the three notes were never executed by the corporation and were without consideration. The court found the issues for the petitioner, and adjudged the corporation a bankrupt. Thereafter the three claims were presented to the referee for allowance by Donie Ulfelder, Henry Ulfelder and A. Levy, respectively, and the bankrupt and Bernard Lowenstein objected to their allowance, upon the same grounds which they had urged at the trial upon the petition in bankruptcy. Neither the trustee nor any other creditor made any objection. The court decided that the issue over the validity of the claim of the petitioner, Donie Ulfelder, was *res adjudicata* between these parties, because the bankrupt and Lowenstein were both parties to the suit on the petition and to the trial of that issue in that litigation and denied them permission to contest that claim upon its merits. But the court also decided that the issues over the validity of the claims of Henry Ulfelder and A. Levy were not *res adjudicata* even against the corporation and Lowenstein, notwithstanding the fact that they were material issues and had been carefully tried and determined in the litigation upon the petition, because neither Henry Ulfelder nor A. Levy were parties to the litigation. The court accordingly reversed the order of the referee and directed him to try these issues upon the merits, regardless of the adjudication in bankruptcy. In *re Henry Ulfelder Clothing Co. (D. C.)*, 3 Am. B. R. 425, 98 Fed. 409-411, 413, 414.

"It is obvious that this decision was a direct repudiation of the proposition that the estoppel of the bankrupt was the estoppel of the creditors, because under that theory the estoppel of the bankrupt to contest the claims of Levy and Henry Ulfelder must have estopped them although they were not parties to the litigation. The theory that after the filing of the petition the bankrupt is the representative of the creditors, and that his subsequent estoppel affects the rights of creditors, in the property which he owned at the time the petition was filed, is fallacious, because the status of claims of creditors and the status of the property at the time of filing the petition, and at that time alone, fixes the rights of the parties, and because the power of disposition and application of the property at will, and hence the power to bind it and the creditors, its beneficial owners, is divested from the bankrupt by the law, and vested in the creditors and the court, when the petition in bankruptcy is filed. It is for this reason that the decision in *Candee v. Lord*, 2 N. Y. 269, 52 Am. Dec. 294, is

neither controlling nor persuasive here. In that case Russell Lord, a debtor, confessed a judgment in August, 1843, for \$1,400, in favor of Henry Lord, and a second judgment, during the same month, for \$1,250, in favor of Champlin. On March 29, 1844, Candee recovered a judgment against Russell Lord for \$1,142.90. He brought a suit upon this judgment to avoid the prior judgments for fraud, and Henry Lord and Champlin answered that his judgment was founded upon a forged note. The court rightly held that in the absence of fraud they were bound by the judgment against their debtor, because at the time it was rendered he had the right and the power to sell, to dispose of, to charge with liens, and to apply his property to the payment of his debts as he chose, so that any deed, assurance, or judgment of their debtor estopped his creditors as well as himself. In the case at bar the bankrupt, Gentle, was deprived of his right and power of disposition 25 days before the estoppel by the adjudication in bankruptcy arose, and for that reason his deeds, assurances, and estoppels after the filing of the petition in bankruptcy bound neither his creditors nor the property, which had vested in the court in trust for the creditors when the petition was first deposited. The condition of this property and of the parties after the filing of the petition will more clearly appear by a brief consideration of the effect of that filing upon the rights of the bankrupt and the creditors."

Compare suggestive reasoning in *In re Plymouth Cordage Co.*, 13 A. B. R. 670, 135 Fed. 1000 (C. C. A. Okla.): "The fact that there is no averment that the creditors are less than twelve cannot be more fatal to the right of the petitioner to an adjudication in bankruptcy than the fact that he has made such an averment, which, upon the trial, proves to be without foundation in fact. The truth is that the contention of counsel for the respondent fails to distinguish between the averments essential to jurisdiction over the subject-matter and the parties and those requisite to invoke a favorable adjudication upon the petition. Jurisdiction of the subject-matter and of the parties is the right to hear and determine the suit or proceeding in favor of or against the parties to it. The facts essential to invoke this jurisdiction differ materially from those essential to constitute a good cause of action for the relief sought. A defective petition in bankruptcy or an insufficient complaint at law, accompanied by proper service upon the defendants, gives jurisdiction to the court to determine the questions it presents, although it may not contain averments which entitle the complainant to any relief; and it may be the duty of the court to determine either the question of its jurisdiction or the merits of the controversy against the petitioner or plaintiff. Allegations indispensable to a favorable adjudication or decree include all those requisite to state a complete cause of action, and they comprehend many that are not requisite to the jurisdiction of the suit or proceeding. The averment that all the creditors of Smith were less than twelve was not of the former, but of the latter, class. It was not essential to invoke the jurisdiction of the court over the parties to the proceeding and the property it involved, because the act of Congress gave that court, upon the filing of the petition of the creditor, jurisdiction to hear and determine the questions it presented, whether they were questions of jurisdiction or upon the merits. Not only this, but the averment that the creditors were less than twelve was not even essential to a favorable adjudication upon the petition, because the Bankruptcy Law provided that if two other creditors, whose claims were sufficient in amount, joined in the petition of the cordage company, the court might proceed to adjudicate the issue of bankruptcy upon the merits, although the creditors exceeded twelve in number."

Contra, *Ayres v. Cone*, 14 A. B. R. 739, 138 Fed. 778 (C. C. A. S. Dak.): "Where in a proceeding to have a debtor adjudged bankrupt, the validity of the claim of a petitioning creditor is put in issue by the pleadings and adjudged valid, the creditor cannot be required to establish it again before the referee when presented for allowance, at the suggestion of the bankrupt and other creditors, not parties to the petition." But see the dissenting opinion in this case, which, in the author's opinion, states the truer rule.

But the adjudication is binding upon parties or their privies who have actually litigated the same issue in the hearing upon the petition for adjudication.³⁸

The adjudication is not, however, binding as to collateral matters not directly brought in issue.³⁹

Inferentially, *Pepperdine v. Bank*, 10 A. B. R. 573 (St. Louis Ct. Appeals): "Appellant urges that the adjudication in bankruptcy is conclusive upon respondent, asserting that the question in issue in the present case was the identical question decided by the bankruptcy court. The bankruptcy court had no lawful authority to pass upon any but the sole issue before it—whether within four months next before the petition Good committed an act of bankruptcy by suffering defendant to obtain judgment against him on March 24, 1899—and no adjudication upon any other issue was sought or rendered in the proceeding."

Nor will the adjudication on an act of bankruptcy committed at one time revert to an earlier date to prove insolvency.⁴⁰

But of course it would be admissible whenever proof of a later condition of insolvency would be competent as tending to prove insolvency at an earlier period.

§ 448. Refusal to Adjudge Bankrupt, after Hearing Merits, Res Judicata as to All; and Second Petition Not Maintainable.—It has been held, obiter, that the refusal to adjudge bankrupt is not res adjudicata binding upon other and different creditors as to the same acts of bankruptcy.⁴¹

Obiter, *In re Lavoc*, 13 A. B. R. 400, 134 Fed. 237 (C. C. A. N. Y.): "Reference is made in the brief to the circumstance that the answer avers that the acts of bankruptcy now alleged were set forth in a former petition brought by three other creditors, were denied, and the issues thereon raised considered by the judge who determined them in the bankrupt's favor. It is not contended that there cannot be another trial of the same issues, when different petitioning creditors appear."

But these decisions seem to be of doubtful authority. Bankruptcy proceedings are proceedings in rem, binding on all the world as to the commission or noncommission of the acts of bankruptcy therein alleged. After refusal to adjudicate a debtor bankrupt, other creditors may *not* file a new

38. *In re Ulfelder Clothing Co.*, 3 A. B. R. 425, 98 Fed. 409 (D. C. Cal.).

39. *In re Ulfelder Clothing Co.*, 3 A. B. R. 425, 98 Fed. 409 (D. C. Cal.).

40. *Martin v. Bigelow*, 7 A. B. R. 220 (Sup. Ct. N. Y.).

41. Obiter, *Neustadter v. Chic. Dry Goods Co.*, 3 A. B. R. 96, 96 Fed. 830 (D. C. Wash.).

petition upon the same acts of bankruptcy and relitigate the issues; the first adjudication is binding in the bankrupt's favor as to all the world.

§ 449. **Laches Bars.**—Laches will bar the creditors' right to interpose the defense of lack of jurisdiction to adjudge bankrupt.⁴²

In re Mason, 3 A. B. R. 599, 99 Fed. 256 (D. C. N. Car.): "Creditors, when bankruptcy proceedings have been commenced, must promptly, by motion or petition to vacate the adjudication, object to the jurisdiction of the court, or the objection is waived. A creditor cannot prove his debt and file the same, as in this cause, participate in the election of a trustee, distribute the estate, use the proceeds for his benefit, and then, on the application of the bankrupt for a final discharge, for the first time object to the jurisdiction. Entire want of jurisdiction over the subject-matter may be taken advantage of at any time, and it is never too late to make the objection, and it may be collaterally attacked. Freem. Judgm. 120-117, et seq. But, where objection goes merely to a want of jurisdiction of the person or the thing, there may be a waiver of the objection, or restriction as to the manner and time of making it."

§ 450. **Collateral Attack on Adjudication.**—Adjudication (unless it is void on its face) may not be collaterally attacked.⁴³

Wilson v. Parr, 8 A. B. R. 230 (Ga. Sup. Ct.): "It is claimed, by the answer of some of the defendants to the petition filed by the creditors of the bankrupts, that the adjudication in bankruptcy was fraudulent and void in so far as those respondents were concerned, for reasons set forth by them. It is enough for us to say, in reply to this contention, that, when an adjudication in bankruptcy has in fact been had by the bankruptcy court, such an adjudication will be respected by the State court, and the latter court will not, after a regular adjudication has been had, enter into an inquiry as to whether such adjudication was fraudulent or void. Mr. Black, in the first volume of his work on Judgments (§ 248), citing the case of Chapman v. Brewer, 114 U. S. 158, 5 Sup. Ct. 799, 29 L. Ed. 83, which upon examination seems to support his text, declares: 'An adjudication in bankruptcy, having been made by a court having jurisdiction of the subject matter, upon the voluntary appearance of the bankrupt, and being correct in form, is conclusive of the fact decreed, and cannot be attacked collaterally in a suit brought by the assignee against a person claiming an adverse interest in the property of the bankrupt,' and Mr. Freeman, in his work on Judgments (volume 2, § 337), declares that discharges in bankruptcy and other orders and decrees of courts of bankruptcy cannot be collaterally impeached by proving them to be irregular, for which proposition he cites a number of cases found in note 1 of page 612. See, also, Brady v. Brady,

⁴². In re Polakoff, 1 A. B. R. 358 (Master, affirmed by D. C. N. Y.). Compare, ante, § 436, as to laches barring creditor's right to move for vacating of adjudication.

Jurisdiction is not affected by failure to file the petition or schedules at the time of their verification. In re Berner, 3 A. B. R. 325 (Ref. Ohio).

⁴³. In re Columbia Real Estate Co., 4 A. B. R. 411, 101 Fed. 965 (D. C. Ind.); In re Goodale, 6 A. B. R. 493, 109 Fed. 783 (D. C. N. Y.). Nonresidence of the bankrupt is not a question that can be considered on discharge hearing. In re Clisdell, 4 A. B. R. 95 (D. C. N. Y.), reversing, on this point, 2 A. B. R. 424 (Ref. N. Y.). Compare, *quære*, In re Berner, 3 A. B. R. 325 (Ref. Ohio). Compare, In re Mason, 3 A. B. R. 599, 99 Fed. 256 (D. C. N. Car.); (1867) In re Fallon, Fed. Cases, No. 4,628; Edelman v. U. S. 17 A. B. R. 649 (C. C. A. Minn.).

71 Ga. 71. Many other authorities could readily be cited to prove that, where an adjudication in bankruptcy has been made by a court of competent jurisdiction, such adjudication will be respected by the State Court, and the question whether it was erroneously made or not, will not be entertained by such court, but the whole matter will be relegated to the proper bankruptcy court in which such adjudication was had, and there the parties complaining may and can have all objections to the regularity of the proceedings of such court considered and passed on."

Thus, lack of jurisdiction to adjudicate bankrupt will not be considered on the hearing upon the bankrupt's petition for discharge.⁴⁴ Nor upon trial for the crime "False Oath."⁴⁵

But where the adjudication is absolutely void on its face, of course it may be disregarded. But, in this connection the distinction is to be noted between an adjudication, the record of which shows affirmatively that jurisdiction does not exist, and an adjudication whose record simply omits to show jurisdictional facts. An adjudication whose record simply omits to show jurisdictional facts may be helped out by the presumption of law that the court did find jurisdictional facts to exist, although the record may be silent. Jurisdiction is imported. Of course such presumption of law could not exist where the record affirmatively declares that such jurisdictional facts did not exist.⁴⁶

§ 451. Contractual Relations Not Affected unless Merged in Provable Debts.—Adjudication in bankruptcy does not sever contractual relations as such.⁴⁷

Watson v. Merrill, 14 A. B. R. 453, 136 Fed. 363 (C. C. A. Kas.): "An adjudication in bankruptcy does not dissolve or terminate the contractual relations of the bankrupt, notwithstanding the decisions to the contrary in *In re Jefferson* (D. C.), 2 Am. B. R. 206, 93 Fed. 448; *Bray v. Cobb* (D. C.), 3 Am. B. R. 788, 100 Fed. 270; and in *In re Hays, Foster & Ward Co.* (D. C.), 9 Am. B. R. 144, 117 Fed. 879. Its effect is to transfer to the trustee all the property of the bankrupt except his executory contracts, and to vest in the trustee the option to assume or to renounce these. It is the assignment of the property of the bankrupt to the trustee by operation of law. It neither releases nor absolves the debtor from any of his contracts or obligations, but, like any other assignment of property by an obligor, leaves him bound by his agreements, and subject to the liabilities he has incurred. It is the discharge of the bankrupt alone, not his adjudication, that releases him from liability for provable debts in consideration of his surrender of his property, and its distribution among the creditors who hold them. Even the discharge fails to relieve him from claims against him that are not provable in bankruptcy, and since his obligation to pay rents which are to accrue after the filing of the petition in bank-

⁴⁴. *In re Goodale*, 6 A. B. R. 493, 109 Fed. 783 (D. C. N. Y.); *In re Mason*, 3 A. B. R. 599, 99 Fed. 256.

⁴⁵. *Edelstein v. U. S.*, 17 A. B. R. 649, 149 Fed. 636 (C. C. A. Minn.).

⁴⁶. See further, as to this distinction, ante, § 437, et seq.

⁴⁷. *In re Brew Co.*, 16 A. B. R. 110 (D. C. Mo.), quoted ante, § 444. Contra, *Bray v. Cobb*, 3 A. B. R. 791, 91 Fed. 102 (D. C. N. Car.), reversed in *Cobb v. Overman*, 6 A. B. R. 324, 109 Fed. 65.

ruptcy may not be the basis of a provable claim, his liability for them is neither released nor affected by his adjudication in bankruptcy, or by his discharge from his provable debts. One agrees to pay monthly rents for the place of residence of his family or for his place of business, or to render personal services for monthly compensation for a term of years; he agrees to purchase or to convey property; and he then becomes insolvent and is adjudicated bankrupt. His obligations and liabilities are neither terminated nor released by the adjudication. He still remains legally bound to pay the rents, to render the services, and to fulfill all his other obligations, notwithstanding the fact that his insolvency may render him unable immediately to do so. Nor are those who contracted with him absolved from their obligations. If he or his trustee pays the stipulated rents for his place of residence or for his place of business, the lessors may not deny to the payor the use of the premises according to the terms of the lease. If he renders the personal services, he who contracted to pay for them may not deny his liability to discharge this obligation. His trustee does not become liable for his debts, but he does acquire the right to accept and assume or to renounce the executory agreements of the bankrupt, as he may deem most advantageous to the estate he is administering, and the parties to those contracts which he assumes are still liable to perform them. And so throughout the entire field of contractual obligations the adjudication in bankruptcy absolves from no agreement, terminates no contract, and discharges no liability. In *re Curtis* (La.), 9 Am. B. R. 286; In *re Ells* (D. C.), 3 Am. B. R. 564, 98 Fed. 967, 968; *Witthaus v. Zimmerman*, 11 Am. B. R. 314, 316, 86 N. Y. Supp. 315; *White v. Griffing*, 44 Conn. 437, 446, 447; In *re Pennewell*, 9 Am. B. R. 490, 119 Fed. 139, 55 C. C. A. 471."

Unless, of course, such contractual relations have become merged in provable claims, and even then it is not the contractual relation that is severed but the claim into which it is merged that is discharged.

Impliedly, In *re Adams*, 12 A. B. R. 368, 370 (D. C. Mass.): "The creditors seek also to prove their damages for breach of the executory contract. If the contract was broken at or before bankruptcy, they can prove. In *re Stern*, 8 A. B. R. 569, 116 Fed. 604. It seems that this contract was broken by bankruptcy as of the date of filing the petition."

But contracts for liens as security for debts upon property to be acquired in the future will not affect property acquired after adjudication; as, for instance, contracts for liens on future earned wages where the State law holds such wages to be future acquired property and not simply future accruals under presently possessed property.⁴⁸

In *re West*, 11 A. B. R. 782, 128 Fed. 205 (D. C. Ore.): "The theory of a lien upon the earnings of future labor is not that it attaches to such earnings from the moment of contract of pledge or assignment, but from the moment of their existence. It is needless to say that there can be no lien upon what does not exist. A pledge or assignment of future wages under an existing employment is said to create an equitable interest in such wages. *Stott v. Franey*, 20 Ore. 410, 23 Am. St. Rep. 132. This is true of wages earned upon a general employment, as well as those earned upon a definite contract. In this case the railroad company was under no obligation to employ the bankrupt, nor he to work for the company. If future earnings in such a case can be said

48. In *re Karns*, 16 A. B. R. 841 (D. C. Ohio).

to have a potential existence, they are the subject of an agreement for a lien; but the lien, or the so-called equitable interest, does not attach until the wages come into existence, and until the lien does attach there is no lien. The discharge in bankruptcy operated to discharge these obligations as of the date of the adjudication, so that the obligations were discharged before the wages intended as security were in existence. The law does not continue an obligation in order that there may be a lien, but only does so because there is one. The effect of the discharge upon the prospective liens was the same as though the debts had been paid before the assigned wages were earned. The wages earned after the adjudication became the property of the bankrupt clear of the claims of all creditors. Collier on Bankruptcy, 509. These debts cannot escape the operation of the Bankruptcy Law by an agreement for a lien upon what the debtor expected to earn, but did not earn until after the adjudication of bankruptcy."

In re Home Discount Co., 17 A. B. R. 180 (D. C. Ala.): "The effect of the assignment, without regard to its infirmities under the local statute, is avoided by the provisions of the bankruptcy law as to wages earned after the filing of the petition. The power or ability of the debtor to earn wages in the future under a subsisting contract, standing apart from anything which it has brought into existence as property, is the mere right of the debtor to create property in the future. One dominant purpose of the bankruptcy statute is to prevent creditors from seizing, directly or indirectly, upon this right of the bankrupt, after his adjudication, by applying its subsequent fruits to anterior obligations. This right of the bankrupt falls neither under the head of lands, chattels nor choses in action, and it is not vendible. It is not subject to seizure on execution at law, or equitable attachment, and equity will not appoint a receiver to intercept the expected fruits of its exercise. Specific performance of a contract as to future personal services will not be decreed. In a broad sense, the right of a man to render personal services under an existing contract may be said to be his property; but the nature of the right is such that no one can compel him to exercise it, or get title to or lien upon it. The law, except as a punishment for crime, can never take this right away from a man, or confer any property in the right itself upon another man. It can affect the right only by dealing with the property it brings into existence. Whether it can then be taken depends upon the man's status at the time, and whether the law then gives a remedy for the enforcement of his contract concerning the thing his labor has brought into existence. The debtor's right to earn wages in the future and to dispose of the fruits of his labor is not 'property' in any sense in which the bankruptcy statute uses the term, but constitute rather rights and privileges which go to make up a man's liberty and freedom. The plain purpose of the statute is that the title and right to all things and rights which do not fall within the vesting words of § 70 of the bankruptcy statute (30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]) shall remain in the bankrupt, and that as to the rights or things thus saved to him he shall be released from all liability to answer for prior debts and contracts, with certain exceptions not here material. The right of the debtor to work and contract for future service is not mentioned, directly or inferentially, in the rights or things required to be sold, appraised or scheduled, or which pass to the trustee for the benefit of creditors. The studied enumeration of the particular rights and things which the bankrupt is required to surrender takes all other rights and things not named without the definition, thus fixed, of the 'property' which the statute intends to take from the bankrupt or to pass to his creditors. Whatever he is not required to surrender is his absolutely, freed from the enforcement of the obligation of his prior contracts, unless at the time of the filing of the petition.

it has taken the form of property, upon which a lien has fastened. In that event only does he take it subject to the performance of prior contracts concerning it. If a debtor should solemnly contract for a present valuable consideration not to avail himself of the benefit of a discharge against the enforcement of a contract as to wages to be earned when they do actually come into existence his undertaking would be void on grounds of public policy. *Nelson v. Stewart*, 54 Ala. 115, 25 Am. Rep. 660. Equity, therefore, cannot import into the obligation of the assignment any promise of the assignor, upon which to build an equity to the lien, that the power will be exercised after the adjudication, to bring wages into existence to satisfy the terms of a prior assignment, or that the bankrupt will not avail himself of a release from the obligation, when it is sought to enforce it after his discharge. The adjudication of a debtor, followed by a discharge, takes away all remedy for the enforcement of the obligation of the contract concerning wages earned after his bankruptcy, precisely as the discharge releases the debtor from the performance of the obligation of his promissory note made prior to the adjudication."

But where, by the state law, an assignment of a contract to be performed by the assignor in the future will pass future accruals thereunder as of the date of the original assignment, undoubtedly the future accruals resulting from the continued performance of the contract will pass to the assignee thereof and the assignor's trustee in bankruptcy will take no title thereto, except, of course, in so far as the original assignment might or might not itself be defeasible as being a preference or a fraudulent transfer, etc., at the time it was made.

An interesting example arises in cases of assignments of wages to be earned in the future under a contract of employment existing at the time of the bankruptcy. Two questions are involved in such cases: First, is the assignment void as to the trustee in bankruptcy? Second, is it discharged as to the bankrupt himself? The assignment certainly is not void as to the trustee, for the contract of employment, being a contract for personal services would not be an asset of the estate as to future earnings thereunder even if not previously assigned. It is not dischargeable as to the bankrupt, because at the time of the bankruptcy it was merely a contract and not a debt (discharge barring "provable debts" and "debts" only); nor is it a contract that had become, by virtue of the bankruptcy itself, merged in a provable debt. This is so, obviously, because, at the time of the bankruptcy, suit could not have been brought thereon, nor by virtue of the bankruptcy did the assignor become incapable of carrying out his contract. In fact, the hypothesis itself is that he did in fact continue to carry it out after the bankruptcy.⁴⁹

Johnson v. Donahue, 83 N. W. 360 (Tenn. 1906): "Where an insolvent prior to bankruptcy assigns a right to receive certain funds from a railway company thereafter to accrue under a contract in consideration of a pre-existing debt the assignee of said claim is entitled to enforce his right to such subsequently accruing fund."

49. *Mallin v. Wenham*, 13 A. B. R. 210, 209 Ills. 252. For this entire subject, see post, § 2662, et seq., "Discharge," "Effect of Discharge on the Rights of the Parties."

CHAPTER XV.

THE BANKRUPT—HIS DUTIES AND RIGHTS OF PROTECTION FROM ARREST AND FOR STAY OF SUITS.

Synopsis of Chapter.

- § 452. Adjudication Establishes Status of Debtor as Bankrupt.
- § 453. When Begins and When Ceases to Be a "Bankrupt."

DIVISION 1.

- § 454. Statutory Duties of Bankrupt.
- § 455. First Statutory Duty—Attendance.
- § 456. Corporation Officers "Bankrupts."
- § 457. Order Requisite to Procure Attendance at Creditors' Meetings but Not on Discharge Hearing.
- § 458. Second Statutory Duty—Obedience.
- § 459. Third, Sixth and Seventh Statutory Duties—Examination of Claims and Reporting of Frauds, etc.
- § 460. Fourth and Fifth Statutory Duties—Execution of Papers.
- § 461. Eighth Statutory Duty—Schedules.
- § 462. Ninth Statutory Duty—Submission to Examination.

DIVISION 2.

- § 463. Protection of Bankrupt from Arrest.
- § 464. Protected if Debt Dischargeable—Otherwise Not.
- § 465. Arrest before Bankruptcy—Protection Equally Available.
- § 466. Duty of Court to Protect.
- § 467. May Be Arrested upon Criminal Charge.
- § 468. No Exemption from Arrest for Contempt of Bankruptcy Court Itself.
- § 469. Whether Arrest for Contempt of Other Courts within Protection.
- § 470. Protected While Attending Bankruptcy Court or Performing Statutory Duties; Whether Debt Dischargeable or Not.
- § 471. Whether Protection Applies to Arrest on Process from Federal Court.
- § 472. Habeas Corpus and Injunction Available to Effect Protection.
- § 473. "Bankrupt" for Purposes of Protection, as Long as Any Proceedings Pending.
- § 474. Infliction of Penalty or Forfeiture for Taking Benefit of Act, Prohibited.

DIVISION 3.

- § 475. Staying Suits to Permit Procuring and Interposing of Discharge.

§ 452. **Adjudication Establishes Status of Debtor as Bankrupt.**—By the adjudication, then, the status of the debtor as a bankrupt becomes established.

§ 453. **When Begins and When Ceases to Be a "Bankrupt."**—The term "bankrupt," however, may include a debtor against whom a petition

is pending, before adjudication thereon.¹ The term "bankrupt" is applicable to a debtor so long as his bankruptcy proceedings are pending in any of their branches.² After discharge has been granted, at any rate if the estate also be wound up, the debtor properly ceases to be a "bankrupt." But if a petition to revoke a discharge or set aside a composition is pending he is a bankrupt.³

Elsewhere, under appropriate titles, but not as a connected subject, are considered the different relations the bankrupt sustains to his creditors and their trustee, to third parties and to the court, and certain of the duties devolving upon him by virtue thereof.

DIVISION 1.

DUTIES OF THE BANKRUPT.

§ 454. **Statutory Duties of Bankrupt.**—The Act itself has attempted in § 7 to summarize the duties of the bankrupt and to specify them; and it is apprehended that the terms used by the statute in so doing are so broad that they embrace most, although not all, the duties growing out of those relations.⁴ These statutory duties are eight in number.

§ 455. **First Statutory Duty—Attendance.**—The bankrupt must attend the first meeting of his creditors, if directed by the court or a judge thereof to do so; and the hearing upon his application for a discharge, if filed.⁵

§ 456. **Corporation Officers "Bankrupts."**—In cases of corporation bankrupts, the officers and members of the corporation are for certain purposes at any rate, "the bankrupts;" thus, for the purpose of preparing schedules and as being subject to summary jurisdiction.⁶

§ 457. **Order Requisite to Procure Attendance at Creditors' Meetings but Not on Discharge Hearing.**—It is requisite that an order be made for his attendance at the first meeting as well as at all other meetings of creditors.⁷ But such prior order is not requisite to procure his attendance at the hearing on his discharge.⁸

1. Bankr. Act; § 1 (4): " 'Bankrupt' shall include a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition or who has been adjudged a bankrupt."

2. Impliedly, *In re Chandler*, 13 A. B. R. 614 (D. C. Ills.).

3. *In re Chandler*, 13 A. B. R. 614 (D. C. Ills.).

4. *In re Dow*, 5 A. B. R. 401, 105 Fed. 889 (D. C. Iowa).

5. Bankr. Act, § 7 (a) (1); *In re Eagles & Crisp*, 3 A. B. R. 734, 99 Fed. 695 (D. C. N. Car.).

6. *In re Alphin & Lake Cotton Co.*, 12 A. B. R. 653, 131 Fed. 824 (D. C. Ark.).

7. *Obiter*, inferentially, *In re Shanker*, 15 A. B. R. 109, 138 Fed. 862 (D. C. Pa.).

8. *In re Shanker*, 15 A. B. R. 109, 138 Fed. 862 (D. C. Pa.). Ante, § 455.

§ 458. **Second Statutory Duty—Obedience.**—The bankrupt must comply with all lawful orders of the court.⁹ Disobedience of this duty is ground for barring the bankrupt's discharge.¹⁰

§ 459. **Third, Sixth and Seventh Statutory Duties—Examination of Claims and Reporting of Frauds, etc.**—The bankrupt must examine the correctness of all proofs of claim filed against the estate; must immediately inform his trustee of any attempt, by his creditors or other person, to evade the provisions of this act, coming to his knowledge; and in case any person has to his knowledge proved a false claim against his estate, must disclose that fact immediately to his trustee.¹¹

§ 460. **Fourth and Fifth Statutory Duties—Execution of Papers.**—The bankrupt must execute and deliver such papers as shall be ordered by the court; and must execute to his trustee transfers of all his property in foreign countries.¹²

§ 461. **Eighth Statutory Duty—Schedules.**—The bankrupt must prepare and file his schedules.¹³ The requirements of this duty are considered elsewhere under the subjects of the Schedules (see post, ch. xvi, § 476, et seq.), and of Discharge, "Due Scheduling" and "Concealment" and "False Oath" by omissions from schedules.

§ 462. **Ninth Statutory Duty—Submission to Examination.**—The bankrupt must submit to examination, when present at the first meeting of creditors and at such other times as the court shall order, concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind and whereabouts of his property, and in addition, all matters which may affect the administration and settlement of his estate.¹⁴

DIVISION 2.

PROTECTION OF BANKRUPT FROM ARREST.

463. **Protection of Bankrupt from Arrest.**—A bankrupt is exempt from arrest upon civil process except: First, when issued from the court of bankruptcy itself for contempt or disobedience of its lawful orders; and, second, when issued from a state court upon a claim which

9. Bankr. Act, § 7 (a) (2).

10. See post, subject of the bankrupt's discharge.

11. Bankr. Act, § 7 (3) (6) (7). Inferentially, *In re Carton*, 17 A. B. R. 350, 148 Fed. 63 (D. C. N. Y.).

12. Bankr. Act, § 7 (a) (4) and (5). See post, § 1115.

13. Bankr. Act, § 7 (a) (8).

14. Bankr. Act, § 7 (a) (9). Compare, also, Bankr. Act, § 21 (a).

would not be released by his discharge in bankruptcy, and even then he shall be exempt from arrest whilst in attendance on the court of bankruptcy or engaged in the performance of a duty imposed by the bankruptcy act.¹⁵

In *re Adler*, 16 A. B. R. 416, 144 Fed. 659 (C. C. A. N. Y.): "It is the obvious scheme of the law to protect the bankrupt during the pendency of the proceedings from being harassed by process issuing from the State courts in civil actions. His presence may be required at any time before the court or referee, and § 7 (30 Stat. 548 [U. S. Comp. St. 1901, p. 3424]), defining the duties of bankrupts, directs him to perform acts which practically require his presence within call of the court at all times during the pendency of the proceedings. It is manifest that it will be impossible for him to comply with 'all lawful orders of the court' if he be required at the same time to obey the orders of the State court, and, a fortiori, if he be actually imprisoned on civil process, issued out of the State court. The Bankruptcy Act could not be administered under such conditions."

§ 464. Protected if Debt Dischargeable—Otherwise, Not.—Where the debt is dischargeable he is exempt from arrest.¹⁶ Where the debt is not dischargeable, however, the bankrupt is not exempt, and may be arrested in cases where arrest is allowed by State law on civil process where there is no bankruptcy.¹⁷

§ 465. Arrest before Bankruptcy—Protection Equally Available.—But one arrested for debt is entitled to his liberty, upon filing subsequently a petition in bankruptcy. The protection of the statute ap-

15. Bankr. Act, § 9 (a).

16. In *re Baker*, 3 A. B. R. 101, 98 Fed. 710 (D. C. Kas.); In *re Houston*, 2 A. B. R. 107, 94 Fed. 119 (D. C. Ky., affirmed sub nom. *Wagner v. U. S.*, 4 A. B. R. 596, 104 Fed. 133, C. C. A.); In *re Wenman*, 16 A. B. R. 690, 153 Fed. 910 (D. C. N. Y.), which was a case of conversion of proceeds of sale of tickets by passenger ticket agent. In *re Fife*, 6 A. B. R. 258, 109 Fed. 880 (D. C. Pa.), which was an arrest on a judgment for breach of promise to marry. In *re Adler*, 16 A. B. R. 416, 144 Fed. 659 (C. C. A. N. Y.); *People v. Erlanger*, 13 A. B. R. 197, 132 Fed. 883 (D. C. N. Y.).

Barrett v. Prince, 16 A. B. R. 64, 143 Fed. 302 (C. C. A. Ills.). This was a case of a stockbroker's alleged conversion of stock for failure to follow instructions—not "embezzlement," "fraud" nor "fiduciary capacity."

Compare, In *re Lorde*, 16 A. B. R. 201, 144 Fed. 320 (D. C. N. Y.), where a judgment against a landlord for bite of tenant's vicious dog was held dischargeable and the bankrupt protected.

Also compare, *Wagner v. U. S.*, 4 A. B. R. 596, 104 Fed. 133 (C. C. A. Ky., affirming In *re Houston*, 2 A. B. R. 107), where habeas corpus was granted in arrest for contempt for failure to pay alimony. This was, however, before the rule was definitely settled that alimony was not a dischargeable debt.

17. In *re Marcus*, 5 A. B. R. 365 (C. C. A. Mass., affirming 5 A. B. R. 19, 104 Fed. 331); In *re Baker*, 3 A. B. R. 101, 96 Fed. 954 (D. C. Kas.). Judgment for support of illegitimate child. Distinguished, In *re Lewensohn*, 3 A. B. R. 598, 99 Fed. 73 (D. C. N. Y.).

Subsequent discharge of judgment debtor in bankruptcy is no defense to a pending action against the sheriff for permitting the escape of the judgment debtor who had been arrested on body execution. *Baer v. Grell*, 6 A. B. R. 428 (Mun. Ct. N. Y.).

plies to arrest before as well as after the filing of the bankruptcy petition and prevents a continuance of the detention.¹⁸

§ 466. **Duty of Court to Protect.**—And it is the duty of the court to issue the stay if the debt is dischargeable.¹⁹

§ 467. **May Be Arrested upon Criminal Charge.**—The bankrupt may be arrested at any time upon a criminal charge.²⁰

§ 468. **No Exemption from Arrest for Contempt of Bankruptcy Court Itself.**—The bankrupt may be arrested for contempt of the bankruptcy court or for disobedience of its lawful orders.²¹ Thus, a bankrupt may be fined for contempt for surrendering property to a creditor after his petition is filed.²²

§ 469. **Whether Arrest for Contempt of Other Courts within Protection.**—It is a question whether the bankrupt is exempt from arrest for contempt of other courts; whether arrest for contempt of court is within the "civil process" meant by this provision of the Bankruptcy Act. It has been held, that he may be arrested for contempt in disobeying an order in proceedings supplementary to execution.²³

§ 470. **Protected While Attending Bankruptcy Court or Performing Statutory Duties, whether Debt Dischargeable or Not.**—But a bankrupt may not be arrested, in any event, upon civil process issued upon a debt, where he is at the time in attendance upon the bankruptcy court or

18. *People v. Erlanger*, 13 A. B. R. 197, 132 Fed. 883 (D. C. N. Y.); [1867] *In re Seymour*, 1 Ben. 348, Fed. Cases 12,684; compare, to same effect, *In re Grist*, 1 A. B. R. 89 (Ref. N. Y.); contra, *In re Claiborne*, 5 A. B. R. 812, 109 Fed. 74 (D. C. N. Y.); [1867] also contra, *In re Walker*, Fed. Cases 17,060; [1867] also contra, *Minon v. Van Nostrand*, 1 Low 458, Fed. Cases 9,642.

19. *In re Adler*, 16 A. B. R. 416, 144 Fed. 659 (C. C. A. N. Y.).

Whether Conditions May Be Imposed on Granting the Protection.—It has been held, that the Bankruptcy Court may, in granting such protection from arrest impose conditions on the bankrupt, such as that he shall not leave the jurisdiction and shall give bond to that effect. *In re Lewensohn*, 3 A. B. R. 594, 99 Fed. 73 (D. C. N. Y.).

20. Compare, as to arrest for fraudulent insolvency proceedings under State insolvency law superseded by the Bankruptcy Act, U. S., *ex rel. Scott, v. McAleese*, 1 A. B. R. 650 (C. C. A. Penna.).

21. *In re Arnett*, 7 A. B. R. 522, 112 Fed. 770 (D. C. Tenn.). See also, post, subject of ordering bankrupts to surrender property, § 1813, et seq.

22. *In re Arnett*, 7 A. B. R. 522, 112 Fed. 770 (D. C. Tenn.).

23. *In re Fritz*, 18 A. B. R. 244 (D. C. N. Y.).

Arrest of Bankrupt for Contempt for Failure to Pay Alimony.—Before the Supreme Court of the United States declared alimony not dischargeable, it was held, in some cases proper to release on habeas corpus a bankrupt imprisoned for contempt in failing to pay alimony. *In re Houston*, 2 A. B. R. 107, 94 Fed. 119 (D. C. Ky., affirmed in 4 A. B. R. 596, rejected in 3 A. B. R. 70, and in 5 A. B. R. 834).

engaged in the performance of a statutory duty imposed by the Bankruptcy Act.²⁴ And this protection applies even where the debt is not dischargeable.²⁵

§ 471. Whether Protection Applies to Arrest on Process from Federal Court.—It has been held, that the bankrupt will be protected from arrest upon process issuing from the United States Circuit Court equally as well as when issued from the State Court.²⁶

§ 472. Habeas Corpus and Injunction Available to Effect Protection.—Habeas corpus in the Federal Court will lie to make effective the protection of the bankrupt under this provision.²⁷

Injunction also will lie to enforce the protection.²⁸ And the referee may issue the restraining order, if directed against a party (and not against a court or officer).²⁹

§ 473. "Bankrupt" for Purposes of Protection, as Long as Any Proceedings Pending.—For the purpose of this protection one is a "bankrupt" as long as any proceedings in bankruptcy, in his case are pending;³⁰ even after a petition for the revocation of his discharge has been refused, if review proceedings are pending.³¹

§ 474. Infliction of Penalty or Forfeiture for Taking Benefit of Act Prohibited.—Neither penalty nor forfeiture may be inflicted upon a debtor for taking the benefit of the Bankruptcy Act.³²

24. In re Lewensohn, 3 A. B. R. 594, 98 Fed. 576 (D. C. N. Y., affirmed in 104 Fed. 1006); In re Dresser, 10 A. B. R. 270, 124 Fed. 915 (D. C. N. Y.); In re Chandler, 13 A. B. R. 614, 135 Fed. 893 (D. C. Ills.); In re Grist, 1 A. B. R. 89 (Ref. N. Y.). Obiter, inferentially, In re Marcus, 5 A. B. R. 365, 105 Fed. 907 (C. C. A. Mass.). Instance, In re Lewensohn, 3 A. B. R. 594, 98 Fed. 576 (D. C. N. Y.), where he was held exempt pending application for discharge.

25. In re Dresser, 10 A. B. R. 270, 124 Fed. 915 (D. C. N. Y.); In re Grist, 1 A. B. R. 89 (Ref. N. Y.). Obiter, inferentially, In re Marcus, 5 A. B. R. 365, 105 Fed. 907 (C. C. A. Mass.).

26. In re Wenman, 16 A. B. R. 961, 153 Fed. 910 (D. C. N. Y.).

27. In re Houston, 2 A. B. R. 107, 94 Fed. 119 (D. C. Ky., affirmed sub nom. *Wagner v. U. S.*, 4 A. B. R. 596). Although occasion for its exercise was doubtful, alimony not being dischargeable. *Wagner v. U. S.*, 4 A. B. R. 596, 104 Fed. 133 (C. C. A. Ky., affirming In re Houston, 2 A. B. R. 107, 94 Fed. 119, D. C. Ky.); In re Fife, 6 A. B. R. 258, 109 Fed. 880 (D. C. Pa.); In re Baker, 3 A. B. R. 101, 96 Fed. 954 (D. C. Kas.); instance, In re Wenman, 16 A. B. R. 690, 153 Fed. 910 (D. C. N. Y.); impliedly, *Barrett v. Prince*, 16 A. B. R. 64, 143 Fed. 302 (C. C. A. Ills.); Ex rel. *Tarante v. Erlanger*, 13 A. B. R. 197, 132 Fed. 883 (D. C. N. Y.); obiter, In re Grist, 1 A. B. R. 89 (Ref. N. Y.). Compare, *U. S., ex rel. Scott v. McAleese*, 1 A. B. R. 650 (C. C. A. Pa.).

28. In re Adler, 16 A. B. R. 414, 144 Fed. 659 (C. C. A. N. Y.); In re Grist, 1 A. B. R. 89 (Ref. N. Y.).

29. In re Grist, 1 A. B. R. 89 (Ref. N. Y.). Gen. Order XII. In re Siebert, 13 A. B. R. 348, 133 Fed. 781 (D. C. N. J.).

30. Impliedly, In re Chandler, 13 A. B. R. 614, 135 Fed. 893 (D. C. Ills.).

31. In re Chandler, 13 A. B. R. 614, 135 Fed. 893 (D. C. Ills.).

32. In re Hicks, 13 A. B. R. 654, 133 Fed. 739 (D. C. N. Y.), which was the case of a member of city fire department filing petition in bankruptcy—proceedings under city ordinance to collect debt being enjoined.

DIVISION 3.

STAYING SUITS AND PROCEEDINGS TO PERMIT BANKRUPT TO PROCURE AND
INTERPOSE DISCHARGE.

§ 475. **Staying Suits to Permit Procuring and Interposing of Discharge.**—The subject of staying lawsuits and proceedings pending the hearing upon the bankrupt's petition for discharge, in order to afford opportunity for the bankrupt to procure his discharge and to plead it, is considered later, under the general subject of Discharge.

CHAPTER XVI.

SCHEDULES.

Synopsis of Chapter.

- § 476. After Adjudication Voluntary and Involuntary Proceedings Alike Except as to Time of Filing Schedules.
- § 477. Duty of Bankrupt to File Schedules of Assets, Liabilities and Exemption Claim.
- § 478. If Bankrupt Fails to File, Petitioning Creditors or Referee to Prepare.
- § 479. Duty of Referee to Examine Schedules and Require Amendment.
- § 480. Officers of Corporation to Prepare Schedules.
- § 481. Schedules to Be Filed with Petition in Voluntary Cases.
- § 482. Within Ten Days after Adjudication, in Involuntary Cases.
- § 483. Importance of Schedules in Bankruptcy.
- § 484. Requirements in General.
- § 485. Notation to Be Made against Each Item.
- § 486. Ditto Marks and Abbreviations to Be Avoided.
- § 487. Signature and Oath.
- § 488. To Be Filed in Triplicate, Both in Voluntary and in Involuntary Cases.
- § 489. Names and Addresses of Creditors to Be Given.
- § 490. Exempt Property to Be Scheduled.
- § 491. And Claim for Exemptions to Give Particular Description.
- § 492. Amendment Allowed.
- § 493. Omitted Creditors Added by Amendment.
- § 494. But Not after Expiration of Year for Filing Claims.

§ 476. **After Adjudication Voluntary and Involuntary Proceedings Alike Except as to Time of Filing Schedules.**—After adjudication of bankruptcy, the subsequent proceedings are precisely alike in both voluntary and involuntary bankruptcies, excepting that the schedules are filed after adjudication in involuntary bankruptcies and before adjudication in voluntary cases; that is to say, the voluntary bankrupt must file his schedules with his petition while the involuntary bankrupt has ten days time after his adjudication within which to file them; otherwise the proceedings are precisely alike.

§ 477. **Duty of Bankrupt to File Schedules of Assets, Liabilities and Exemption Claim.**—By § 7, clause 8, of the statute, as noted (ante, § 461), it is made one of the duties of the bankrupt to prepare, make oath to and file in court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, and with the petition if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the se-

curity held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee and one for the trustee.¹ And failure of the bankrupt to file schedules may be punished as a contempt.²

§ 478. If Bankrupt Fails to File, Petitioning Creditors or Referee to Prepare.—If the bankrupt is out of the jurisdiction or his whereabouts is unknown or he refuses or fails to prepare schedules, the court may order the petitioning creditors to prepare schedules, or the referee may prepare them himself.³

§ 479. Duty of Referee to Examine Schedules and Require Amendment.—And it is the duty of the referee to examine the schedules of property and lists of creditors and to cause such as are incomplete or defective to be amended.⁴ And it is the referee's duty to require amendment of defective schedules whether any creditor moves to that effect or not.⁵

§ 480. Officers of Corporation to Prepare Schedules.—In cases of bankrupt corporations, the officers and members of the corporation are "the bankrupts" for the purpose of preparing the schedules, etc., and must prepare the schedules.⁶

§ 481. Schedules to Be Filed with Petition, in Voluntary Cases.—In voluntary cases the bankrupt must file his schedules with his petition.⁷

§ 482. Within Ten Days after Adjudication, in Involuntary Cases.—In involuntary cases the bankrupt must file his schedules within ten days after the adjudication, unless longer time is granted by the court.⁸

§ 483. Importance of Schedules in Bankruptcy.—The schedules play an important part in bankruptcy. Oftentimes the bankrupt's right to his discharge turns upon the point whether he has or has not made a full and truthful exposition of his assets and liabilities in his schedules. The schedules are supposed to be the statement of the bankrupt to his creditors, and he runs great risk of forfeiting his opportunity to get released from his debts if he makes omissions in them.

1. *Haack v. Theise*, 16 A. B. R. 700, 51 Misc. (N. Y.) 3.

2. *In re Fetterman*, 17 A. B. R. 785 (D. C. N. Y.).

3. In case the bankrupt fails to prepare schedules within the ten days limited and the referee himself prepares them in consequence, the bankrupt must not complain that all creditors were not notified of the first meeting. *In re Schiller*, 2 A. B. R. 704, 96 Fed. 403 (D. C. Va.).

4. Bankr. Act, § 39 (a) (2). *In re Mackey & Co.*, 1 A. B. R. 593 (Ref. N. Y.). See post, § 508.

5. *In re Mackey*, 1 A. B. R. 593 (Ref. N. Y.).

6. Bankr. Act, § 1 (19). *In re Alphin & Lake Cotton Co.*, 12 A. B. R. 654, 131 Fed. 824 (D. C. Ark.).

7. Bankr. Act, § 7 (8).

8. Bankr. Act, § 7 (8).

However, it must not be understood that the scheduling of an asset is essential to the passing of its title to the trustee, nor that the scheduling of a liability is essential to the right of the creditor to participate in the proceedings. The scheduling is merely a part of the most important duty devolving upon the bankrupt, namely, that of giving full information concerning his assets and liabilities. Therefore, assets that ought to have been scheduled by the bankrupt as belonging to the estate, nevertheless pass to the trustee although not scheduled, and the bankrupt does not retain title to them by omitting them from his schedules.⁹

§ 484. Requirements in General.—The statute provides for three different things: 1st, A schedule of assets; 2nd, a list of creditors; and 3rd, a claim for exemptions. Section 30 of the statute provides that all necessary rules, forms and orders as to procedure and for carrying the Act into force and effect shall be prescribed and may be amended from time to time, by the Supreme Court of the United States. In conformity with this command, the Supreme Court has prescribed various orders and official forms; and whilst these orders and forms are not held to be parts of the statute, for of course Congress could not thus delegate its lawmaking power, yet they are in effect, held to be, virtually, interpretations of the Statute; decisions in advance, as it were, as to what the statute means by its various regulations of procedure.

Thus, as to the prescribed schedule of assets, called Schedule "B" in the forms (for the official forms are not lettered in the same order in which the statutory requirements occur, else it would be schedule A), there are only four requisites mentioned in the Statute itself; which are that the schedule shall show, 1st, the kind of property; 2nd, its quantity (or as the statute puts it, its amount); 3rd, the location of the property; 4th, its money value in detail; but, while these are the only things required by the words of the statute to be shown by the bankrupt on his schedule of property, yet the official form of this schedule, called Schedule "B," requires a great particularity of statement in complying with the statutory requirements. Thus, Schedule "B" of assets is subdivided into Schedule B (1), taken up with a statement of the real estate; B (2), with personal property; B (3), with choses in action; B (4), with property in reversion, remainder or expectancy, including property held in trust for the debtor, etc.; B (5) is concerned with the bankrupt's claim for exemptions; and B (6) with books, papers, documents, etc. And each of these subdivisions is again subdivided, so as to require in the end a full and complete statement by the bankrupt of his property. A proper idea of the requirements of Schedule "B" of Assets, is best obtained by an inspection of the blank form itself.

Likewise with the "list of creditors" which the bankrupt is required to supply. This list of creditors is named Schedule "A" in the official forms,

⁹. *Rand v. Iowa Central Railway Co.*, 12 A. B. R. 164, 96 App. Div. 413 (N. Y. Sup. Ct. App. Div.). See post, § 1113.

and is subdivided into Schedule "A" (1), which is taken up with priority claims, such as taxes, wages of workmen and the like; Schedule "A" (2), taken up with a list of secured creditors; Schedule "A" (3), covering creditors whose claims are unsecured; Schedule "A" (4), which contains a list of claims on notes and bills of third parties which the bankrupt has discounted and which the third parties ought to pay, such as customer's paper discounted at bank; and Schedule "A" (5), for accommodation paper signed by the bankrupt.

Securities held by creditors should be scheduled in Schedule "B" of assets, as well as in Schedule "A" of secured debts.¹⁰ Exempt property should be scheduled both as assets and also in Schedule "B" (5) as property claimed to be exempt.

The following points are useful for the practitioner to observe; and are required either by the law or rules, or by the dictates of good practice:

§ 485. **Notation to Be Made against Each Item.**—Each separate item in the printed schedules should contain some sort of notation against it, to make sure that there has been no unintentional omission, for it will not do simply to make entries under the appropriate headings and opposite the items for the particular species of property owned or kind of debt actually owed, leaving the remaining headings and items without entries. Where there is none of a particular kind of property or debt called for by a particular item, the entry "none" or some similar entry should be made.

§ 486. **Ditto Marks and Abbreviations to Be Avoided.**—Ditto marks should be avoided.¹¹

Likewise, abbreviations except such as are in common use.¹²

Obiter, Sutherland v. Lasher, 11 A. B. R. 780, 41 Misc. 249 (Sup. Ct. N. Y.): "If it were necessary to pass upon the point it would also have to be held that the words 'residence, 135 Bway,' are not a sufficient designation of any residence, being in plain violation of the rules established by the United States Supreme Court governing the form of petitions and schedules."

§ 487. **Signature and Oath.**—Each page must be signed by the bankrupt; and an oath must be made at the end of Schedule "A" and one at the end of Schedule "B", to the effect that the schedules contain all the bankrupt's debts and all his assets respectively; the form of which oath is also prescribed by the Supreme Court.

Perhaps the oath need not be signed by the bankrupt. It has been held

10. See inferentially, *Jacquith v. Rowley*, 9 A. B. R. 525, 188 U. S. 620, wherein the court holds, that property held as security is to be considered as part of the assets in ascertaining the solvency of the bankrupt.

11. In *re Mackey*, 1 A. B. R. 593 (Ref. N. Y.).

12. **Gen. Ord. V. Frame of Petitions.**—"All petitions and the schedules filed therewith shall be printed or written out plainly, without abbreviation or interlineation, except where such abbreviation and interlineation may be for the purpose of reference." In *re Mackey*, 1 A. B. R. 593 (Ref. N. Y.). The case in *re Mackey* is extreme in its holding as to common abbreviations.

that the oaths to the schedules in a voluntary petition need not be signed by the bankrupt, if the petition itself is properly verified and the officer before whom the oath is taken certifies that it is taken by the bankrupt.¹³

§ 488. To Be Filed in Triplicate, Both in Voluntary and in Involuntary Cases.—These schedules must be prepared in triplicate, one for the clerk to keep on file, one for the referee, and one for the trustee, who will need it in his work. Of course there need be only one petition in the case of a voluntary bankrupt and only two, as we have seen, in the case of an involuntary bankrupt, but in both voluntary and involuntary bankruptcies the number of copies of the schedules is always the same—three.

§ 489. Names and Addresses of Creditors to Be Given.—The names and addresses of all creditors must be given as accurately as possible; and if the addresses are not known, that fact must be stated.¹⁴

Where the addresses of none of the creditors are known, some showing should be made to the court that diligent effort has been made to ascertain the same.

In *re Dvorak*, 6 A. B. R. 66, 68, 107 Fed. 76 (D. C. Iowa): "The act requires the bankrupt to furnish a list of creditors and their addresses, and in cases like the present, when the bankrupt gives a list of creditors, but states that their addresses are unknown, the referee should require the addresses to be furnished, or satisfactory proof to be made that the same cannot be ascertained after due search had been made."

Where any address is unknown the fact must be stated..

Sutherland v. Lasher, 11 A. B. R. 781 (Sup. Ct. N. Y.): "From this it is quite apparent that the schedule was defective. According to the defendant's statements now made, the address of the plaintiff was unknown to him but instead of so stating in the schedule, as the law requires, an incorrect as well as indefinite and unauthorized address was given."

§ 490. Exempt Property to Be Scheduled.—Exempt property must be scheduled as well as other property.¹⁵

§ 491. And Claim for Exemptions to Give Particular Description.—The claim for exemption must describe with particularity the precise articles and property claimed as exempt. It will not do simply to say "the bankrupt is a married man," etc., etc., "resident of New York," etc., etc., "and claims under section so and so of the statutes," "\$500.00 in lieu of a homestead," when perhaps there is no cash money in the estate at all but

13. In *re McConnell*, 11 A. B. R. 418 (Ref. N. Y.).

14. In *re Dvorak*, 6 A. B. R. 66, 107 Fed. 76 (D. C. Iowa); In *re Mackey*, 1 A. B. R. 593 (Ref. N. Y.). See post, § 2487, "Discharge—Opposition on Ground of Failure to Duly Schedule." *Sutherland v. Lasher*, 11 A. B. R. 782 (Sup. Ct. N. Y.).

15. In *re Todd*, 7 A. B. R. 770, 112 Fed. 315 (D. C. Vt.).

only unsold merchandise. In other words, the identical property in the form in which it existed at the date of adjudication, or at any rate at the date when the schedules are presumed to be filed, must be described as the property claimed as exempt; thus, if there be cash money at that time, then it may be claimed as money; if there be none, then \$500.00 worth of goods or accounts or other property, may be claimed—in goods, in accounts and in other property. It will not do to claim money unless there was money at the time; the property actually in existence at that time to the value of the exemption allowed in lieu of homestead, however, may be claimed and must be so described that the trustee may be able to set it off at once to the bankrupt and separate it from the assets belonging to the creditors.¹⁶

§ 492. **Amendment Allowed.**—Amendment may be allowed to the schedules, but the originals must not be altered in any particular. Amendment by interlineation will not be permitted. The amendment must be made out and sworn to precisely like the original schedules. In the application for leave to amend, the cause of the failure to have the original schedules correct must be stated.¹⁷

§ 493. **Omitted Creditors Added by Amendment.**—Omitted creditors may be added by amendment.¹⁸ And such amendment in its effect reverts to the date of the filing of the petition.¹⁹

§ 494. **But Not after Expiration of Year for Filing Claims.**—But omitted creditors may not be added by amendment after the expiration of the year from the date of the adjudication within which the creditor could file his claim.²⁰

16. See post, subject of "Exemptions," § 1052, et seq.

17. See rule XI of the Supreme Court's General Orders in Bankruptcy.

18. In re Beerman, 7 A. B. R. 434 (D. C. Ga.).

19. In re Beerman, 7 A. B. R. 434 (D. C. Ga.).

20. In re Hawk, 8 A. B. R. 71, 114 Fed. 916 (C. C. A.); impliedly, In re Spicer, 16 A. B. R. 802, 145 Fed. 431 (D. C. N. Y.). Compare, analogously, In re Shaffer, 4 A. B. R. 730, 104 Fed. 982 (D. C. N. Car.).

As to whether the omitted creditor should have notice of the application for leave to amend, see In re Hawk, 8 A. B. R. 73, 114 Fed. 916 (C. C. A.). Ordinarily such notice is not necessary where the amendment is sought for within the year limited for proving claims and sufficiently in time to enable the creditor to participate in the distribution of assets.

Stockholder's Liability for Debts of the Corporation—Who to Be Scheduled as the Creditor.—Doubtless, all the creditors of an insolvent corporation, where an action against the bankrupt stockholder would lie to enforce "double" liability, might be listed, although the receiver appointed in the stockholder's liability suit would also be a sufficient "agent" for that purpose. Compare, Dight v. Chapman, 12 A. B. R. 743 (Sup. Ct. Ore.). Also, compare, In re Rouse, 1 A. B. R. 393 (Ref. Ohio, affirmed by D. C.).

Schedules as Evidence.—As to the admissibility of the schedules in evidence, see post, "Pleadings and Practice in Actions by Trustees," § 1745.

PART III.

ADMINISTRATION OF THE ESTATE AFTER ADJUDICATION.

§ 495. **Administration of Estate Distinguished from Proceedings for Adjudication.**—Another branch of bankruptcy is now reached, separate, in theory at least, from that which heretofore has been considered. Heretofore have been considered the proceedings leading up to the adjudication of bankruptcy, those which determine the status of the debtor in the community as a bankrupt, the affairs of his estate having only incidentally been considered, as the same may or may not have been in need of attention during the pendency of the petition for adjudication. It being now determined, however, that the debtor is a bankrupt, the consequence follows that his estate comes into court for administration. The administration of the estate is a separate and distinct branch of bankruptcy jurisprudence. It is founded upon the adjudication of bankruptcy, to be sure, but it is distinct from the proceedings leading up to the adjudication. The administration of the estate is a proceeding in rem, like the proceedings leading up to the adjudication, but the res involved in the two proceedings are quite different. The status of the debtor in the community was the res involved in the hearing upon the petition. But that status is now settled; the petition is *functus officio*, it has become merged in the “adjudication.” And we now pass to the proceedings that involve the assets of the debtor as the res.¹

These latter proceedings—the administration of the bankrupt estate—owing to their complicated nature and the detail work entailed, are mostly carried on before a subsidiary officer, known under the present law as the referee in bankruptcy.

1. Compare, *In re Continental Corp'r*, 14 A. B. R. 588 (Ref. Ohio).

CHAPTER XVII.

REFEREES IN BANKRUPTCY.

Synopsis of Chapter.

§ 496. History.

DIVISION 1.

§ 497. The "Referee."

§ 498. Appointment and Term of Office.

§ 499. Removal.

§ 500. Referees' Districts.

§ 501. At Least One Referee for Each County.

§ 502. Qualifications.

§ 503. Oath of Office and Bond.

§ 504. Not to Act Where Interested.

§ 505. Not to Practice in Bankruptcy nor Purchase Bankrupt Assets.

DIVISION 2.

§ 506. Statutory Duties of Referee.

§ 507. First Statutory Duty—To Declare Dividends and Prepare Dividend Sheets.

§ 508. Second Statutory Duty—To Examine Schedules.

§ 509. Third Statutory Duty—To Furnish Information.

§ 510. Fourth Statutory Duty—To Give Notices to Creditors.

§ 511. Fifth Statutory Duty—To Make Up Records and Findings for Review.

§ 512. Sixth Statutory Duty—To Cause Schedules to Be Prepared Where Bankrupt Derelict.

§ 513. Seventh Statutory Duty—To Keep, Perfect and Transmit Records.

§ 514. Eighth Statutory Duty—To Transmit to Clerk Papers on File, etc.

§ 515. Ninth Statutory Duty—To Preserve Evidence.

§ 516. Tenth Statutory Duty—To Get Papers from Clerk.

§ 517. Statutory Duty—To Audit Trustee's Accounts.

§ 518. Duty to Audit Receiver's Accounts.

DIVISION 3.

§ 519. Judge May Dispense with Referee and Retain Charge Himself.

§ 520. Reference.

§ 521. Reference after Adjudication, General or Special; before Adjudication, Special.

§ 522. Reference to Another Referee.

DIVISION 4.

§ 523. The Referee, upon Reference, Becomes "the Court."

§ 524. May Adjudge Bankrupt on Default, or Dismiss Petition.

§ 525. May Issue Warrants and Orders for Seizing and Releasing Property.

§ 526. After Adjudication and General Reference All Proceedings to Be before Referee.

§ 527. Referee May Issue Injunctions.

§ 528. But May Not Restrain Courts or Officers Thereof.

- § 529. May Appoint Receiver.
- § 530. Even before Adjudication.
- § 531. May Marshal Liens.
- § 532. May Order Sale of Assets.
- § 533. And May Sell Free from Liens.
- § 534. May, on Reference in Judge's Absence or Disability, Order Sale before Adjudication, Same as Judge.
- § 535. May Tax Costs.
- § 536. May Order Payment of Priority Claims and Order Distribution.
- § 537. May Order Witnesses to Appear for Examination.
- § 538. May Pass on Intervening Petition Claiming Property.
- § 539. May Order Surrender of Property Held By Bankrupt.
- § 540. Also by Agent of Bankrupt or Person Not Claiming Adversely.
- § 541. Also Property by Assignees.
- § 542. Also Property in Hands of Garnishees.
- § 543. Also Property Taken Out of Bankrupt's Possession after Filing of Bankruptcy Petition.
- § 544. No Jurisdiction to Order Surrender of Property Held Adversely.
- § 545. No Jurisdiction to Entertain Plenary Actions.
- § 546. May Not Vacate Adjudication.
- § 547. May Disapprove Election of Trustee.

DIVISION 5.

- § 548. Proceedings before Referee Summary.
- § 549. But Not on Plane of Depositions before Notaries nor of Hearings before Masters in Chancery.
- § 550. Hearings Governed by United States Equity Rules, Where Act or Rules Silent.
- § 551. Competency of Witnesses Governed by United States Statutes, Not by State Statutes.
- § 552. Referee to Rule on Evidence and Admit or Exclude.
- § 553. Referee to Hear Evidence.

SUBDIVISION "A."

- § 554. Untrustworthy, though Uncontradicted, Testimony May Be Rejected.
- § 555. But Mere Circumstances of Suspicion Insufficient for Rejection.
- § 556. Dealings between Near Relatives to Be Scrutinized with Care.
- § 557. Also Obligations Given by Bankrupts on Eve of Bankruptcy.
- § 558. Schemes to Charge Partnership Assets with Individual Liabilities.
- § 559. Agent's Admission Not Binding unless within Scope.

DIVISION 6.

- § 560. Records and Files in Bankruptcy.
- § 561. Orders of Referees.
- § 562. Order to Recite Notice, Appearance and Hearing, etc.
- § 563. Referee May Vacate or Modify Orders or Findings.

§ 496. **History.**—Originally, as appears from the bankruptcy statute of King Henry VIII, the administration of the bankrupt's estate was conducted directly by the Lord Privy Seal, Lord High Chancellor, etc., who were, by that Act, created courts of bankruptcy. And with the small popu-

lation of those days and comparatively little commerce and trading, such few courts were undoubtedly sufficient.

The bankruptcy laws of the United States, however, have generally created inferior judicial officers whose functions have been to relieve the judge himself from the consideration of the numberless legal questions that necessarily arise in the course of the administration of the bankrupt estate. Under the old law of 1867 this officer was called a register and there was not one for each county, as now, but generally only two or three for an entire district. Their fees were high and the two or three had a monopoly of all the cases of a big district.

Under the present law the fees are purposely made very low and the law contemplates that there shall be at least one referee for each county, so each referee receives not only smaller fees but fewer fees than the old registrars received. These improvements in the line of economy and in bringing the courts to the homes of the people played an important part in the arguments that finally induced Congress to pass the present law.

DIVISION 1.

APPOINTMENT, TERM, DISTRICTS, QUALIFICATIONS OF REFEREES.

§ 497. **The "Referee."**—The present law creates an inferior judicial officer and denominates him "referee."²

§ 498. **Appointment, and Term of Office.**—Referees are appointed by the judge of the district court. They are not temporary officers appointed for each case as the occasion arises, as in cases of referees in chancery generally, but are appointed for a term of two years, and have charge of all cases referred to them.³

§ 499. **Removal.**—Referees may be removed because their services are not needed or for other cause, in the discretion of the court.⁴

§ 500. **Referees' Districts.**—The district court designates the limits of the districts of the referee and may change the same from time to time.⁵ The territorial jurisdiction of the referee, is limited, and official acts done outside the limits of his district are undoubtedly void. And the referee's

2. Bankr. Act, § 33. "Creation of two offices—(a) The offices of referee and trustee are hereby created."

3. Bankr. Act, § 34 (a): "Courts of bankruptcy shall, within the territorial limits of which they respectively have jurisdiction, (1) appoint referees, each for a term of two years, and may, in their discretion, remove them because their services are not needed or for other cause; and (2) designate, and from time to time change, the limits of the districts of referees, so that each county, where the services of a referee are needed, may constitute at least one district."

4. Bankr. Act, § 34 (a).

5. Bankr. Act, § 34 (a) (2): "* * * designate, and from time to time change, the limits of the district of referees."

jurisdiction does not extend to cases outside of the district of his appointment.⁶

§ 501. **At Least One Referee for Each County.**—It is intended by the Act that there shall be at least one referee for each county where any referee is needed at all.⁷

In *re Steuer*, 5 A. B. R. 214, 104 Fed. 976 (D. C. Mass.): "The Court of Bankruptcy will thus be brought nearer to the residence of suitors as there is a referee in every county."

And the referee must reside or have his office in his own district.⁸ These latter two provisions are in the interest of bringing the bankruptcy courts home to the people, thus correcting one of the hardships of previous bankruptcy laws. The spirit of these provisions, however, if not their letter has been violated in many districts by naming one referee for several counties, although nominally having office in each.

Such number of referees are to be appointed as may be necessary to assist in expeditiously transacting the bankruptcy business.⁹

§ 502. **Qualifications.**—Individuals are not eligible to appointment as referees unless they are respectively (1) competent to perform the duties of the office; (2) not holding any office of profit or emolument under the laws of the United States or of any State other than commissioners of deeds, justices of the peace, masters in chancery, or notaries public; (3) not related by consanguinity or affinity, within the third degree as determined by the common law, to any of the judges of the courts of bankruptcy or circuit courts of the United States, or of the justices or judges of the appellate courts of the districts wherein they may be appointed; and (4) residents of, or have their offices in, the territorial districts for which they are to be appointed.¹⁰

§ 503. **Oath of Office and Bond.**—The referee takes the same oath of office as that prescribed for judges of United States Courts;¹¹ and he is required to give bond in such sum as the court may fix, not to exceed five thousand dollars, conditioned for the faithful performance of his duties.¹²

6. In *re Engineering & Construction Co.*, 17 A. B. R. 279, 147 Fed. 868 (D. C. N. Y.).

7. Bankr. Act, § 34 (a) (2): "* * * so that each county, where the services of a referee are needed, may constitute at least one district."

8. Bankr. Act, § 35 (a) (4).

9. Bankr. Act, § 37.

10. Bankr. Act, § 35 (a).

11. Bankr. Act, § 36 (a). Also, *White v. Schloerb*, 4 A. B. R. 181, 178 U. S. 542.

12. Bankr. Act, § 50 (a): "Referees, before assuming the duties of their offices, and within such time as the district courts of the United States having jurisdiction shall prescribe, shall respectively qualify by entering into bond to the United States in such sum as shall be fixed by such courts, not to exceed five thousand dollars, with such sureties as shall be approved by such courts, conditioned for the faithful performance of their official duties."

This bond undoubtedly covers merely ministerial duties. Perhaps the instances coming under § 30 (a), "Duties of Referees," would, in general, be covered by the bond.

§ 504. **Not to Act Where Interested.**—Referees must not act in cases in which they are directly or indirectly interested.¹² But that the referee is a debtor of the bankrupt is no disqualification if the debt is admitted and cannot be affected as a liability by the bankruptcy proceedings.¹³ And that the referee receives compensation based upon amounts disbursed to creditors does not make him "interested" within the meaning of this section.¹⁴

§ 505. **Not to Practice in Bankruptcy nor Purchase Bankrupt Assets.**—Referees must not act as attorneys nor counselors in any bankruptcy proceedings; nor may they purchase, directly or indirectly, any property of an estate in bankruptcy.¹⁵

DIVISION 2.

STATUTORY AND MISCELLANEOUS DUTIES OF THE REFEREE.

§ 506. **Statutory Duties of Referee.**—Besides the referee's duties as a branch of a court of equity performing the functions usually to be performed by such courts in the administration of estates, certain special duties are laid upon him by the provisions of the Bankruptcy Act itself, such duties being generally partly or wholly ministerial in their nature.

§ 507. **First Statutory Duty—To Declare Dividends and Prepare Dividend Sheets.**—It is a duty of the referee to declare dividends and prepare and deliver to trustees dividend sheets showing the dividends declared and to whom payable.¹⁶ This section entails ministerial duties of considerable responsibility upon the referees for the accurate preparation of such dividend sheets.

§ 508. **Second Statutory Duty—To Examine Schedules.**—It is the duty of the referee to examine lists of creditors and schedules of property and to require such as are incomplete or defective to be amended.¹⁷ And it is the referee's duty to require such correction whether any creditor asks for it or not.¹⁸

§ 509. **Third Statutory Duty—To Furnish Information.**—It is the duty of the referee to furnish such information concerning the estates in

12. Bankr. Act, § 39 (b) (1).

13. *Bray v. Cobb*, 1 A. B. R. 153, 91 Fed. 102 (D. C. N. Car.).

14. *In re Abbey Press*, 13 A. B. R. 11, 134 Fed. 51 (C. C. A. N. Y.).

15. Bankr. Act, § 39 (b) (3).

16. Bankr. Act, § 39 (a) (1).

17. Bankr. Act, § 39 (a) (2). *In re Mackey*, 1 A. B. R. 593 (Ref. N. Y.).

18. *In re Mackey*, 1 A. B. R. 593 (Ref. N. Y.).

process of administration before him as may be requested by the parties in interest.¹⁹

§ 510. **Fourth Statutory Duty—To Give Notices to Creditors.**—It is the duty of the referee to give the notices to creditors that are hereafter discussed.²⁰

§ 511. **Fifth Statutory Duty—To Make Up Records and Findings for Review.**—It is the duty of the referee to make up records and findings for review.²¹

And referees should so conduct their proceedings and make up their records that a full and fair review may be made of their actions.²²

§ 512. **Sixth Statutory Duty—To Cause Schedules to Be Prepared Where Bankrupt Derelict.**—It is the duty of the referee either himself to prepare and file the schedules of property and list of creditors or to cause the same to be prepared and filed, when the bankrupt fails, neglects or refuses to do so;²³ and the bankrupt will not be heard to complain that notices of a first meeting called thereon were not sent to all his creditors.²⁴

§ 513. **Seventh Statutory Duty—To Keep, Perfect and Transmit Records.**—It is the duty of the referee to safely keep, perfect, and transmit to the clerk when the cases are concluded, the records required to be kept by him.²⁵

§ 514. **Eighth Statutory Duty—To Transmit to Clerk Papers on File, etc.**—It is the duty of the referee to transmit to the clerks such papers as may be on file before him whenever the same are needed in any proceedings in courts, and in like manner secure the return of such papers after they have been used, or, if it be impracticable to transmit the original papers, transmit certified copies thereof by mail.²⁶

§ 515. **Ninth Statutory Duty—To Preserve Evidence.**—It is the referee's duty, upon application of any party in interest, to preserve the evidence taken or the substance thereof as agreed upon by the parties before them when a stenographer is not in attendance.²⁷

19. Bankr. Act, § 39 (a) (3).

20. See next following chapter.

21. Bankr. Act, § 39 (a) (5). *Cunningham v. Bank*, 4 A. B. R. 195, 103 Fed. 932 (C. C. A. Ky.). This subject is treated post, under the subject of "Review."

22. *In re Romine*, 14 A. B. R. 788, 138 Fed. 837 (D. C. W. Va.).

23. Bankr. Act, § 39 (a) (6). Impliedly, *In re Schiller*, 2 A. B. R. 704, 96 Fed. 400 (D. C. Va.).

24. *In re Schiller*, 2 A. B. R. 704, 96 Fed. 400 (D. C. Va.).

25. Bankr. Act, § 39 (a) (7).

26. Bankr. Act, § 39 (a) (8).

27. Bankr. Act, § 39 (a) (9).

§ 516. **Tenth Statutory Duty—To Get Papers from Clerk.**—It is the duty of the referee, whenever his office is in the same city or town where the court of bankruptcy convenes, to call upon and receive from the clerk all papers filed in the court of bankruptcy which have been referred to him.²⁸

§ 517. **Statutory Duty to Audit Trustee's Accounts.**—It is the duty of the referee to audit the accounts of the trustee;²⁹ and to do so whether creditors except to the accounts or not.³⁰

§ 518. **Duty to Audit Receiver's Accounts.**—It is also the duty of the referee to audit receiver's accounts, although such duty is not specifically enjoined upon him by the statute or rules of court.³¹

DIVISION 3.

REFERENCE TO REFEREE.

§ 519. **Judge May Dispense with Referee and Retain Charge Himself.**—Immediately upon adjudication, the case is referred to the proper referee to take charge of the administration of the estate. The judge, however, may, if he so desires, retain direct charge of the case after the adjudication, as he must do before adjudication, and may dispense with the referee.³²

This power to retain control of the administration of bankrupt estates is seldom, if ever, exercised by the judge; and, indeed, to exercise it would defeat one of the best features of the present law, which is that of having a referee for each county, whereby suitors have the bankruptcy court brought

28. Bankr. Act, § 39 (a) (10).

29. Bankr. Act, § 62. Gen. Order No. XVII. "All accounts of trustees shall be referred as of course to the referee for audit, unless otherwise specially ordered by the court."

A practice has grown up in some districts of referring to special masters various matters that form part of the regular duties of referees, thus putting estates to additional and unnecessary expense. The practice is to be reprehended in view of the manifest spirit of economy in which the present law was framed.

For an instance where a district judge appears to have been guilty of this practice, see, *In re Hoyt & Mitchell*, 11 A. B. R. 784, the district judge there having referred to a special master the matter of auditing the trustee's reports, a duty clearly enjoined on the referee by the statute and General Orders in Bankruptcy as well.

30. *In re Baginsky*, 2 A. B. R. 243 (Ref. La.).

31. Compare evident practice, *In re Reliance Storage, etc., Co.*, 4 A. B. R. 49, 100 Fed. 619 (D. C. Pa.).

32. Bankr. Act, § 22 (a): "After a person has been adjudged a bankrupt the judge may cause the trustee to proceed with the administration of the estate, or refer it (1) generally to the referee or specially with only limited authority to act in the premises or to consider and report upon specified issues; or (2) to any referee within the territorial jurisdiction of the court, if the convenience of parties in interest will be served thereby, or for cause, or if the bankrupt does not do business, reside, or have his domicile in the district."

directly to their own homes and need not seek the distant federal court where the judge himself sits. In fact, since the meeting of creditors must be held at the county seat of the county where the bankrupt resides or at some other place convenient to the litigants, the judge would be obliged to leave his usual court room in all bankruptcies from other counties in order to preside at the different meetings of creditors, even if, as to other matters, he might conduct hearings at the regular court room of the United States District Court.

§ 520. **Reference.**—Reference is accomplished by the making and entry of an order by the judge, or in the name of the judge by the District Clerk, referring the case to the referee; and the sending of the papers with a certificate of the order of reference, to the referee.

§ 521. **Reference after Adjudication, General or Special; before Adjudication, Special.**—The reference after adjudication may be general or special.³³ If the order of reference is not restricted, it will be taken to be a general reference.

References before adjudication are presumably always special, taking up simply the specific duty then at hand which cannot be performed by the judge himself because of absence or inability to act.

§ 522. **Reference to Another Referee.**—Reference may be made to another referee than the one regularly having jurisdiction, if the greater convenience of the parties will thus be subserved or cause be shown, or if the bankrupt does not reside or have his principal place of business in the district.³⁴ But the other referee must be in the same district; and a district judge may not refer a bankruptcy case to a referee in another district.³⁵

DIVISION 4.

FUNCTIONS AND JURISDICTION OF REFEREES.

§ 523. **The Referee, upon Reference, Becomes "The Court."**—The referee under the present law is also an officer with more extensive functions than the old registrar possessed.

In re McGill, 5 A. B. R. 155, 106 Fed. 57 (C. C. A. Ohio): "It is to be remembered that under the present act, subject to review by the court, the referee is given broader powers than were conferred upon the register under the Act of 1867. Under the latter act the register could make no decision, but must certify disputed questions to the court for determination."

33. Bankr. Act, § 22 (a): "* * * or refer it (1) generally to the referee or specially with only limited authority to act in the premises or to consider and report upon specified issues."

34. Bankr. Act, § 22 (a) (2): "* * * to any referee within the territorial jurisdiction of the court, if the convenience of parties in interest will be served thereby, or for cause, or if the bankrupt does not do business, reside, or have his domicile in the district."

35. In re Engineering & Construction Co., 17 A. B. R. 279, 147 Fed. 868 (D. C. N. Y.).

The referee, in fact, becomes to all intents and purposes the court of bankruptcy, as soon as the case is referred to him. Indeed, the definition in the law itself, in § 1, is that "Courts shall mean the court of bankruptcy in which the proceedings are pending and may include the referee."³⁶

In *re Simon & Sternberg*, 18 A. B. R. 205, 151 Fed. 507 (D. C. Ga.): "The bankruptcy law authorizes the appointment by the court of a tribunal especially qualified to dispose of such conflicts of fact as those which are here presented on review. The referee is a court, and a court of very great importance in the administration of bankrupt assets, and the determination of conflicting rights arising thereunder. This court has attempted to be very careful in the appointment of men of acumen, experience, and character to these positions, and it would be, I think, quite unjustifiable, in view of the facts which are palpably apparent on this record—conflicting as they are—for the court to disturb the finding of the referee.

"The finding of the referee is entitled to the same consideration as that of a district judge upon conflicting evidence, as in an admiralty case, or in any other case where the judges pass upon the facts, if that finding is under review by an appellate tribunal."

In *re McIntyre*, 16 A. B. R. 85, 142 Fed. 593 (D. C. W. Va.): "Referees in their hearings within the scope of their powers are clothed with the authority of judges, and their orders and decrees are to be reviewed, reversed or annulled under the same rules and conditions as those governing other courts of equity, subject always to the express provisions of the Bankrupt Act."

White v. Schloerb, 4 A. B. R. 178, 178 U. S. 542: " * * * exercise much of the judicial authority of that court."

And the referee takes the same oath of office as that prescribed for judges of United States Courts.³⁷

White v. Schloerb, 4 A. B. R. 181, 178 U. S. 542: "Under §§ 33-43 of the Bankruptcy Act of 1898 and the 12th General Order in Bankruptcy, referees in bankruptcy are appointed by the Courts of Bankruptcy, and take the same oath of office as judges of United States Courts, each case in bankruptcy is referred by the Court of Bankruptcy to a referee and he exercises much of the judicial authority of that Court."

The referee is a judicial officer and his orders are entitled to the credit and respect due to officers who act judicially.³⁸

In *re Covington*, 6 A. B. R. 373, 110 Fed. 143 (D. C. N. Car.): "That they sometimes err is to be expected—so do the ablest judges of all the courts—but they should not be reversed except upon clear and convincing proof of error, especially as to the findings of fact when they have seen the witnesses and heard them testify."

In *re Abbey Press*, 13 A. B. R. 11, 134 Fed. 51 (C. C. A. N. Y.): "The referee to whom the proceeding in bankruptcy has been referred generally constitutes

36. In *re Tilden*, 1 A. B. R. 302, 91 Fed. 501 (D. C. Iowa); In *re Sonnabend*, 18 A. B. R. 120 (Ref. Mass.); In *re Knopf*, 16 A. B. R. 439, 144 Fed. 245 (D. C. S. C.).

37. Bankr. Act, § 36.

38. *Clendenen v. Red River Valley N. Bk.*, 11 A. B. R. 245 (Sup. Ct. N. D.).
On Review, Referee's Findings on the Facts Not Disturbed unless Manifestly against Weight of Evidence.—See post, § 2839, subject, "Review."

a court with all the powers of the court for the purposes of the examination of the witnesses."

In *re Romine*, 14 A. B. R. 788, 138 Fed. 837 (D. C. W. Va., on review, *Bank v. Johnson*, 16 A. B. R. 206, 143 Fed. 463): "Referees are judicial officers, clothed with judicial powers. They are, however, subordinate to the court above them, and should so conduct their proceedings, and make up their records that a full and fair review may be made of their actions. Their decisions will not be lightly treated, but given the consideration due to conclusions reached by conscientious officers seeking to discharge their duties to the best of their ability."

Thus, a referee's order allowing a claim without surrender of an alleged preference over objection, is *res adjudicata* in a subsequent suit by the trustee in a state court to recover the alleged preference.³⁸

Clendening v. Red. River Valley N. Bank, 11 A. B. R. 245 (Sup. Ct. N. Dak.): "Referees are judicial officers clothed with power to adjudicate in the first instance over the allowance or disallowance of claims presented against the bankrupt's estate, and their findings are entitled to the respect and credit given to officers acting judicially. * * * It is unnecessary to say that we have no supervisory or appellate jurisdiction over referees in bankruptcy or over the decisions of courts of bankruptcy.

"The question which the plaintiff seeks to have us determine has been judicially determined by a tribunal having jurisdiction, and is therefore binding upon us. *Smith v. Walker*, 77 Ga. 289, 3 S. E. 256. Whether the referee intended to decide these questions is not material. As we have seen, they were necessarily involved, and were in fact determined by his adjudication. Whether his decision was right or wrong we need not discuss. It is sufficient for the purpose of this case to say that the question has been adjudicated by the order of allowance made by the referee, and that the same has not been reconsidered by him or reversed by the judge upon a petition for review. If the trustee was dissatisfied with the adjudication made by the referee, he had a speedy remedy in the bankruptcy court upon a petition for review, and also by appeal from the order of the bankruptcy court if adverse to him."

Likewise, a mortgagee of a bankrupt's real estate, to whom, after due hearing, has been awarded the amount of his lien from the proceeds of sale, is protected by the order of the referee, which established his right to the money, until the order is set aside by proceedings directly taken for that purpose.³⁹

Section 38 in clause (4) describes in a nutshell the jurisdiction of referees. It says:

"Referees respectively are hereby invested, subject always to a review by the judge, within the limits of their districts as established from time to time (that is to say, not outside their county), with jurisdiction to perform such part of the duties, except as to questions arising out of the applications of bankrupts for

38. *Contra, Buder v. Columbia Distilling Co.*, 9 A. B. R. 331, 70 S. W. 508. This case, however, proceeds not on the theory that the referee's order is not entitled to respect as *res judicata*, but that his order of allowance of a claim, where preferences are not attacked and the issue not raised, is not *res judicata*.

39. *In re Wilkesbarre Furniture M'fg Co.*, 12 A. B. R. 472 (D. C. Pa.).

compositions or discharges, as are by this Act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts."⁴⁰

In *re Scott*, 7 A. B. R. 36, 37, 111 Fed. 144 (Ref. Mass.): "Under the present act the referee takes the oath of office under 'Title XIII—The Judiciary.' Revised Statutes, §§ 712, 1756, 4995. The functions of the referee have been somewhat inaccurately likened to those of a master in chancery or a United States commissioner, and such latter officers have been sometimes erroneously spoken of as judicial officers. It would be more accurate to designate them as officers of the court, just as an attorney at law is an officer of the court, though clearly not a judicial officer. The distinction between such officers and the magistrates of a court was clearly considered in the case of *Todd v. United States*, 158 U. S. 278, 282, 284. It may be urged in opposition that the referee, not being a technical constitutional judge, cannot perform judicial functions. In the latter case of *Todd v. United States*, Mr. Justice Brewer quotes an opinion of Mr. Justice Story, in which he says: 'A court is not a judge, nor a judge a court. A judge is a public officer who, by virtue of his office, is clothed with judicial authorities. A court is defined to be a place in which justice is judicially administered. It is the exercise of judicial power, by the proper officer or officers, at a time and place appointed by law.'

"That Congress determined to confer upon the referee the right and authority to assist the district judge in discharge of the functions of the court is plainly seen by the following provisions of the Act. Section 1 (7), §§ 37, 38 (4). Under these provisions and throughout the act the referee is frequently alluded to as the 'court,' and is spoken of as an assistant of the judge 'in expeditiously transacting the bankruptcy business pending in the various courts of bankruptcy.'

"In a speech of Senator Nelson, he refers to the referee as 'practically a judge in chambers.' Cong. Rec. 55th Cong., 2nd Sess., p. 6298.

"It may be urged as a further objection that the referee has, while exercising his functions, no power to commit for contempt. In answer to this it is to be observed that the English registrar in bankruptcy has likewise no power to commit for contempt, yet such registrar is a judicial officer appointed for life or during good behavior. In addition, a clerk, officer in attendance and seal are provided for by General Order XXVI and III, and the act requires, in § 42, that records of proceedings before referees shall be kept in the same manner 'as records are now kept in equity cases in Circuit Courts of the United States.'"

In *re Huddleston*, 1 A. B. R. 574 (Ref. Ala.): "Subdivision 7 of § 1 of the act, in defining the word 'court,' says 'and may include the referee.' I take it that it does necessarily include the referee whenever a case is referred to him generally and without limitations. That for all purposes, excepting as to matters of composition and discharge, the referee stands in the place of the judge. It certainly never was intended by the act, that after a case was referred to a referee, every interlocutory motion necessary in the administration of the estate should be heard before the judge, and every order made by him. Such a construction of the act would be an obstruction merely, to the administration of the law, and practically prevent that prompt execution of the act, which, by its very terms, is contemplated."

The other clauses of § 38 of the Act are merely corollary to this clause.

⁴⁰ In *re Drayton*, 13 A. B. R. 602, 135 Fed. 883 (D. C. Wis.); *Mueller v. Nugent*, 7 A. B. R. 224, 184 U. S. 1; *Love v. Export Storage Co.*, 16 A. B. R. 171, 198, 143 Fed. 1 (C. C. A. Tenn.).

§ 524. May Adjudge Bankrupt on Default, or Dismiss Petition.—Before adjudication, by clause (1) referees are given jurisdiction to consider all petitions referred to them by the Clerk of the United States District Court, and to make the adjudication or dismiss the petitions, thus even having jurisdiction to adjudge debtors bankrupt.⁴¹

§ 525. May Issue Warrants and Orders for Seizing and Releasing Property.—By clause (3) they are also vested with jurisdiction to

“exercise the powers of the judge for the taking possession and releasing of the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of the judge from the judicial district, or the division of the district, or his sickness or inability to act.”⁴²

Thus, the warrant to the marshal for the provisional seizure of the bankrupt's property, heretofore mentioned, may be issued by the referee before adjudication, in case the clerk sends him a certificate to the effect that the judge is absent or unable to act.⁴³

Thus, also, before adjudication, he may appoint a receiver, if the judge is absent or unable to act, upon receipt of a certificate from the District Clerk to that effect,⁴⁴ and, upon receipt of such certificate, may order such receiver to sell assets.⁴⁵

§ 526. After Adjudication and General Reference All Proceedings to Be before Referee.—After adjudication and reference (unless the reference is restricted) all the proceedings are conducted before the referee, even to the appointment of receivers to take charge of the property until the election of the trustee, precisely the same as if they were before the judge himself. By the reference the judge divests himself, to the extent at least of the authority conferred by the order of reference, of control over the proceedings except by way, virtually, of a court to review the orders made by the referee.

Nevertheless the referee's relation to the judge is not precisely that of a trial court to an appellate court.⁴⁶

In *re* Pettingill & Co., 14 A. B. R. 760, 137 Fed. 840 (C. C. A. Mass.): “The fundamental difficulty about these propositions is that, under § 24b of the Act of July 1, 1898, ch. 541, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432); the proceedings of the District Court are before us, and not the proceedings of the referee. Although in a loose sense parties who are dissatisfied with the conclusions of the referee are said to appeal to the District Court, yet the action of that court on the findings of the referee did not assume the formalities of an appellate tri-

41. Bankr. Act, § 38 (1). See ante, § 425.

42. See ante, § 337.

43. See Bankr. Act, § 38 (3).

44. In *re* Kelly Dry Goods Co., 4 A. B. R. 528, 102 Fed. 747 (D. C. Wis.).

45. In *re* Kelly Dry Goods Co., 4 A. B. R. 528, 102 Fed. 747 (D. C. Wis.).

46. In *re* DeGottardi, 7 A. B. R. 744, 114 Fed. 328 (D. C. Calif.). Compare, however, In *re* McIntyre, 16 A. B. R. 85, 142 Fed. 593 (D. C. W. Va.), quoted at § 523.

bunal. Neither, according to the usual practice, are the proceedings before the referee brought before the court on exceptions, and thus made a part of the record, as in the case of a master in chancery. The relations between the court and the referee are usually of an informal character. Section 38 of the Act of July 1, 1898, ch. 541, 30 Stat. 555 (U. S. Comp. St. 1901, p. 3455), and General Order 27 (89 Fed. xi; 32 C. C. A. xxvii), provide for review by the court, of orders of referees in the most general terms, and are far from limiting the court to the rules which govern a chancery suit. Therefore, according to the common practice, the District Court was authorized to disregard the findings of the referee entirely, if it saw fit so to do, and proceed *de novo*, or reject them for reasons of law, or refuse to accept them in whole or in part, without assigning reasons therefor. The position of the petitioner in this particular would require this court to be bound conclusively by the findings by the referee of the preliminary and ultimate facts, although the District Court was not so bound, a proposition which defeats itself on its very face."

Coal Fields Co. v. Caldwell, 17 A. B. R. 139, 147 Fed. 475 (C. C. A. W. Va.): "The District Courts in the several districts of the United States are, by law, the courts of bankruptcy. The referee is not the District Court. He is only an elemental part of the court; one of the instrumentalities of the court, created by the law for the purpose of carrying out the provisions and purposes of the Bankruptcy Act. He occupies, in many respects, the relation to the bankruptcy court that the master does to the court of chancery. Such orders and proceedings as are had before the referee in any case, after the same is concluded by him and the proceedings certified, become a part of the record of the case and as such belong in the office of the clerk of the court in the district and territory within which the referee acts. The clerk of the District Court, being also a clerk of the bankruptcy court, can alone, therefore, certify to the appellate court the proceedings had in a bankruptcy case, either on appeal or on petition to superintend and revise. He, and he alone, has the authorized seal of the court.

"Certain judicial powers are vested in the referee and also certain administrative duties devolved upon him, but these he exercises, as before stated, as an instrumentality to carry into effect the Bankruptcy Act and as an essential of the court designated by law for that purpose. But these do not constitute him the keeper of the records or authorize him to certify records directly to a Circuit Court of Appeals." This was a case of Special Master on Adjudication, however.

And undoubtedly the judge may revoke a reference before it is completed.⁴⁷

§ 527. Referee May Issue Injunctions.—The referee has power to issue restraining orders and injunctions.⁴⁸

47. Bankr. Act, § 40 (c): "In the event of the reference of a case being revoked before it is concluded, and when the case is specially referred, the judge shall determine what part of the fee and commissions shall be paid to the referee."

48. *In re Northrop*, 1 A. B. R. 427 (Ref. N. Y.). This case goes too far in authorizing injunction against court officers. See next section following.

In re Steuer, 5 A. B. R. 209, 104 Fed. 976, 980 (D. C. Mass.); *In re Martin*, 5 A. B. R. 423, 105 Fed. 753 (D. C. N. Y.); impliedly, *In re Wilkes*, 7 A. B. R. 574, 112 Fed. 975 (D. C. Ark.); *In re Huddleston*, 1 A. B. R. 572 (Ref. Ala.); *In re White*, 10 A. B. R. 799 (Ref. Ala.).

Quære, *In re Benjamin*, 15 A. B. R. 352, 140 Fed. 320 (D. C. Pa.): "The right

In *re Adams*, 14 A. B. R. 23, 134 Fed. 142 (D. C. Conn.): "In his injunctive order, I do not think that the referee exceeded the power which the Act confers upon him. It would be a sad state of things if in such emergencies the referee should be compelled to discover the judge in time to save the situation. The matter in hand was peculiarly within the knowledge of the referee, and the court will, in advance, thank all like officers who shall relieve it from an unnecessary burden."

§ 528. But May Not Restrain Courts or Officers Thereof.—But not to enjoin proceedings of a court or officer.⁴⁹

§ 529. May Appoint Receiver.—The referee has power, after receipt of the order of reference, to appoint a receiver.⁵⁰

§ 530. Even before Adjudication.—The referee has power before adjudication, upon receipt of a certificate of the District Clerk of the absence or disability of the District Judge, to appoint a receiver.⁵¹

§ 531. May Marshal Liens.—The referee has power to marshal liens on property in the custody of the bankruptcy court and to determine their validity and priority.⁵²

of a referee to award an injunction cannot be regarded as finally settled. For while it is sustained by some of the leading works on bankruptcy (Collier, 5th Ed., p. 132; Brandenburg, 3d Ed. 663), it is denied by rule in certain jurisdictions (In *re Siebert*, 13 A. B. R. 348), and limited in others (Collier, p. 132, note 52) and is materially restricted, if not taken away, by the general orders promulgated by the Supreme Court. General Order XII. It is not questioned, however, here, and I only refer to it, so that in confirming the action of the referee I may not be committed to it as a precedent. The parties have submitted the question at issue between them to the referee for disposition, and as the court might have referred it to him in the first instance, this must be regarded as an equivalent, by which they are bound. In *re Steuer*, 5 A. B. R. 209."

The case In *re Siebert*, however, as well as Rule XII referred to, is solely concerned with the referee's lack of jurisdiction to restrain a court or an officer thereof, a power that is not granted even to the District or Circuit Courts of the United States themselves except in bankruptcy cases. The mention of the restriction in Rule XII, furthermore, would seem to imply authority in the referee to issue injunctions in other cases.

Obiter, In *re Berkowitz*, 16 A. B. R. 254, 143 Fed. 598 (D. C. Pa.). Instance, In *re De Long*, 1 A. B. R. 66 (Ref. N. Y.).

49. Gen. Order No. XII. In *re Siebert*, 13 A. B. R. 348, 133 Fed. 781 (D. C. N. J.); In *re Berkowitz*, 16 A. B. R. 251, 143 Fed. 598 (D. C. Pa.); impliedly, In *re Lesser*, 5 A. B. R. 325 (C. C. A. N. Y., reversed, on other grounds, sub nom. *Metcalf v. Barker*, 9 A. B. R. 36, 187 U. S. 165); impliedly, In *re Globe Cycle Wks.*, 2 A. B. R. 447 (Ref. N. Y.). But see contra, In *re Sabine*, 1 A. B. R. 315 (Ref. N. Y.); contra, In *re White*, 10 A. B. R. 799 (Ref. Ala.); contra, In *re Grist*, 1 A. B. R. 89 (Ref. N. Y.); contra, In *re Northrop*, 1 A. B. R. 427 (Ref. N. Y.); apparently contra, In *re Huddleston*, 1 A. B. R. 572 (Ref. Ala.). Compare, apparently contra, obiter, *Smith v. Belford*, 5 A. B. R. 294, 106 Fed. 658 (C. C. A. Ohio).

50. In *re Florcken*, 5 A. B. R. 802, 107 Fed. 241 (D. C. Cal.); inferentially, In *re Moody*, 12 A. B. R. 718, 131 Fed. 555 (D. C. Ia.).

51. In *re Kelly Dry Goods Co.*, 4 A. B. R. 528, 102 Fed. 747 (D. C. Wis.).

52. In *re Kellogg*, 10 A. B. R. 7, 121 Fed. 332 (C. C. A. N. Y., affirming 7 A. B. R. 623); In *re Murphy* (note *Shutts v. Bank*), 3 A. B. R. 505, 98 Fed. 720 (Ref. Mass.). Also, see cases under following sections relative to selling free from liens.

In re Rochford, 10 A. B. R. 608 (C. C. A. S. Dak.): "A referee in bankruptcy has jurisdiction to draw to himself by summary process or notice, and in the first instance to determine, the question of the validity of the claim of a third party to a lien upon, or an interest in, property or the proceeds of property lawfully in the custody of a trustee in bankruptcy."

§ 532. **May Order Sale of Assets.**—The referee has power to order the sale of assets;⁵³ and may appoint appraisers.⁵⁴

§ 533. **And May Sell Free from Liens.**—The referee has power to order the sale of assets free of liens.⁵⁵

In re Sanborn, 3 A. B. R. 54; 96 Fed. 551 (D. C. Vt.): "That the referee has power to order and approve a sale free of encumbrances of property in possession by the trustee on notice to the encumbrancer seems to be clear."

§ 534. **May, on Reference in Judge's Absence or Disability, Order Sale before Adjudication, Same as Judge.**—And to order a sale on reference to him in the judge's absence or disability before adjudication under such circumstances as would warrant the judge to order a sale.⁵⁶

§ 535. **May Tax Costs.**—The referee may tax costs.⁵⁷

§ 536. **May Order Payment of Priority Claims and Order Distribution.**—The referee may order the payment of priority claims, and, in general, may order distribution; thus, as to taxes.⁵⁸

53. In re Sanborn, 3 A. B. R. 54, 96 Fed. 551 (D. C. Vt.); In re Styer, 3 A. B. R. 424, 98 Fed. 290 (D. C. N. Y.); In re Mathews, 6 A. B. R. 96, 109 Fed. 603 (D. C. Ark., affirmed in *Chancey v. Dyke Bros.*, 9 A. B. R. 444); inferentially, In re Kellogg, 10 A. B. R. 7, 121 Fed. 333 (C. C. A. N. Y., affirming 7 A. B. R. 623, 113 Fed. 120, 122); inferentially, In re Rochford, 10 A. B. R. 608 (C. C. A. S. Dak.); impliedly, In re Columbia Iron Wks., 14 A. B. R. 528, 142 Fed. 234 (D. C. Mich.).

54. In re Fisher & Co., 14 A. B. R. 368, 135 Fed. 223 (D. C. N. J.); In re Styer, 3 A. B. R. 424, 98 Fed. 290 (D. C. N. Y.); inferentially, In re Columbia Iron Wks., 14 A. B. R. 528, 142 Fed. 234 (D. C. Mich.).

55. In re Waterloo Organ Co., 9 A. B. R. 427, 118 Fed. 904 (D. C. N. Y.); In re Styer, 3 A. B. R. 424, 98 Fed. 290 (D. C. N. Y.); In re Mathews, 6 A. B. R. 96, 109 Fed. 603 (D. C. Ark., affirmed in *Chauncey v. Dyke Bros.*, 9 A. B. R. 444, 119 Fed. 1); inferentially, In re Kellogg, 10 A. B. R. 7 (C. C. A. N. Y., affirming 7 A. B. R. 623, 113 Fed. 120, 122); In re Pittelkow, 1 A. B. R. 422, 92 Fed. 901 (D. C. Wis.); In re Granite City Bank, 14 A. B. R. 404, 137 Fed. 818 (C. C. A. Iowa, affirming In re Wilka, 12 A. B. R. 727); inferentially, In re Saxton Furnace Co., 14 A. B. R. 483 (D. C. Pa.); instance, *McNair v. McIntyre*, 7 A. B. R. 638, 136 Fed. 697 (C. C. A. N. Car.). See post, subject of "Selling Property Free from Liens," § 1962, et seq. Instance, In re Keller, 6 A. B. R. 351, 109 Fed. 131 (D. C. Iowa); instance, In re Prince & Walter, 12 A. B. R. 675 (D. C. La.); instance, In re New England Piano Co., 9 A. B. R. 767 (C. C. A. Mass.); instance, *Carriage Co. v. Solanas*, 6 A. B. R. 221, 108 Fed. 532 (D. C. La.); instance, In re Rosenberg, 8 A. B. R. 624, 116 Fed. 402 (D. C. Pa.).

56. In re Kelly Dry Goods Co., 4 A. B. R. 528, 102 Fed. 747 (D. C. Wis.).

57. In re Scott, 7 A. B. R. 710 (D. C. Mass.); inferentially, In re Todd, 6 A. B. R. 88, 109 Fed. 265 (D. C. N. Y.).

58. In re Tilden, 1 A. B. R. 302, 91 Fed. 501 (D. C. Iowa).

§ 537. **May Order Witnesses to Appear for Examination.**—The referee has full discretion to order witnesses to appear for examination.⁵⁹

§ 538. **May Pass on Intervening Petition Claiming Property.**—The referee has power to pass upon an intervening petition claiming property or its proceeds in the custody of the bankruptcy court.⁶⁰

§ 539. **May Order Surrender of Property Held by Bankrupt.**—The referee has power to order the surrender of property held by the bankrupt.⁶¹

§ 540. **Also by Agent of Bankrupt or Person Not Claiming Adversely.**—The referee has power to order the surrender of property held by agents of the bankrupt, or by persons not claiming adverse interest therein.⁶²

§ 541. **Also Property by Assignees.**—Also property held by assignees under void assignments.⁶³

§ 542. **Also Property in Hands of Garnishees.**—Also property held by garnishees, where the legal proceedings are void under § 67 "f",⁶⁴ but not where it is a mere debt owing by the garnishee to the debtor.

§ 543. **Also Property Taken Out of Bankrupt's Possession after Filing of Bankruptcy Petition.**—The referee has power to order the surrender of property taken out of the bankrupt's possession after the filing of the bankruptcy petition;⁶⁵ and to order its seizure by the marshal upon warrant of seizure.⁶⁶

§ 544. **No Jurisdiction to Order Surrender of Property Held Adversely.**—But the referee has not power to order the surrender of property held adversely by third persons at the time of the adjudication.⁶⁷

59. In re The Abbey Press, 13 A. B. R. 11, 134 Fed. 41 (C. C. A. N. Y.).

60. In re Drayton, 13 A. B. R. 602, 135 Fed. 883 (D. C. Wis.).

61. In re Miller, 5 A. B. R. 184, 105 Fed. 57 (D. C. Iowa); In re Rosser, 4 A. B. R. 153, 101 Fed. 462 (C. C. A. Mo.); In re Oliver, 2 A. B. R. 783, 96 Fed. 85 (D. C. Calif.); impliedly, In re Purvine, 2 A. B. R. 787, 96 Fed. 192 (C. C. A. Tex.); In re Mayer, 3 A. B. R. 533, 98 Fed. 839 (D. C. Wis.). See post, § 1816, et seq.

62. Mueller v. Nugent, 7 A. B. R. 224, 184 U. S. 1. See post, § 1823, et seq.

63. But compare, contra, Smith v. Belford, 5 A. B. R. 294 (C. C. A. Ohio), on doctrine of overruled case of In re Nugent, 5 A. B. R. 176, reversed in Mueller v. Nugent, 184 U. S. 1.

See post, § 1828, et seq.

But that the taking of property out of one's possession and the restraining of such one's use of it as owner are but different acts of the exercise of the same jurisdiction, see In re Ward, 5 A. B. R. 215, 104 Fed. 985 (D. C. Mass.).

64. In re Beals, 8 A. B. R. 639, 116 Fed. 530 (D. C. Ind.).

65. In re Huddleston, 1 A. B. R. 572 (Ref. Ala.).

66. Impliedly, but obiter, In re Rochford, 10 A. B. R. 608, 124 Fed. 782 (C. A. S. D.).

67. In re Grohs, 1 A. B. R. 465 (Ref. Ohio); In re Cohn, 3 A. B. R. 421 (D. C. N. Y.); contra, In re Shults and Marks, 11 A. B. R. 690 (Ref. N. Y.). See ante, §§ 355, 391; post, § 1652, et seq.

§ 545. **No Jurisdiction to Entertain Plenary Actions.**—And the referee has no jurisdiction to entertain plenary suits against third parties to recover property adversely held or debts due the estate;⁶⁸ for the referee, though included within the term “the court” by clause (7) of § 1 of the act, has not the machinery at hand for the conducting of a plenary suit, with its requirements of formal service of process, rule days, pleadings, trial and verdicts.

A plenary suit brought by a trustee in bankruptcy is not a proceedings in bankruptcy although it may be an action or proceeding, growing out of a bankruptcy proceedings. Referees are restricted in their jurisdiction to purely “proceedings in bankruptcy,” and also to such controversies arising out of bankruptcy proceedings as concern property within the possession or control of the bankruptcy court.

§ 546. **May Not Vacate Adjudication.**—The referee has not power to pass upon an application for the vacating of the adjudication.⁶⁹

§ 547. **May Disapprove Election of Trustee.**—The referee has authority to disapprove of the trustee elected by creditors.⁷⁰

DIVISION 5.

PLEADINGS AND PRACTICE BEFORE REFEREES.

§ 548. **Proceedings before Referee Summary.**—Proceedings before the referee are summary, not plenary. By this is not meant that the proceedings are ex parte, nor that they are conducted without pleadings; for the power of the court is invoked in bankruptcy as in other branches of jurisprudence, by the filing of pleadings, and, as in other branches, is in general to be exercised only upon notice. But by being summary is meant that they proceed by mere notice and by orders upon persons to do or abstain from doing; and not, as in plenary actions, by way of summons or subpoena, by way of stated rule days for pleading in answer and reply, or by way of judgment leviable out of property.

The remedies before the referee are perhaps more drastic than those before a court which proceeds by way of judgment or decree, for the orders of the referee are enforceable by imprisonment for contempt.⁷¹ But

68. *Horskins v. Sanderson*, 13 A. B. R. 102, 132 Fed. 415 (D. C. Vt.); *In re Scherber*, 12 A. B. R. 616, 131 Fed. 121 (D. C. Mass.); *In re Grohs*, 1 A. B. R. 465 (Ref. Ohio); compare, *In re Steuer*, 5 A. B. R. 209, 104 Fed. 976 (D. C. Mass.); *quære*, *In re Goldberg*, 1 A. B. R. 385 (Ref. Utah); *In re Cohn*, 3 A. B. R. 421 (D. C. N. Y.); *contra*, *In re Shults & Marks*, 11 A. B. R. 690 (Ref. N. Y.).

69. *In re Imperial Corp.*, 13 A. B. R. 199 (D. C. N. Y.). But see, *contra*, *In re Scott*, 7 A. B. R. 37 (Ref. Mass.). And, also, see, apparently *contra*, *In re Clisdell*, 2 A. B. R. 424 (Ref. N. Y.). See ante, § 430.

70. *In re McGill*, 5 A. B. R. 155, 106 Fed. 57 (C. C. A. Ohio). See post, § 878, et seq.

71. See *In re De Gottardi*, 7 A. B. R. 741, 114 Fed. 328 (D. C. Calif.).

for this precise reason they are more limited, for when a remedy is enforceable by depriving the individual of liberty the court is bound to proceed with utmost caution and only upon clear proof that the person ordered has the present capacity to perform. This principle undoubtedly partly lies at the basis of the rule that the orders of the referee may, in general, be made only concerning property in the custody of the court or its officers or of the bankrupt himself, and not concerning property in the custody of third persons, as to whom plenary action alone will lie.

Nor has the Amendment of 1903, giving to the bankruptcy courts jurisdiction over suits for the recovery from third parties of property of the estate fraudulently or preferentially conveyed, enlarged, in this particular, the jurisdiction of the referee. No more now than formerly may the referee proceed by judgment or decree leviable out of the property of the defeated party, nor by order against a third party concerning property not in the custody of the bankruptcy court or of its officers or of the bankrupt. The Amending Act of 1903 conferred power on the bankruptcy courts to recover property of the estate from the possession of third parties, to be sure, but such jurisdiction is to be exercised only by plenary action—formal bill or petition, with regular rule days for pleading, hearing and trial—in the ordinary manner of lawsuits; and not merely upon such notice and hearing as may appear to be reasonable, enforceable solely by order upon the person to do or abstain from doing particular acts. There is no more machinery provided now, than formerly, for the carrying on of plenary actions before the referee—no rule days for pleadings prescribed, no juries obtainable.⁷²

Quære, *In re Mullen*, 4 A. B. R. 224, 101 Fed. 413 (D. C. Mass.): "I doubt if the forms of pleading at common law and in equity are applicable to such summary proceedings. It may well be that the objections raised by the demurrer should have been presented, as they certainly might have been, in an answer to the merits."

§ 549. **But Not on Plane of Depositions before Notaries nor of Hearings before Masters in Chancery.**—Although the referee is not possessed of jurisdiction to entertain plenary actions, yet he is more than a notary public or master in chancery; he is, when exercising the functions of his office, "the court."⁷³

^{72.} Contra, obiter, that the referee possessed and possesses plenary jurisdiction. *In re Murphy* (Shults v. Bk.), 3 A. B. R. 505, 98 Fed. 720 (Ref. Mass.).

Contra, obiter, that possibly the referee might call a jury to pass upon the allowability of a claim. *In re Rude*, 4 A. B. R. 319, 101 Fed. 805 (D. C. Ky.).

Demurrers to Petitions before Referees.—It is doubtful whether demurrer will lie to a summary petition before a referee, whether the objection should not be taken by answer. Inferentially, *In re Mullen*, 4 A. B. R. 224, 101 Fed. 413 (D. C. Mass.).

Referees should so conduct their proceedings and make up their records that a full and fair review of their acts may be had. *In re Romine*, 14 A. B. R. 785, 138 Fed. 437 (D. C. W. Va.).

^{73.} See ante, preceding division of this chapter. But compare, *In re Covington*, 6 A. B. R. 373, 110 Fed. 143 (D. C. N. Car.).

§ 550. **Hearings Governed by United States Equity Rules, Where Act or Rules Silent.**—Hearings before referees are governed by the United States equity rules, where the special provisions of the Bankruptcy Act or the rules and forms prescribed by the General Orders in Bankruptcy of the Supreme Court or by local rules, are silent.⁷⁴

§ 551. **Competency of Witnesses Governed by United States Statutes, Not by State Statutes.**—The competency of witnesses to testify is to be governed by the United States statutes and not by the state law.⁷⁵

§ 552. **Referee to Rule on Evidence and Admit or Exclude.**—A referee in bankruptcy, in hearings before him, should rule upon the admissibility and competency of evidence, and may exclude evidence deemed by him inadmissible.⁷⁶

In *re Wilde's Sons*, 11 A. B. R. 714, 131 Fed. 142 (D. C. N. Y.): "This motion involves the question whether a referee in bankruptcy has any power to exclude evidence. As I understand it, an officer appointed to simply take testimony for the use of the court, as, for instance, an examiner in an equity suit, has no jurisdiction to exclude or pass upon testimony. Unless the parties refer any question of the admission of testimony to the court, he is obliged to take all that is offered. But I think that whenever any officer is appointed whose duty it is to take evidence and also to exercise any judicial duty in regard to it, as to decide issues or to state the facts or law in an opinion or report, it is his right and his duty to exclude inadmissible evidence upon objection. Why should he admit evidence which it would be his duty to disregard if admitted? Substantially all the cases in which evidence is taken by referees in bankruptcy, either in their character as referees or as special commissioners, are cases in which they either decide questions outright or draw conclusions from the evidence in the shape either of a report or an opinion; and I think that in all such cases the referee has the right to exclude evidence which he deems inadmissible. If error is committed by such exclusion, any party interested can take up the matter immediately on a certificate, or can urge the alleged error on final hearing."

In *re De Gottardi*, 7 A. B. R. 723, 114 Fed. 328 (D. C. Calif.): "The first proposition stated in the bankrupts' argument, that a referee is clothed with important powers, among them that of determining objections to testimony, has been approvingly adopted by text writers, and is unquestionably sound. Jurisdiction to hear and determine issues of fact necessarily implies power to pass upon the admissibility of testimony."

It has, however, been held, apparently contra, that the referee must take down all the evidence, simply noting the objections thereto.⁷⁷

⁷⁴. *Dressel v. North State Lumber Co.*, 9 A. B. R. 541, 119 Fed. 531 (D. C. N. Car.).

⁷⁵. *Smith v. Township*, 17 A. B. R. 748 (C. C. A. Mich.).

⁷⁶. In *re Kaiser*, 3 A. B. R. 767, 99 Fed. 689 (D. C. Minn.).

⁷⁷. Compare, In *re Rauchenplat*, 9 A. B. R. 763 (D. C. Porto Rico).

Compare, In *re Lipset*, 9 A. B. R. 32, 119 Fed. 379 (Ref. N. Y.). Referee Wise held in this case that the referee, acting as special commissioner on dis-

Compare, to same effect, *obiter*, *Bank v. Johnson*, 16 A. B. R. 208, 143 Fed. 463 (C. C. A. W. Va., reversing, on this point, *In re Romine*, 14 A. B. R. 785): "We cannot concur in the decision of the District Court that a referee acting in his character as referee or as special commissioner has the right to exclude evidence which he deems inadmissible." For this holding *In re Wilde's Sons*, 11 Am. B. R. 714, 131 Fed. 142, is cited, and the learned judge states there are many cases to the contrary. Even if the conflicting decisions are considered, the general orders passed by the Supreme Court are controlling; they have the force of the statute, are made pursuant to express authority in the statute. The same question was raised in *In re Sturgeon*, 14 Am. B. R. 681, 139 Fed. 608. * * *

"No amount of argument could make the matter plainer. Any one who will can understand."

But the *contra* holding, though strongly supported, certainly cannot be the true rule. If referees are without power to exclude questions and answers, license will run riot in the referee's hearings and very bedlam be let loose. It is easy enough to say all questions and answers are to be taken down and objections be simply noted—all for the convenience of possible review, the exceptional case—but the carrying out of the doctrine would lead to insufferable abuses. A reasonable construction of the rule simply is that the referee should admit or exclude evidence, as the case may be, but in cases of exclusion should take down, if requested, the answer the proponent says he expected, which, undoubtedly, the witness himself might be asked to frame. Such rule is sensible, appropriate and long established, and sufficiently conveniences the reviewing courts and protects the rights of all parties.

And it is true that the referee should take the answer, so that the district judge on review may be able to rule without sending the matter back to the referee.⁷⁸

In re Romine, 14 A. B. R. 785, 138 Fed. 437 (D. C. W. Va.): "It is clear to me that in taking testimony the referee must have it taken down, preferably in narrative form, but, upon objection raised, it is his duty to require the matter to be presented by question to which the objection and reason thereof is to be clearly but briefly noted; then to enter his ruling thereon as to whether proper or not, and although he may rule it to be improper, yet allow it to be answered."

Undoubtedly the taking down of the answer after objection sustained under Rule XXII is no more cumbersome than the familiar practice, in other courts, of counsel stating in the record, after objection has been sustained to the question, what it is expected the answer to the question would

charge, although he might rule upon the admissibility, nevertheless, should take down all the evidence.

Also compare, *Dressel v. North State Lumber Co.*, 9 A. B. R. 541, 119 Fed. 531 (D. C. N. Car.). In this case it was held, that on simple objection the referee must not excuse a witness from answering, but must note the objection and take the answer.

Compare, to same effect, *In re Sturgeon*, 14 A. B. R. 681, 139 Fed. 608 (C. C. A. N. Y.); compare, to same effect, *Blease v. Garlington*, 92 U. S. 1.

78. Gen. Order XXII.

have been, thus exhibiting to the reviewing court the materiality of the answer and the prejudice resulting from its exclusion.⁷⁹ It is doubtful whether the answer should be taken however unless, after objection is sustained, exception is taken to the ruling. Any less strict rule would simply lead to license and interminable confusion and prolonged examination, such as perhaps was the situation in the case *In re Romine*, 14 A. B. R. 789; the remedy for which, suggested in the court's opinion, would hardly be adequate.

But, in any event, the referee may absolutely exclude repetitions of the same questions and answers.

In re Romine, 14 A. B. R. 789, 138 Fed. 437 (D. C. W. Va.): "I am persuaded, however, that he is not called upon to suffer and allow counsel * * * to ask and permit witnesses to answer the same question, over and over again, whereby time is unnecessarily consumed and costs incurred; but that upon his noting the fact that the question has been once answered, or the demand to answer has once been positively refused, the court will justify him in preventing vain repetition."

And it is to be noted that almost all the cases holding the referee's function to be limited to merely noting the objections and nevertheless taking the answers, have been cases where the referee has not been acting as such in contested cases before him, but where he has been acting as special master on discharge or as master commissioner taking depositions for use elsewhere.

§ 553. **Referee to Hear Evidence.**—The referee must be present and hear the evidence, whenever he is to decide upon the weight of it,⁸⁰ but in purely formal hearings his presence may be waived.

SUBDIVISION "A".

CREDIBILITY OF WITNESSES AND EVIDENCE ON HEARINGS IN BANKRUPTCY.

§ 554. **Untrustworthy, Though Uncontradicted, Testimony May Be Rejected.**—Oral admissions, denied and uncorroborated, may be not sufficient to support a claim.⁸¹ And the bankrupt's uncorroborated testimony as to the precise time of his becoming insolvent should be received with

⁷⁹. See, to same effect, *In re Lipset*, 9 A. B. R. 32, 119 Fed. 379 (Ref. N. Y.); also, to same effect, *Dressel v. North State Lumber Co.*, 9 A. B. R. 541, 119 Fed. 531 (D. C. N. C.).

⁸⁰. *In re Wilde's Sons*, 11 A. B. R. 714, 131 Fed. 142 (D. C. N. Y.).

As to manner of taking exceptions to the referee's rulings and as to review of same, see post, § 2839, "Review of Referee's Orders."

As to procedure in the general examination of the bankrupt and witnesses, see post, "General Examination of Bankrupt and Witnesses," § 1525, et seq.

As to proper parties in hearings before referee, see various subjects concerned.

As to right to inspect documents, etc., see post, § 915.

⁸¹. *In re Kaldenberg*, 5 A. B. R. 6, 105 Fed. 232 (D. C. N. Y.).

caution.⁸² Even uncontradicted testimony in support of a claim may be so unsatisfactory that it may be rejected and the claim be disallowed, although the objectors may have been under the burden of rebutting the prima facie case made by the deposition for proof of the claim.⁸³

To same effect, *In re Domenig*, 11 A. B. R. 555, 128 Fed. 146 (D. C. Pa.): "Much will necessarily depend on the manner of the witness while under examination, and referees should feel themselves obliged to consider of their own motion the credibility of the witness and of the story that is told, even if there should be no opposing testimony. The mere fact that the witness has not been contradicted does not require the acceptance of the testimony."

§ 555. But Mere Circumstances of Suspicion Insufficient for Rejection.—But uncontradicted testimony is to be given weight as proof of the facts testified to although circumstances of suspicion may exist, so long as such circumstances fall short of making the testimony incredible.⁸⁴

§ 556. Dealings between Near Relatives to Be Scrutinized with Care.—The rules governing the dealings between near relatives apply to contests over the allowance of claims in bankruptcy. They are to be scrutinized with care.⁸⁵

In re Domenig, 11 A. B. R. 555, 128 Fed. 146 (D. C. Pa.): "Undoubtedly contracts of this kind between husband and wife ought to be scrutinized with the utmost vigilance, and should never be allowed unless the evidence is clear and convincing in every particular. Ordinarily, there is little evidence to support them, except the testimony of the husband and the wife themselves, and the husband is usually interested nearly as much as the wife in favor of her claim."

Inferentially, but obiter, *Union Trust Co. v. Bulkeley*, 18 A. B. R. 43, 150 Fed. 510 (C. C. A. Mich.): "It is subject to some criticism, such as that the parties were related by marriage, * * *"

§ 557. Also, Obligations Given by Bankrupts on Eve of Bankruptcy.—Likewise, written obligations and acknowledgments of indebtedness given by bankrupts during the period of insolvency immediately preceding bankruptcy are to be subjected to close scrutiny and should not be upheld where they are not supported by good and sufficient consideration.⁸⁶

§ 558. Schemes to Charge Partnership Assets with Individual Liabilities.—Any scheme or device resorted to by persons in contemplation of bankruptcy for the purpose of charging partnership assets with the individual liabilities of the partners is violative of the provisions of the Act.

⁸². *In re Linton*, 7 A. B. R. 676 (Ref. Tex.).

⁸³. *In re Cannon*, 14 A. B. R. 114, 133 Fed. 837 (D. C. Pa.).

⁸⁴. Inferentially, *Union Trust Co. v. Bulkeley*, 18 A. B. R. 42, 150 Fed. 510 (C. C. A. Mich.).

⁸⁵. *In re Wooten*, 9 A. B. R. 247, 118 Fed. 670 (D. C. N. Car.).

⁸⁶. *In re Brewster*, 7 A. B. R. 436 (Ref. N. Y.).

In re Jones & Cook, 4 A. B. R. 141 (D. C. Mo.): "The physical and undisputed facts surrounding the case are also in my opinion, sufficient to stamp the transaction as fraudulent within the meaning of the Bankruptcy Act. The two endorsements were made at the time the firm was in an embarrassed financial condition. They were also made without any new consideration moving from the individual creditor to the firm, and they were made within four months prior to the time when the members of the firm petitioned voluntarily to be adjudicated bankrupts. The endorsements were also made in favor of relatives. Under this state of facts, it is impossible to believe that the parties intended anything less than to gain an unconscionable and unlawful advantage over partnership creditors in violation of the spirit and meaning of the Bankruptcy Act. If authority for the conclusion reached in this case were needed, it can be found in In re Lane, 10 Bank Reg. 135, 14 Fed. Cas. 1070 (No. 8044)."

§ 559. **Agent's Admission Not Binding unless within Scope.**—The admissions of an agent are not binding on his principal, unless within the scope of his authority. Thus, the husband's admissions of his wife's insolvency, while acting as manager of her business, have been held not competent.⁸⁷

• DIVISION 6.

RECORDS OF BANKRUPTCY PROCEEDINGS AND ORDERS OF REFEREE.

§ 560. **Records and Files in Bankruptcy.**—The manner of recording cases by copying into one book all papers in the case and all orders entered does not prevail in bankruptcy proceedings in the administration of the estate. A very much looser but much more economical system prevails. Under the old law of 1867 it seems that the records of bankruptcy cases were even less permanent than under the present law.

Under the old law of 1867 there was very little writing into books: the orders of the court and of the registrar and the accounts of the officers, proofs of claims, etc., were simply filed with a red tape around them in the archives of the District Court and there allowed to moulder. The present law makes no provision for recording the proceedings in one docket, except that the appearances before the District Judge and the filing of pleadings and orders and their transmission to and return from the referee in charge are noted on the record. No papers are copied into the record even yet, but under the present law provision is made that the referee shall keep a little record book or books—a separate book or books—for each case, in which the filing of papers shall be entered and orders made by him be copied.⁸⁸

⁸⁷. Duncan v. Landis, 5 A. B. R. 652, 106 Fed. 839 (C. C. A. Pa.).

⁸⁸. Bankr. Act, § 42.

Records of Referees.—"The records of all proceedings in each case before a referee shall be kept as nearly as may be in the same manner as records are now kept in equity cases in circuit courts of the United States."

"A record of the proceedings in each case shall be kept in a separate book or

Inferentially, *In re Carr*, 8 A. B. R. 635 (D. C. N. Car.): "A final settlement of the bankrupt's estate will not be ordered until a full and complete record of the proceedings is made, showing that they have been conducted in accordance with the requirements of the statute and the general orders of the Supreme Court and the district rules, and a balance sheet is presented which can be understood, and from which the bankrupt and his creditors can see what has been done with the money."

§ 561. **Orders of Referees.**—Referees act through orders. They do not render "judgments" nor "decrees;" they enter "orders." Without the entry of an order, neither the judge nor the upper courts will review the decision of a referee.⁸⁹

§ 562. **Order to Recite Notice, Appearance and Hearing, etc.**—In all orders made by a referee, it shall be recited, according as the facts may be that notice was given and the manner thereof; or that the order was made by consent; or that no adverse interest was represented at the hearing; or that the order was made after hearing adverse interests.⁹⁰

In re Saxton Furnace Co., 14 A. B. R. 483 (D. C. Pa.): "A general statement by a referee that notice of an application for the sale of assets free from liens was given to each and every general creditor and lien creditor is insufficient, the record must disclose affirmatively that every creditor whose lien will be discharged by the sale has received due notice of the application."

§ 563. **Referee May Vacate or Modify Orders or Findings.**—The referee has jurisdiction to modify his findings.

In re Hawley, 8 A. B. R. 629 (D. C. Iowa): "I can see no good reason why the referee, before he completed his record and after the evidence had been written out, might not review the same. Undoubtedly it would have been the better practice, had the referee given notice to the counsel, so that they might be reheard, before making the change in the valuation placed upon the land; but that fact does not sustain the position taken by counsel for creditors that the referee is bound by the first conclusion reached upon the question of the value of the land, and cannot modify the same to accord with his conclusion after a review of the evidence, when written out for his consideration."

The referee has jurisdiction to vacate or modify his orders.⁹¹ But it is a question whether he has such jurisdiction after the case has been carried

books, and shall, together with the papers on file, constitute the records of the case."

"The book or books containing a record of the proceedings shall, when the case is concluded before the referee be certified to by him, and together with such papers as are on file before him, be transmitted to the court of bankruptcy and shall there remain as a part of the records of the court."

Referees should so conduct their proceedings and make up their records that a full and fair review may be made of their actions. *In re Romine*, 14 A. B. R. 788 (D. C. W. Va.).

⁸⁹. See post, § 2825, et seq., "Appeals and Error."

⁹⁰. Supreme Court's General Order, No. XXIII. Compare, inferentially, *In re Abbey Press*, 13 A. B. R. 16, 134 Fed. 51 (C. C. A. N. Y.).

⁹¹. Compare, *First Nat'l Bk. v. State Bk.*, 12 A. B. R. 440 (C. C. A. Mont.). Also compare, analogously, *In re Orman*, 5 A. B. R. 698 (C. C. A. Ala.).

up for review. Yet, since the case is not carried up from the referee on appeal, it would seem the "whole case" was not taken away and is still pending before the referee. After the filing of the petition for review, the referee still has jurisdiction to dismiss an application on request of the applicant.⁹² Rehearing need not be granted unless for a proper cause.⁹³ The referee may sua sponte let in additional evidence in the interest of justice.⁹⁴

92. Inferentially, *In re Orman*, 5 A. B. R. 698 (C. C. A. Ala.).

93. Instance, *In re Royal*, 7 A. B. R. 636 (D. C. N. C.), where no newly-discovered evidence was produced and no exceptions had been filed to the findings of fact.

94. *Geo. Carroll & Bro. Co. v. Young*, 9 A. B. R. 643.

CHAPTER XVIII.

NOTICES TO CREDITORS.

Synopsis of Chapter.

- § 564. Notices to Creditors, Valuable Feature of Act.
- § 565. Ten Days Notice by Mail to Creditors.
- § 566. Notices by Mail Postage Free.
- § 567. Notice to All Scheduled and All Filing Claims.
- § 568. Notice by Publication.
- § 569. Notices to Be Given by Referee.
- § 570. Notice to State Object, Time and Place.

§ 564. **Notices to Creditors, Valuable Feature of Act.**—The next step in the proceedings is the fixing of the time and place for the first meeting of creditors and the issuance and mailing of notices to them, and the publication of notice thereof in the newspapers; all which bring up naturally the subject of notices to creditors. Before the passage of the bankruptcy law, one of the greatest abuses in the ordinary administration of insolvent estates was the rushing through of improper sales of assets and of improper distributions of the proceeds. Thus, repeatedly it would happen that the insolvent debtor, on the eve of assignment, would make a preferential mortgage or conveyance to some favored creditor, frequently a relative or friend, and would make the assignment itself moreover, to his attorney or to some relative or friend who would be most likely to act in the debtor's interest and then, after the assignment was made and this assignee placed in charge, all parties, except the unpreferred and unsecured and unfortunate general creditors, forthwith would conspire together to work through some secret sale, usually at needless sacrifice, to some one acting in the debtor's interest or in the interest of some special clique. Frequently, indeed, the debtor himself would thereupon be hired as agent or manager and would go on with the business as formerly, his frustrated general creditors looking on without recourse and watching the proceeds of their own goods thus being dealt out under the guise of court proceedings to the favored creditors and relatives.

Thus it is that one of the most valuable features of the Bankruptcy Act is its requirement that notice by mail be given to all creditors of virtually every important step in the proceedings.

Compare, *Birkett v. Columbia Bank*, 12 A. B. R. 691, 195 U. S. 345: "In my opinion there are features in the present Bankruptcy Act, which differentiate it from preceding acts and which indicate a legislative intent that greater strictness shall prevail in notifying the creditor of the various proceedings in bankruptcy."

§ 565. **Ten Days Notice by Mail to Creditors.**—Creditors are to be given at least ten days notice by mail, to their respective addresses as they

appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors;¹ unless they waive notice in writing, of

- (1) All examinations of the bankrupt;²
- (2) All hearing upon applications for the confirmation of compositions; or the discharge of bankrupts;³
- (3) All meetings of creditors;⁴
- (4) All proposed sales of property;⁵
- (5) The declaration and time of payment of dividends;⁶
- (6) The filing of the final accounts of the trustee, and the time when and the place where they will be examined and passed upon;⁷
- (7) The proposed compromise of any controversy;⁸
- (8) The proposed dismissal of the proceedings.⁹

It is readily seen that, if a creditor would file away these various notices as he receives them, he would have a fair history of the case as it progresses, without the necessity of personally attending court at all or of having a representative in attendance; and seldom are complaints heard, under the present law, that creditors have been kept in the dark as to the important steps in the progress of the administration of insolvent estates.

§ 566. Notices by Mail Postage Free.—Some of the forms of notices sent to creditors in conformity with this provision are given in the appendix. The notices are inclosed in penalty envelopes and sent by mail, for the government gives the freedom of the mails to bankruptcy proceedings.

Nothing illustrates more forcibly that bankruptcy proceedings are proceedings in rem than the provisions relative to notices. Were the proceedings not in rem it would be doubtful whether notice by mail would constitute "due process of law." Being in rem it is to be conceded that only such notice as the statute provides for is necessary and that the statute could provide for no notice at all to creditors, as indeed was the case with our preceding Bankruptcy Acts.

§ 567. Notice to All Scheduled and to All Filing Claims.—Notice must be sent to all creditors who have been scheduled or who have filed claims although not scheduled. Notices must be sent to those who are

1. Bankr. Act, § 58 (a).

2. See post, § 1535.

3. See post, §§ 2345, 2414, subjects of "Composition" and "Discharge."

4. Death of trustee elect before qualifying while first creditors' meeting still in session will not require new notice. In re Wright, 2 A. B. R. 497, 95 Fed. 807 (Ref. N. Y.).

5. See post, § 1931, et seq., subject of "Sale of Assets."

6. See post, § 2206, et seq., subject of "Dividends."

7. See post, § 2295, et seq., "Final Meetings of Creditors."

8. See post, § 926.

9. See ante. § 419.

scheduled but who have not filed their claims although the year within which to file proofs of claim has elapsed and such creditors could not participate in the dividends. This is so because, although such creditors are debarred from participation in the estate, yet they are still "parties in interest," entitled to oppose the discharge, and, as such, entitled to participate in the examination of the bankrupt for discovery of facts preventing his discharge, and also to be notified of other matters that they may see to it that the estate is duly and economically administered and the bankrupt's other indebtedness reduced as much as possible. Moreover, the statutory words are explicit and without exception.¹⁰

§ 568. **Notice by Publication.**—The Act also provides for the publication of notices.¹¹ Indeed, it is mandatory to publish notice of the first meeting of creditors at least once, and the last publication must be not later than one week before the meeting time.¹² Other notices are to be published as the court may direct.¹³

§ 569. **Notices to Be Given by Referee.**—All notices are to be given by the referee unless otherwise ordered by the judge.¹⁴

§ 570. **Notice to State Object, Time and Place.**—Naturally, the notice should state the matter in hand and the time and place of considering the same.

10. Apparently, *contra*, obiter, *Clark v. Pidcock*, 12 A. B. R. 315 (C. C. A. N. J.), where the court evidently assumes (obiter) that, after the expiration of the statutory year for proving claims, only those creditors who have proved their claims are entitled to notice of the appointment of trustee. Yet, in that instance, the bankrupt never received his discharge, and a creditor who had not proved his claim was nevertheless interested in the proper administration of the estate so that he himself might have the fewer creditors with whom to share future assets of the bankrupt.

11. Bankr. Act, § 58 (b): "Notice to creditors of the first meeting shall be published at least once and may be published such number of additional times as the court may direct; the last publication shall be at least one week prior to the date fixed for the meeting. Other notices may be published as the court shall direct."

12. Bankr. Act, § 58 (b), *supra*.

13. Bankr. Act, § 58 (b), *supra*.

14. Bankr. Act, § 58 (c).

CHAPTER XIX.

MEETINGS OF CREDITORS.

Synopsis of Chapter.

- § 571. Creditors' Meetings Valuable Feature of Modern Bankruptcy Law.
- § 572. How Creditors Pass upon Matters at Meetings.
- § 573. Only "Creditors" to Vote—Who Are "Creditors."
- § 574. Several Claims Assigned to One Person, but One Vote.
- § 575. Creditors Not to Vote Whose Claims Not Allowed.
- § 576. Thus, Secured and Priority Creditors.
- § 577. Preliminary Estimate of Values for Voting Purposes.
- § 578. Thus, Creditors Holding Voidable Preferences.
- § 579. Or Holding Liens by Legal Proceedings, Nullified by § 67f.
- § 580. For Other Participation than Voting, Claim Need Not Be Allowed.
- § 581. Majority Required, Majority Both in Number and Amount of Allowed Claims Present.
- § 582. Creditors Not Present, Not to Vote.
- § 583. May Act by Proxy or Attorney and Be Considered "Present."
- § 584. Written Power of Attorney Requisite to Vote.
- § 585. But Not Requisite for Attorney at Law in Other Matters than Voting.
- § 586. Only Attorneys Admitted to United States Court to Practice.
- § 587. Powers of Attorney for Corporations and Partnerships to Contain Oath of Official Capacity.
- § 588. Who May Take Oaths and Acknowledgments.
- § 589. Meetings to Be Held in Conformity with Notices.
- § 590. May Be Adjourned.
- § 591. First Meeting—Time of Holding.
- § 592. First Meeting—Place of Holding.
- § 593. First Meeting—Referee or Judge to Preside, Allow Claims, Examine Bankrupt.

§ 571. Creditors' Meetings Valuable Feature of Modern Bankruptcy Law.—Another distinguishing and valuable feature of modern bankruptcy law is its provision for calling creditors together in meetings for the purposes of electing a trustee to administer the estate, of examining the bankrupt and other witnesses, of hearing reports of receivers and trustees, and in general of consulting together for the care and protection of the estate, § 55, clause C, providing that:

"The creditors shall at each meeting take such steps as may be pertinent and necessary for the promotion of the best interests of the estate and the enforcement of this Act."

Under the old regime the insolvent debtor, through his appointee, the assignee, usually controlled the administration, and general creditors had little voice in it and usually felt their presence not desired; and it seemed

frequently that the assignee and the preferred creditor or creditors were in a tacit understanding to slight and thwart the unfortunate general creditor. In bankruptcy it is quite different. Not only do the creditors elect their own trustee, but he is elected by the creditors whose claims are not secured nor preferred; the administration is essentially an administration by general creditors, by the unprotected creditors.¹

In *re Etheridge Furn. Co.*, 1 A. B. R. 115, 92 Fed. 329 (D. C. Ore.): "To allow the bankrupt to select the trustee to administer upon his estate, instead of the creditors, as provided in the Bankrupt Act, or to allow the State to take jurisdiction of the estate of the bankrupt and administer and distribute it, would effectually destroy the efficiency of any bankrupt act that might be enacted by Congress, and thus effectually destroy the power granted to Congress to pass a bankrupt act."

In *re Henschel*, 6 A. B. R. 29, 109 Fed. 861 (Ref. N. Y.): "I am also convinced, and it will hardly be gainsaid, that the enactment of the present bankrupt law is due to the greater extent of the evils which existed under the former systems of state assignments, bills of sale and deeds of trust, whereby the insolvent debtor could select his own assignee or trustee to dispose of his assets, among a favored few of his creditors, and thereby discriminate against the main body of creditors or against any number of creditors; and it is merely the statement of a self-evident truth, to hold that if by any means whatsoever the bankrupt would be able to control the selection of his trustee in bankruptcy, that the true intent and spirit of the bankrupt law would be thereby violated in a very important direction, and its usefulness impaired, if such an evil were allowed to be tolerated, and thereby established as part of the procedure, in bankruptcy."

Obiter In *re Gutwillig*, 1 A. B. R. 391, 92 Fed. 337 (C. C. A.): "The general purpose of bankrupt laws, and of the present act is not only to administer the assets of insolvent debtors on the basis of equality but to secure that result by giving to the creditors, and not to the debtor, the selection of the person to be entrusted with the administration."

But it must not be thought that bankruptcy proceedings to any considerable extent are conducted by vote of creditors. The conclusion must not be jumped at that they are a species of town meeting, where creditors get together and pass upon rights by the ballot, nor that creditors are like a jury, receiving instruction from the court and then going into session by themselves. In practice, it will be found that bankruptcy proceedings are conducted like any other judicial proceedings, and that the court passes upon the rights of the litigants after due consideration of the evidence and arguments of counsel, upon pleadings properly filed, and that creditors ordinarily will not be asked to vote, nor be allowed to vote, nor even to be heard, except in the usual manner of court proceedings; and that ordinarily their vote is not conclusive but merely advisory, except in cases of the election of trustee, etc.²

1. Compare disadvantages of the rule, In *re Columbia Iron Wks.*, 14 A. B. R. 529, 142 Fed. 234 (D. C. Mich.). Also compare, as to disadvantages of rule, In *re Sumner*, 4 A. B. R. 123, 101 Fed. 224 (D. C. N. Y.).

2. In *re Heyman*, 5 A. B. R. 808, 104 Fed. 677 (D. C. N. Y.).

Compare, *In re Columbia Iron Wks.*, 14 A. B. R. 529, 530, 142 Fed. 243 (D. C. Mich.): "These differences seem to be due in part to a misconception of the powers of creditors and of trustees, and to conflicts of interests and judgment in regard to matters, the disposition of which belongs to the court. * * *

"This controversy, and that relative to the question whether the property should be sold in bulk or in parcels, are matters for determination by the court and not by vote of creditors."

Nevertheless it is a valuable right, that at such meetings creditors may be heard in making suggestions for the practical administration of the estate for the benefit of the trustee. And yet, even as to that, they may not dictate to him, their rights being simply advisory at best.

In actual practice there are only two things that creditors have control over as matter of right, namely, the election of a trustee and the fixing of the amount of his bond. This is as far as the absolute right of creditors to conduct proceedings extends. They have not even the right to vote on the question as to whether an adjournment should be had; the court will rule on that question. Nor may they pass on the qualifications of the surety after they have fixed the bond; the court will rule on that also. Their right extends no further than to vote for a trustee and to fix his bond.

The fact that notices to creditors of the pendency of a petition to sell or compromise, etc., etc., have been issued and that "creditors shall at each meeting take such steps as may be pertinent and necessary for the promotion of the best interests of the estate and the enforcement of this Act" does not place them above the court, but simply operates to give them standing to speak in court and a right there to assemble and confer together.³ But even the right to vote for trustee and name the bond are of greatest value, and, for the exercise of those rights, the whole trend of the administration of insolvent estates is made to differ in bankruptcy from what it is generally in State Courts, where, in practice, the assignee or receiver, as the case may be, is not the choice of general creditors but is the choice either of the debtor or of the preferred creditors or of both together.⁴ And the right of creditors to select a trustee is a substantial right.⁵

§ 572. How Creditors Pass upon Matters at Meetings.—Creditors pass upon matters submitted to them at their meetings by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present.⁶

3. *In re Heyman*, 5 A. B. R. 808, 104 Fed. 677 (D. C. N. Y.).

4. Inferentially, *In re Etheridge Furn. Co.*, 1 A. B. R. 115, 92 Fed. 329 (D. C. Ore.).

5. *In re Henschel*, 7 A. B. R. 662, 109 Fed. 869 (C. C. A. N. Y.); *In re Malino*, 8 A. B. R. 205, 206, 118 Fed. 368 (D. C. N. Y.); *In re Kelly Dry Goods Co.*, 4 A. B. R. 268, 102 Fed. 747 (D. C. Wis.).

6. Bankr. Act, § 56 (a).

For general discussion of the method of procedure at creditors' meetings, see, obiter, *In re Eagles & Crisp*, 3 A. B. R. 733, 99 Fed. 695 (D. C. N. Car.). Also, see *In re Lazoris*, 10 A. B. R. 31, 120 Fed. 716 (D. C. Wis.); *In re Henschel*, 7 A. B. R. 662, 109 Fed. 869 (C. C. A. N. Y.).

§ 573. **Only "Creditors" to Vote—Who Are "Creditors."**—Only creditors may vote at creditors' meetings in bankruptcy. "Creditor," as the term is defined in bankruptcy, is any one who owns a demand or claim provable in bankruptcy.⁷ The term "creditor" is used in somewhat different senses in different parts of the statute.⁸ Thus, when it refers to examinations of bankrupts and witnesses, it includes creditors who have not proved their claims.⁹ But, when it refers to voting for trustee or receiving dividends or otherwise participating, it includes only those whose claims have been allowed.¹⁰

§ 574. **Several Claims Assigned to One Person, but One Vote.**—Where a claim has been assigned after proof the real owner alone can vote. And where one person holds several assigned claims he is entitled to but one vote. He is one creditor holding several claims.¹¹ Thus, where many creditors have assigned their claims to a trustee or committee for the purpose of controlling the election of trustee and of purchasing the assets, they may have but one vote.¹²

§ 575. **Creditors Not to Vote Whose Claims Not Allowed.**—Creditors whose claims have not been "allowed" may not vote.¹³

Obiter, In re Walker, 3 A. B. R. 35, 96 Fed. 550 (D. C. N. Dak.): "The general principle to be deduced from the entire act would seem to be that only those creditors whose claims have been proved and allowed can participate either in the management of the estate or in the dividends derived therefrom, but as to all other matters any person having a provable claim is entitled to be heard."

7. Bankr. Act, § 1 (g).

Receiver in Stockholders' Liability Suit a "Creditor" of Bankrupt Stockholder.

—A receiver appointed by the State Court to collect the judgment is the duly authorized agent of the corporation and may make the deposition for proof of their claim against a bankrupt stockholder. *Dight v. Chapman*, 12 A. B. R. 743, 44 Ore. 265 (Sup. Ct. Ore.).

Undischarged Bankrupt Proving Claim Acquired after His Own Adjudication.

—An undischarged bankrupt may prove a claim acquired after his own adjudication against another bankrupt. In re Smith, 1 A. B. R. 37 (Ref. N. Y.).

8. In re Walker, 3 A. B. R. 35, 96 Fed. 550 (D. C. N. Dak.).

9. In re Walker, 3 A. B. R. 35, 96 Fed. 550 (D. C. N. Dak.); In re Jehu, 2 A. B. R. 498, 94 Fed. 638 (D. C. Iowa).

10. In re Walker, 3 A. B. R. 35, 96 Fed. 550 (D. C. N. Dak.); In re Ogles, 2 A. B. R. 514 (Ref. Ala.).

11. In re Messengill, 7 A. B. R. 669, 113 Fed. 366 (D. C. N. Car.); (1867) In re Frank, Fed. Cases, No. 5,050, 5 N. B. Reg. 194; compare, inferentially, *Leighton v. Kennedy*, 12 A. B. R. 229, 129 Fed. 707 (C. C. A. Mass.); In re Columbia Iron Wks., 14 A. B. R. 537, 142 Fed. 243 (D. C. Mich.).

Acceptance of Composition by Majority of Creditors.—The assignee of a large number of creditors can only be counted as one creditor. In re Messengill, 7 A. B. R. 669, 113 Fed. 366 (D. C. N. C.).

12. In re E. T. Kenney & Co., 14 A. B. R. 611, 136 Fed. 451 (D. C. Ind.).

A combination of creditors for the control of judicial proceedings in their own interests, as distinguished from the interests of the general creditors is against public policy. In re E. T. Kenney Co., 14 A. B. R. 611, 136 Fed. 451 (D. C. Ind.).

13. In re Henschel, 7 A. B. R. 662 (C. C. A. N. Y., reversing In re Henschel, 6 A. B. R. 305); In re Eagles & Crisp, 3 A. B. R. 734, 99 Fed. 695 (D. C. N. Car.); obiter, In re MacKellar, 8 A. B. R. 669, 116 Fed. 547 (D. C. Penna.).

§ 576. **Thus, Secured and Priority Creditors.**—Thus, creditors holding security on the bankrupt's property or entitled to priority of payment from the general assets before other creditors, may not vote except to the amount of their probable deficit after application upon their claims of the security or priority;¹⁴ unless they surrender their securities or priorities.¹⁵

§ 577. **Preliminary Estimate of Values for Voting Purposes.**—Such claims may be allowed to enable the creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities or priorities, but are to be allowed only for such sums as seem to the court to be owing over and above the value of the securities or priorities.¹⁶ This statutory provision seems to be the only exception to the established rule against the "provisional" allowance of a claim.

§ 578. **Thus, Creditors Holding Voidable Preferences.**—Thus, creditors holding voidable preferences may not vote until they have surrendered their preferences.¹⁷

§ 579. **Or, Holding Liens by Legal Proceedings, Nullified by § 67f.**—Likewise, creditors holding liens obtained by legal proceedings upon the bankrupt's property, while he was insolvent during the four months preceding the bankruptcy, and which, on that account, are nullified by the adjudication under § 67 (f), may vote.¹⁸ But this would be only on the theory that he has abandoned his lien or that the lien has been adjudicated to be void. If still insisting on the validity of his lien, where the validity is still disputable, of course, a different holding would prevail. He would have to surrender such advantage.¹⁹

§ 580. **For Other Participation than Voting, Claim Need Not Be Allowed.**—As to any other matter than participation in voting at creditors

14. See as to the "provability" and "allowability" of such claims, §§ 632 and 748.

Bankr. Act, § 56 (b): "Creditors holding claims which are secured or have priority shall not, in respect to such claims, be entitled to vote at creditors' meetings, nor shall such claims be counted in computing either the number of creditors or the amount of their claims, unless the amounts of such claims exceed the values of such securities or priorities, and then only for such excess."

In re Eagles & Crisp, 3 A. B. R. 735, 99 Fed. 695 (D. C. N. Car.); In re Columbia Iron Wks., 14 A. B. R. 527, 142 Fed. 234 (D. C. Mich.).

15. In re Eagles & Crisp, 3 A. B. R. 735, 99 Fed. 695 (D. C. N. Car.).

16. Bankr. Act, § 57 (c).

17. Bankr. Act, § 57 (g). In re Columbia Iron Wks., 14 A. B. R. 527, 142 Fed. 234 (D. C. Mich.); In re Malino, 8 A. B. R. 205, 118 Fed. 638 (D. C. N. Y.); In re Conhaim, 3 A. B. R. 249, 97 Fed. 924 (D. C. Wash.). See, "Allowability of Claims Where the Creditor Holds a Preference," § 768, et seq.

18. In re Scully, 5 A. B. R. 716, 108 Fed. 372 (D. C. Pa.).

19. See, "Allowability of Claims Where the Creditor Holds Lien Acquired by Legal Proceedings," § 776, et seq.

meetings, any creditor having a provable claim, whether he proves it or not, is entitled to be heard.

In *re Walker*, 3 A. B. R. 35, 96 Fed. 550 (D. C. N. Dak.): "The general principle to be deduced from the entire act would seem to be that only those creditors whose claims have been proved and allowed can participate either in the management of the estate or in the dividends derived therefrom, but as to all other matters any person having a provable claim is entitled to be heard."

Thus, a creditor need not actually have filed proof of his claim to examine the bankrupt or witness.²⁰ But *prima facie* proof of such person's interest may be required;²¹ and the listing of the person by the bankrupt in his schedules is sufficient *prima facie* proof that he is a creditor.²²

§ 581. Majority Required, Majority Both in Number and Amount of Allowed Claims Present.—The majority required is not a majority of all claims nor of all allowed claims, but is simply a majority of all claims that have been allowed and the creditors holding which, or their proxies, are present.²³ Nor is the majority required a simple majority in numbers of the creditors, nor a simple majority in value, but the majority must be both in number of creditors and amount of the claims.²⁴

§ 582. Creditors Not Present, Not to Vote.—Absent creditors may not vote.²⁵

In *re MacKellar*, 8 A. B. R. 669, 116 Fed. 547 (D. C. Pa.): "There is nothing whatever to sustain the position that those who are not present are to be taken into consideration."

§ 583. May Act by Proxy or Attorney and Be Considered "Present."—The creditor may act by proxy or attorney, for § 1 of the Act making certain definitions, states in clause (9) that the term "creditor" shall include any one who owns a demand or claim provable in bankruptcy and may include his duly authorized agent, attorney or proxy. Two forms have been prescribed by the Supreme Court, one called "Special Letter of Attorney in Fact," to authorize another to act for one in some special proceedings or in one special day; the other called a "General Letter of Attorney in Fact When Creditor Is Not Represented by Attorney at Law." But proxies of absent creditors which are improperly authenticated are not to be considered as constituting the creditor "present."²⁶

20. In *re Walker*, 3 A. B. R. 35, 96 Fed. 550 (D. C. N. Dak.).

21. In *re Walker*, 3 A. B. R. 35, 96 Fed. 550 (D. C. N. Dak.).

22. In *re Walker*, 3 A. B. R. 35, 96 Fed. 550 (D. C. N. Dak.).

23. In *re Henschel*, 7 A. B. R. 662, 113 Fed. 443 (C. C. A. N. Y., reversing 6 A. B. R. 305).

24. In *re MacKellar*, 8 A. B. R. 669, 116 Fed. 547 (D. C. Pa.).

25. In *re Henschel*, 7 A. B. R. 662, 113 Fed. 443 (C. C. A. N. Y., reversing 6 A. B. R. 305).

26. In *re Henschel*, 7 A. B. R. 662, 113 Fed. 443 (C. C. A. N. Y.).

§ 584. **Written Power of Attorney Requisite to Vote.**—The Courts have almost uniformly held, whenever called on to pass upon the question, that even attorneys at law, admitted to practice in the United States Courts, and in good standing, must have written power of attorney in order to vote, although there would be no such requirement in order to act in other respects for clients.²⁷

In *re Blankfein*, 3 A. B. R. 165, 91 Fed. 191 (D. C. N. Y.): "In bankruptcy, this question can hardly be treated as a new one. Under similar provisions of the Act of 1867 the practice was definitely settled, that an attorney could not vote for an assignee merely by virtue of his general authority as attorney-at-law. He must prove his authority by letter of attorney, or by the oath of some one, showing him to be a duly-constituted attorney, i. e., an attorney in fact, for that purpose. See *Bump. Bankr.* (10th Ed.) 667, note; In *re Purvis*, 1 N. B. R. 163, Fed. Cas. No. 11,476; In *re Knoepfel*, 1 N. B. R. 23, 1 Ben. 330, Fed. Cas. No. 789; *Id.*, 1 N. B. R. 70, Fed. Cas. No. 7,892. The latter case was decided in this district by Mr. Justice Blatchford, wherein Mr. Seixas, though he was the attorney and proctor for the parties, and showed a special authority from one Kutter, the attorney in fact of the foreign creditors, was held to have no right to vote for an assignee in their behalf, his special authority to vote being defective. In the case of *Martin v. Walker*, 1 Abb. Adm. 579, 16 Fed. Cas. 911, Betts, J., held that under a retainer as attorney at law, the proctor could not claim to be attorney in fact.

"One cannot, by virtue of his retainer as attorney at law, assume to act in the cause in the character of attorney in fact." *Id.*, 1 Abb. Adm. 584, 16 Fed. Cas. 913.

"I find no sufficient reason for any different rule under the present act. As I have said, there is no substantial difference on this point in the language of the two acts. The Act of 1867 (Rev. St., § 5095) provided:

"Any creditor may act at all meetings by his duly constituted attorney the same as though personally present," and this was held to mean an attorney in fact, as above stated.

"In the present act, §§ 56 and 44 authorize creditors to appoint a trustee by vote; and § 1, subd. 9, provides:

"'Creditor' * * * may include his duly authorized agent, attorney or proxy."

"The words 'duly authorized' here apply to 'attorney' and 'proxy' as well as to 'agent.' This phrase in effect is, 'his duly authorized attorney,' and this requires the production and exhibition or proof of the authority. Such phraseology would not be used where an attorney at law is intended, since his authority is legally presumed, and is not ordinarily required to be shown. The connection with the word 'proxy' is also some indication that an attorney in fact is meant, who must be 'duly authorized' and in due form; that is, as in case of a proxy, unless proved by oath, as an agent's authority may be proved, to be

27. *Obiter*, In *re Eagles & Crisp*, 3 A. B. R. 733, 99 Fed. 696 (D. C. N. Car.); In *re Lazoris*, 10 A. B. R. 31, 120 Fed. 716 (D. C. Wis.); In *re Scully*, 5 A. B. R. 716, 108 Fed. 372 (D. C. Pa.); In *re Henschel*, 6 A. B. R. 305, 109 Fed. 861 (impliedly, on appeal), 7 A. B. R. 662, 113 Fed. 443 (D. C. N. Y.); In *re Sugenhimer*, 1 A. B. R. 425, 91 Fed. 744 (D. C. N. Y.); In *re Richards*, 4 A. B. R. 631, 103 Fed. 849 (D. C. N. Y.); In *re Finlay*, 3 N. B. N. & R. 78, 3 A. B. R. 733 (D. C. N. Y.). But compare reasoning, analogously, of In *re Gass*, 5 A. B. R. 32 (C. C. A. Minn.), and cases cited therein.

legally substantiated by some writing that is self-proving or can be proved by oath, and filed with the referee.

"As the present act uses substantially the same language as the Act of 1867, the practice and rulings under that act, in the absence of any contrary indication, ought, I think, to be deemed controlling, as intended to be continued under the present law. The reasons for the rule are the same as under the former act.

"Such seems also to be the intent of the Supreme Court rule 21, subd. 5 (18 Sup. Ct. vii), in providing for a representation of the creditor through a letter of attorney. This clause provides:

"The execution of any letter of attorney to represent a creditor may be proved,' etc.

"Voting for a trustee, is 'representing' the creditor in a very special sense; and not being a right belonging to an attorney at law as such, the intimation is strong that a letter of attorney is his proper, if not his exclusive, authority. * * *

"The ordinary presumption of an attorney's authority holds, I think, in bankruptcy proceedings, as in other suits; but in my judgment it does not apply at all to acts of the special nature referred to, or to others of a kindred character, which have never been deemed incident to the rights or the duties of an attorney at law, but which have always been performed by the creditors themselves, except when another person has been specifically authorized to perform them.

"In the present case the vote was not offered by either of the attorneys of record, but only by their clerk. This is but a single illustration of the loose practice that would at once arise, if the claim here made were allowed in favor of a mere attorney at law."

However, it seems a wholly unnecessary requirement, in cases of attorneys duly admitted to practice before the court. For in fact, if there is one particular thing a creditor wants of his attorney in a bankruptcy proceeding it is to vote for trustee. That is usually the first duty, and being so it would seem a strong implication would arise from the employment itself that the creditor expects his attorney to vote for him. Certainly it is precisely as appropriate as it would be for attorneys to suggest names of receivers for other courts to appoint. Because there are forms for use in appointing proxies and attorneys in fact is not conclusive that such forms are to be used when the right of attorneys at law to act is brought in question. It would be a great convenience on all sides if the requirement in cases of duly admitted attorneys at law were dispensed with. However, in any event, only the attorney actually engaged by the creditor should be allowed to vote—not his clerk nor office boy—for at any rate, the attorney may not delegate his authority.

§ 585. But Not Requisite, for Attorney at Law in Other Matters than Voting.—But an attorney need not present written power of attorney in order to act for clients in other matters in bankruptcy proceedings; thus, not to withdraw a client's claim altogether.²⁸

²⁸. In re Pauly, 2 A. B. R. 333 (Ref. N. Y.).

§ 586. **Only Attorneys Admitted to United States Court to Practice.**—Only attorneys admitted to practice in the United States District Court should be allowed to practice in bankruptcy.²⁹ But appearance by attorney not admitted to practice in the United States District Court will not warrant dismissal of the proceedings, but simply no recognition of the attorney.³⁰

§ 587. **Powers of Attorney for Corporations and Partnerships to Contain Oath of Official Capacity.**—Powers of attorney to represent partnerships or corporations must contain the oath of the person executing the instrument that he is a member of the partnership, or a duly authorized officer of the corporation on whose behalf he acts.³¹

§ 588. **Who May Take Oaths and Acknowledgments.**—Oaths, except on hearings in court, may be administered by (1) referees; (2) officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the State where the same are to be taken; and (3) diplomatic or consular officers of the United States in any foreign country.³²

§ 589. **Meetings to Be Held in Conformity with Notices.**—Meetings of creditors must be held at the precise time and place specified in the notices to creditors.

§ 590. **May Be Adjourned.**—Meetings of creditors may be adjourned from time to time and the different adjournments will not constitute each a separate meeting of creditors, but each will constitute a session of the same meeting of creditors.³³ But each adjournment should be to a definite time, in order that the prescribed notices may not lapse.

And postponement for "surprise" will not be granted where the "surprise" consists in the overlooking of a plain provision of the law relative to proof of claims.³⁴

§ 591. **First Meeting—Time of Holding.**—The first meeting of creditors must not be held earlier than ten days nor later than thirty days after

29. In re Kindt, 3 A. B. R. 546, 98 Fed. 867 (D. C. Iowa).

30. In re Kindt, 3 A. B. R. 546, 98 Fed. 867 (D. C. Iowa).

31. Gen. Ord. XXI (5). In re Finlay, 3 A. B. R. 738 (D. C. N. Y.).

32. Bankr. Act, § 20 (a).

Acknowledgments in foreign countries may be made before a diplomatic or consular officer although not specifically mentioned in Gen. Ord. XXI (5). In re Suggenheimer, 1 A. B. R. 425, 91 Fed. 744 (D. C. N. Y.).

33. Obiter, In re Eagles & Crisp, 3 A. B. R. 733, 99 Fed. 696 (D. C. N. C.).

34. In re Finlay, 3 A. B. R. 738 (D. C. N. Y.).

the adjudication, save and except it may be held later than thirty days thereafter if by any mischance it is not held within the thirty days.³⁵

What constitutes "mischance" has not been decided. "Mischance" of course, excludes the idea of design; so, where some of the creditors at the beginning wish the meeting not to be held until after the thirty days, the court should refuse the request. "Mischance" only should stand in the way.

§ 592. **First Meeting—Place of Holding.**—The first meeting must be held at the county seat of the county where the bankrupt resides or is domiciled or has his principal place of business. This provision is an advance over all former laws, and is in line with the principle of the present law bringing the bankruptcy courts home to the people, no longer obliging litigants to travel to distant points to get to the federal court, as was the case under the old law. In order still further to carry out this idea, it is also provided that the meeting may be held at even some more convenient place.³⁶

§ 593. **First Meeting—Referee or Judge to Preside, Allow Claims, Examine Bankrupt.**—At the first meeting of creditors the referee (or if the judge so desires, the judge himself) presides, and, usually, before proceeding with the other business, may allow or disallow the claims of creditors there presented, and may publicly examine the bankrupt or cause him to be examined at the instance of any creditor.

The first thing usually done at the first meeting of creditors is the allowing and disallowing of claims. By § 7, clauses (1) and (3), it is made the duty of the bankrupt to attend the first meeting of his creditors, if an order be entered to that effect, and to assist the court in examining the correctness of all proofs of claims filed against his estate. Generally, then, with the bankrupt's assistance, the court, by which usually is meant the referee since the judge seldom if ever takes advantage of the statutory permission to preside, proceeds to the allowance and disallowance of claims, and then the creditors take up the voting for a trustee.

35. Bankr. Act, § 55 (a): "The Court shall cause the first meeting of creditors of a bankrupt to be held, not less than ten nor more than thirty days after the adjudication, * * * If such meeting should by any mischance not be held within such time, the Court shall fix the date, as soon as may be thereafter, when it shall be held."

36. Bankr. Act, § 55 (a): "The court shall cause the first meeting of creditors of a bankrupt to be held * * * at the county seat of the county in which the bankrupt has had his principal place of business, resided or had his domicile; or if that place would be manifestly inconvenient as a place of meeting for the parties in interest, or if the bankrupt is one that does not do business, reside or have his domicile within the United States, the Court shall fix a place for the meeting which is the most convenient for parties in interest."

As to notices of such meeting, see preceding chapter.

CHAPTER XX.

PROOFS OF CLAIMS.

Synopsis of Chapter.

- § 594. "Proof" of Claim—What Is It?
- § 595. "Proof" and "Allowance" Different Terms.
- § 596. Caption and Title.
- § 597. "Claims" to Be Set Forth and Alleged to Be "Justly Owing."
- § 598. Due Date and Interest.
- § 599. Debts Owing but Not Yet Due.
- § 600. Must State Whether Judgment Taken.
- § 601. Must State Whether Note Given.
- § 602. If Instrument in Writing Given, Original to Be Attached.
- § 603. Consideration to Be Stated.
- § 604. Account to Be Itemized.
- § 605. Claims Provable in Name of Real Party in Interest.
- § 606. Secured Claims.
- § 607. Priority Claims.
- § 608. Assigned Claims—Assigned before Bankruptcy.
- § 609. Assigned after Bankruptcy, but before Proof.
- § 610. Assigned after Proof.
- § 611. "Proof" by Person Contingently or Secondarily Liable.
- § 612. Creditor Not Obligated to Prove Claim against Principal, Even on Surety's Demand nor to Lend Written Instrument to Surety, unless.
- § 613. Surety, on Payment, Subrogated, Pro Tanto, to Creditor's Dividends.
- § 614. Signature and Verification.
- § 615. Several Claims by Same Creditor.
- § 616. Single Claim Not to Be Split.
- § 617. Proofs of Claim Amendable.
- § 618. Amendment to Be Based on an Original Proof Filed.
- § 619. Amendment Changing Legal Nature of Cause of Action.
- § 620. Conditions May Be Imposed.
- § 621. Amendment May Be Refused.
- § 622. Amendment Permissible after Expiration of Year for "Proving" Claims.
- § 623. Withdrawal of Proofs of Claim.
- § 624. Attorney at Law Competent to Withdraw without Written Power.

§ 594. **Proof of Claim—What Is It?**—The term proof of claim is the technical term used in bankruptcy for the formal affidavit of the creditor setting forth his claim. Thus § 57, clause "A", defines a proof of claim, saying: "Proof of claim shall consist of a statement under oath in writing, signed by a creditor etc."

Proof of claim consists of a statement, under oath, in writing, signed by a creditor, setting forth the claim, the consideration therefor, and whether any and if so, what securities are held therefor and whether any, and if so

what payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor.¹

The Supreme Court has prescribed certain further requirements in its General Orders and Forms in Bankruptcy; chiefly to be found in General Order No. XXI and the forms for proofs of debts, secured and unsecured, by individuals, partnerships, corporations and agents respectively—being Forms Nos. 31 to 37 inclusive.

§ 595. **“Proof” and “Allowance” Different Terms.**—The proof and the allowance of claims are distinct terms. The “proof” is the sworn statement by which a creditor presents his claim to the court’s consideration; allowance is the judicial action by which the validity of a claim is established for participation in the distribution of dividends. Care and particularity are required in the preparation of a proof of claim in bankruptcy, for it is both the creditor’s pleading and his evidence and makes for him a *prima facie* case.² And it must be made as provided in the Bankruptcy Act and the forms prescribed by the Supreme Court, and a proof made in the form of ordinary pleadings, although setting up a good cause of action, is insufficient.³ But the defect is not “fatal” as the court in the case, *In re Dunn Hardware Co.*, 13 A. B. R. 147, 132 Fed. 719 (D. C. N. Car.), seems to indicate. It may be cured by amendment.

The court, by which is meant the referee, for the judge, as heretofore stated, seldom exercises his power of dispensing with the referee and attending to the details of the administration himself, apparently has no authority to allow any claims except such as have been “duly proved,” as will appear from the later clauses of this same § 57, and only creditors whose claims have been allowed may share in dividends or vote for trustee or participate in the proceedings—except perhaps to examine the bankrupt, if necessary to do so in establishing the validity of their own particular claims—and it is therefore of importance to ascertain what statements are essential to constitute the affidavit of the creditor “due” proof of his claim.

§ 596. **Caption and Title.**—The affidavit, or as it is technically called, the “deposition,” for proof of claim must be correctly entitled in the case and must have the court wherein the case is pending correctly designated in the caption.⁴ But the failure to properly entitle the cause is not a fatal defect.⁵

Then follows the body of the affidavit, the opening clause of which designates the place where the affidavit is made.

1. Bankr. Act, § 57 (a).

2. See post, “Pleadings and Procedure on Objection to Claims,” § 830, et seq.

3. *In re Dunn Hardware Co.*, 13 A. B. R. 147, 132 Fed. 719 (D. C. N. C.).

4. Gen. Ord. XXI.

5. *In re Blue Ridge Packing Co.*, 11 A. B. R. 36, 125 Fed. 619 (D. C. Penn.).

§ 597. **"Claim" to Be Set Forth and Alleged to Be "Justly Owing."**—The affidavit must set forth the claim, that is to say, must *make claim to a debt* and must aver the debt to be justly owing from the bankrupt.⁶ There must be a specific amount claimed, and the nature of the claim must be given.⁷

There seems to be no particular form for proving unliquidated claims. Damages might be claimed in a specific amount though the claim be unliquidated. Perhaps a mere written application to the Court setting up the facts of the existence of the unliquidated claim, together with a brief description of its nature, accompanied by a request for an order of the court to direct the manner of liquidation, would be the proper practice.

§ 598. **Due Date and Interest.**—In interpreting the statutory requirement that the affidavit must set forth the claim, the Supreme Court has prescribed, in its General Order No. XXI and in its forms, that the average due date shall be stated in case of an account.⁸

If the due date or average due date is not given, nor the computed interest stated, the officers of the court need not compute the interest on the claim and dividends will be paid only on the principal. Interest is to be computed to the date of the filing of the bankruptcy petition, if the instrument draws interest. If it does not draw interest and falls due later, then interest must be rebated to the date of the filing of the bankruptcy petition.⁹

§ 599. **Debts Owing but Not Yet Due.**—Debts on written instruments absolutely owing at the time of bankruptcy, but not yet due, may be proved;¹⁰ with interest to the date of bankruptcy if bearing interest, or a rebate of interest to the same date, if not bearing interest.¹¹

§ 600. **Must State Whether Judgment Taken.**—The affidavit must state whether any judgment has been taken on the claim.¹² If judgment has been taken therefor, the judgment must be aptly described.

§ 601. **Must State Whether Note Given.**—The affidavit must state whether any note has been given for the claim or for a part of the claim.¹³

6. Bankr. Act, § 57 (a).

7. As to unliquidated claims, see post, § 704, et seq.

8. Gen. Ord. XXI: "Depositions to prove debts existing in open account shall state when the debt became or will become due; and if it consists of items maturing at different dates the average due date shall be stated, in default of which it shall not be necessary to compute interest upon it."

9. Bankr. Act, § 63 (a) (1): "* * * with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest."

10. Bankr. Act, § 63 (a) (1).

11. Bankr. Act, § 63 (a) (1).

12. Gen. Ord. XXI (1).

13. Gen. Ord. XXI (1).

§ 602. If Instrument in Writing Given, Original to Be Attached.

If any note or other instrument in writing has been given, the original must be attached to the affidavit and left in the files until the claim is allowed. After allowance or disallowance of the claim, the original note or other written instrument may, upon order of the referee, be withdrawn, upon substituting a copy therefor.¹⁴ This requirement undoubtedly applies not only to commercial paper but to all cases of written instruments, including written contracts.¹⁵ But a judgment or transcript of the record of a judgment is not a "written instrument" and need not be filed.

Compare, analogously, *Cox v. Farley*, 2 W. L. M. (Ohio) 315: "A record is undoubtedly the evidence of an indebtedness; but is it a 'written instrument'?" * * * Now, from the use of the words 'written instrument', it is clear that the Code refers to an instrument executed by or between parties. Webster defines the word, as a writing containing the terms of a contract. In this sense, a record is not a written instrument. The judgment of the court is the ground of the action and the record is the mere evidence of that recovery. The record is as accessible to the one party as to the other. It is public property and either party can obtain a copy of it."

14. Bankr. Act, § 57 (b): "Whenever a claim is founded upon an instrument of writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim. If such instrument is lost or destroyed a statement of such fact and of the circumstances of such loss or destruction shall be filed under oath with the claim. After the claim is allowed or disallowed, such instrument may be withdrawn by permission of the court upon leaving a copy thereof on file with the claim."

It has been held, but probably incorrectly, that where the bankrupt's liability is that of an endorser, notice of dishonor and any other facts necessary to fix such liability must be stated. In *re Stevens*, 5 A. B. R. 11, 104 Fed. 323 (D. C. Vt.).

But query, whether any more allegations are necessary than are directly prescribed by the statute, general orders and forms.

Where the claim is for balances due on various collateral notes upon which the bankrupt is either maker or endorser, and which were in part to become due after discount, the date of discount, amount advanced and to whom must be stated in the proof of claim. In *re Stevens*, 5 A. B. R. 11, 104 Fed. 323 (D. C. Vt.).

But the fact that a written instrument is not filed with the proof of claim raises no presumption against its existence. In *re Dresser*, 13 A. B. R. 747 (C. C. A. N. Y.).

Where no objection to a claim was made upon the ground that the original notes and mortgages, the basis of the claim, were not attached thereto, it will be presumed that the original securities were present at the trial, and not attached, or may have been attached and copies substituted or their presence waived. In *re Carter*, 15 A. B. R. 126, 138 Fed. 846 (D. C. Ark.).

Waiving Note and Proving on Original Consideration.—A note may be waived and proof be made on the original consideration.

In *re Worcester Co.*, 4 A. B. R. 504, 102 Fed. 808 (C. C. A. Mass.): "In bankruptcy it is of no consequence whether proof was made of the original account or of the note. Therefore, if the original account belonged to the county, so at its option did the note, and the county claiming the note might prove it, or repudiating it, it might prove the original account." Such waiver, however, does not dispense with the necessity of stating whether such a note was given nor with production of the original.

15. Inferentially, In *re Dresser*, 13 A. B. R. 747, 135 Fed. 495 (C. C. A. N. Y.); obiter and inferentially, In *re Big Meadows Gas Co.*, 7 A. B. R. 697, 113 Fed. 794 (D. C. Pa.).

§ 603. **Consideration to Be Stated.**—The affidavit must state the consideration.¹⁶

In re Scott, 1 A. B. R. 553 (D. C. Tex.): "Upon the proof in bankruptcy proceedings of a debt due a creditor, the statement of the consideration should be sufficiently specific and full to enable other creditors to pursue proper and legitimate inquiry as to the fairness and legality of the claim. If the proof is so meagre and general in character as not to do this, it must be held insufficient. Where it is not sufficiently specific and full the creditor must amend or the referee will expunge from the record of the case the proof already made."

In re Stevens, 5 A. B. R. 806, 104 Fed. 325 (D. C. Vt.): "The provisions of § 57, a, b, respecting the statement of consideration and payments required something more than would be sufficient in a declaration against the bankrupt upon these causes of action, and extend to the particulars of each for the information of the trustee and those interested in the estate, but not beyond what relates to the claim as it accrued to claimant."

[1867] In re Elder, Fed. Cas. No. 4,326: "But what was the object of the law-maker in requiring the consideration to be stated in the deposition? The answer to this will help ascertain how particular the statement of it must be. One object, no doubt, was to enable the register to see whether it is legal in its nature, and will support a demand or promise. Another, to show him whether or not the demand is unliquidated, and must be ascertained by assessment before its allowance. Another, to afford the assignee means for comparing the books of the bankrupt with the proof. But the chief object, no doubt, was to put a check upon the proof of fraudulent and fictitious claims, by requiring the claimant to give such a particular and definite statement of the consideration, as would enable other creditors to trace out, discover and expose the fraud or illegality of the claim, if any existed.

"The requirement is intended to be for the benefit of all other creditors of the estate of the bankrupt, and to prevent fraud. If the statement of the consideration is so general and indefinite as to afford no aid to the creditors in their inquiry as to the fairness and legality of the claim, it does not effect the object of the law, and must be held insufficient."

It is not proper to state the consideration merely as being, "for goods, wares and merchandise." The proof ought further to specify the general nature of the goods, wares and merchandise, as, for instance, leather or tinware, etc., etc.¹⁷

[1867] In re Elder, Fed. Cas. No. 4,326: "Looking then at the object of the law, and the reasons for requiring a statement of the consideration in the deposition, I consider that a general statement that the consideration of a demand is goods, wares and merchandise, or hay, barley and board, is not sufficient; that the kinds of goods, the quantity, the price and near the date of sale should be stated; that the quantity of hay, or barley, the price, and the time of delivery, if delivered at one time, or if delivered continuously through a period of time, that period should be stated. If the proof falls short of this, the register ought not to consider it satisfactory, and should withhold his approval."

• 16. Bankr. Act, § 57 (a). In re Blue Ridge Packing Co., 11 A. B. R. 36, 125 Fed. 619 (D. C. Pa.); In re Creasinger, 17 A. B. R. 543 (Ref. Calif., affirmed by D. C.).

17. In re Blue Ridge Packing Co., 11 A. B. R. 36, 125 Fed. 619 (D. C. Pa.). See note to In re Scott, 1 A. B. R. 553 (D. C. Tex.).

Even claims founded upon promissory notes and other commercial paper importing consideration probably should state the consideration.¹⁸ The requirement that the consideration must be stated would not, of course, operate to nullify the principle that the instrument imports a consideration. It is simply a statement of fact for the information of creditors and does not deprive the claimant of any of his rights.

§ 604. Account to Be Itemized.—In carrying out and interpreting the statutory requirement that the consideration must be stated, the Supreme Court has prescribed in General Order XXI that if the claim is upon an account the account must be in detail, that is to say, be itemized, and be attached to the affidavit.¹⁹ This is so even with an account for legal services.²⁰ The items must be dated and described.²¹

The basis of this requirement is probably that creditors, coming together from long distances, should have the claims of other creditors presented in such form that by simple inspection their validity may appear, and creditors be not subjected to the trouble of instituting protracted enquiries at great expense. Thus, it will not fulfil the requirement to attach an account which sets forth as a part of the account the item merely "to account rendered" so much, or "to balance due" so much, in a lump sum.

§ 605. Claims Provable in Name of Real Party in Interest.—Claims are, in general, to be made in the name of the party substantially in interest.

In *re Worcester Co.*, 4 A. B. R. 504, 102 Fed. 808 (C. C. A. Mass.): "Bankruptcy, however, is governed by the rules of equity proceedings, and takes no cognizance of the technical rules of the common law with reference to parties to litigation, and, like equity, it acts in the names of the parties substantially interested. So that, whether or not the note was indorsed by Dwinell, the debt could be proved by the county, if it owned it (as it was proved), and in no other way. The indorsement by Dwinell was of no effect, except as a matter of convenience, as affording uncontroverted evidence that it belonged to the county."

§ 606. Secured Claims.—If the claim is a secured claim that fact must be stated and the security be described.²²

18. [1867] In *re Elder*, 3 Bankr. Reg. 670, 1 Sawy. 73, Fed. Cases 4,326. See note to In *re Scott*, 1 A. B. R. 553 (D. C. Tex.).

19. Gen. Order XXI. In *re Blue Ridge Packing Co.*, 11 A. B. R. 36, 125 Fed. 619 (D. C. Penn.); In *re Scott*, 1 A. B. R. 553 (D. C. Tex.); In *re Chasnoff*, 3 N. B. N. & R. 1 (Ref. Neb.); In *re Creasinger*, 17 A. B. R. 543 (Ref. Calif., affirmed by D. C.).

20. In *re Scott*, 1 A. B. R. 553 (D. C. Tex.); In *re Creasinger*, 17 A. B. R. 543 (Ref. Calif., affirmed by D. C.).

21. In *re Blue Ridge Packing Co.*, 11 A. B. R. 36, 125 Fed. 619 (D. C. Penn.).

22. Bankr. Act, § 57 (a).

As to what claims are and what are not provable and allowable, see post, chs. XXI and XXIV.

As to determining value of securities for the purpose of voting and sharing in dividends, see post, ch. XXIV, div. 1, subd. "A", § 763; and for the purpose of sharing in dividends, see post, ch. XXIV, div. 1, subd. "A", § 759, et seq.

§ 607. **Priority Claims.**—Claims entitled to priority of payment before general creditors, out of dividends must be “proved.”²³ They are none the less provable debts because of their right to priority of payment before other debts.

To this rule there is of course the usual exception of the claims of the state and federal government for taxes and other demands. The sovereign is not to be put to the necessity of making proof of debt.²⁴

But no special form of proof of a priority claim is prescribed.²⁵

In *re Jones*, 18 A. B. R. 209 (D. C. Mich.): “While the statute expressly provides what the proof of claim shall contain no requirement is made as to the contents of a petition for priority.”

Nor need the “proof” contain formal demand for priority of payment.²⁶

In *re Jones*, 18 A. B. R. 209 (D. C. Mich.): “There is no requirement that priority should be claimed in the petition (deposition) for proof of claim. This priority is matter of administration and may be asserted at any time in connection with or before the payment of dividends.

However, it is good practice to make the proof conform to that prescribed for a secured debt and to insert allegations bringing the claim within those enumerated in § 64 as being entitled to priority of payment.

§ 608. **Assigned Claims—Assigned before Bankruptcy.**—If a claim has been assigned before the bankruptcy, of course the assignee makes the proof and makes it in his own name. He is the creditor.²⁷

In *re Worcester County*, 4 A. B. R. 504, 102 Fed. 808 (C. C. A. Mass.): “Even claims assigned before bankruptcy must be proved by the assignee. This was so determined by Judge Lowell in *In re Fortune*, 1 Low. 384, Fed. Cas. No. 3,586—a decision which was never controverted, and which, on fundamental principles of equity rules of proceeding, cannot be. In case of a debt assigned before bankruptcy, the original assignor is not entitled to be recognized, either in a petition for an adjudication of bankruptcy or in a proof of debt; and the assignee necessarily comes in his own name as the only party to the record. All the discussion and doubt about the method of proceeding with assigned debts, whether under the present statute or previous ones, relate to those assigned after the proceedings in bankruptcy are commenced.”

§ 609. **Assigned after Bankruptcy, but before Proof.**—If a claim has been assigned, however, after the bankruptcy but before it has been proved, the claimant’s proof must be supported by an affidavit of the one

²³. In *re Hayward*, 12 A. B. R. 264, 130 Fed. 720 (D. C. Pa.); instance, claim of county for labor of its convicts, In *re Worcester Co.*, 4 A. B. R. 504, 102 Fed. 808 (C. C. A. Mass.).

²⁴. Thus, as to taxes, see post, § 701. Thus, as to damages on government contract, see post, § 730.

²⁵. In *re Worcester Co.*, 4 A. B. R. 504, 102 Fed. 808 (C. C. A. Mass.).

²⁶. In *re Worcester Co.*, 4 A. B. R. 504, 102 Fed. 808 (C. C. A. Mass.).

²⁷. In *re Worcester County*, 4 A. B. R. 502, 102 Fed. 808 (C. C. A. Mass.). See post, § 740.

who was owner of the claim at the time of the commencement of the bankruptcy proceedings. This supporting affidavit must set forth the true consideration of the debt and that it is entirely unsecured, or, if it be secured then the security must be described, precisely as in the proof of secured claims.²⁸

§ 610. **Assigned after Proof.**—Of course claims that have been proved and entered of record, and that are afterwards assigned, do not require any action on the part of the court except to guard against imposition and falsehood as to the fact of the assignment actually having been made. To this end, whenever notice of the assignment of claim which has already been proved is received, the referee must give ten days notice by mail to the original creditor who made the proof of claim to deny the assignment if it be untrue. No special form of an assignment of a claim is required.²⁹

§ 611. **Proof by Person Contingently or Secondarily Liable.**—Persons contingently or secondarily liable for a bankrupt's debt as, for instance, a surety or endorser for him, may prove the debt in the name of the creditor, if the creditor fails to prove it himself.³⁰ If the name of the creditor be unknown to the person contingently liable, as is likely to occur in the case of endorsers on negotiable notes, the claim may be proved in the name of the person contingently liable.³¹

Of course, the object of this statutory provision and this general order for permitting the proof of contingent claims is to relieve the surety as much as possible and to prevent the injustice that would be worked upon him were the creditor himself to lie back contented to rely solely upon the security, taking no steps to get any portion of the debt paid by the person primarily obligated therefor.³² It is the creditor's claim that is to be thus proved, not the surety's; and the proof therefore must be in the name of the creditor and not in the name of the surety, unless the name of the creditor is unknown.³³

28. Gen. Order XXI. See post, § 741.

29. See *In re Miner*, 9 A. B. R. 103, 117 Fed. 953 (D. C. Ore.). See, also, post, ch. XXVII, § 742.

30. Bankr. Act, § 57 (i). *Obiter*, *Hayes v. Comstock*, 7 A. B. R. 493 (Sup. Ct. Iowa). *In re Carter*, 15 A. B. R. 126, 138 Fed. 846 (D. C. Ark.); *obiter*, *Phillips v. Dreher Shoe Co.*, 7 A. B. R. 326, 112 Fed. 404 (D. C. Penna.).

See post, "Rights of Creditors against Third Parties Jointly or Secondarily Liable for Bankrupt," § 1510, et seq.

31. Gen. Order XXI (4): "The claims of persons contingently liable for the bankrupt may be proved in the name of the creditor when known by the party contingently liable. When the name of the creditor is unknown, such claim may be proved in the name of the party contingently liable; but no dividend shall be paid upon such claim, except upon satisfactory proof that it will diminish pro tanto the original debt."

32. See *Hayes v. Comstock*, 7 A. B. R. 493 (Sup. Ct. Iowa).

33. Bankr. Act, § 57 (i). *Insley v. Garside*, 10 A. B. R. 52, 121 Fed. 699 (C. A. Alaska); *obiter*, *Phillips v. Dreher Shoe Co.*, 7 A. B. R. 326, 112 Fed. 404 (D. C. Penn.); *In re Dillon*, 4 A. B. R. 63, 100 Fed. 627 (D. C. Mass.); *impliedly*, *Swarts v. Siegel*, 8 A. B. R. 696, 117 Fed. 13 (C. C. A. Mo.); *impliedly*, *In re Schmechel*, 4 A. B. R. 719, 104 Fed. 64 (C. C. A. Mo.).

So, also, as we will later see, if the creditor has received voidable preferences

Livingston v. Heineman, 10 A. B. R. 42, 120 Fed. 786 (C. C. A. Ohio): "The surety, to obtain his distributive share of the bankrupt's estate must proceed in the manner pointed out by the Bankrupt Law; that is, if the creditor fails to prove the claim, he must prove it in the name of the creditor, and he will then be permitted to participate in the distribution to the extent that he has discharged the obligation."

The surety may, of course, prove his own claim for indemnity against the bankrupt if the surety has paid anything or suffered any loss on account of his principal, before the filing of the petition.³⁴

§ 612. Creditor Not Obligated to Prove Claim against Principal, Even on Surety's Demand nor to Lend Written Instrument to Surety, unless.—The creditor is not under any active duty either to prove his claim against the bankrupt principal, nor to let the surety take the written instrument to attach to a proof of claim. The creditor is entitled to its possession, and if the surety desires its possession, he must pay the debt.³⁵ But, if the surety demands that the creditor either prove or let the surety have the written instrument in order to prove, and offers to fully indemnify the creditor against loss and expense, the creditor's refusal would probably work a pro tanto release, to the extent of the dividends lost thereby.

Obiter, query, *Bank v. Sawyer*, 6 A. B. R. 154 (Mass. Sup. Jud. Ct.): "We are of opinion that the holder has no such active duty either to prove the note of his own motion, or to tender it to the endorser to enable the latter to make proof, as to make such an omission on the part of the holder a release of the endorser."

"Even equity will not compel a creditor to prove in bankruptcy against his principal debtor for the benefit of a surety, unless the surety himself moves in the matter and requires the creditor to act, furnishing him with suitable in-

then the surety must surrender them or their value as a prerequisite to the allowance of his claim for the surety is subrogated to the creditors' claim "cum onere." *Livingston v. Heineman*, 10 A. B. R. 39, 120 Fed. 786 (C. C. A. Ohio, reversing, on other grounds, *In re New*, 8 A. B. R. 566); compare, *quære*, *In re Dillon*, 4 A. B. R. 63, 100 Fed. 627 (D. C. Mass.); *In re Schmechel*, 4 A. B. R. 719, 104 Fed. 64 (D. C. Mo.); *In re Waterbury Furn. Co.*, 8 A. B. R. 79, 114 Fed. 255 (D. C. Conn.); *Cookingham v. Morgan*, Fed. Cas. 3,183; *Bartholomew v. Bean*, 18 Wall. 635.

Swarts v. Siegel, 8 A. B. R. 696, 117 Fed. 13 (C. C. A. Mo.): "An indorser, an accommodation maker or a surety on the obligation of a bankrupt is a creditor under the act of 1898, and a payment on such an obligation by the principal debtor while insolvent to the innocent holder of the contract within four months before the filing of the petition for adjudication in bankruptcy will constitute a preference which will debar the indorser, accommodation maker, or surety from the allowance of any claim in his favor against the estate of the bankrupt unless the amount so paid is first returned to that estate." Impliedly, *Landry v. Andrews*, 6 A. B. R. 281, 22 R. I. 597; *In re Rea*, 82 Iowa 239; *Cutler v. Steele*, 85 Mich. 632; *Dunnigan v. Stevens*, 122 Ill. 401, 404; (1867) *Ahl v. Thorner*, Fed. Cas. No. 103; (1867) *Sill v. Solberg*, 6 Fed. 474, 477; (1867) *Scammon v. Cole*, Fed. Cas. 12,432.

34. *Boyce v. Guaranty Co.*, 7 A. B. R. 6, 111 Fed. 138 (C. C. A. Ohio). In this case a surety on defaulting contractor's bond who completed the work at greater cost than contract price, was held to be a creditor for the loss. See, inferentially, *Insley v. Garside*, 10 A. B. R. 52, 121 Fed. 699 (C. C. A. Alaska); *In re Bingham*, 2 A. B. R. 223, 94 Fed. 796 (D. C. Vt.).

35. *Bank v. Sawyer*, 6 A. B. R. 154 (Mass. Sup. Jud. Ct.).

demnity against the consequences of risk and delay, and against expense. *Watertown Bank v. Simmons*, 131 Mass. 85, and cases cited; *Wright v. Simpson*, 6 Ves. 714, 734; *Ex parte Rushforth*, 10 Ves. 414; *Mayhen v. Crickett*, 2 Swanst. 185, 191; 1 Story, Eq. Jur. sec. 639. See *Bellows v. Lovell*, 5 Pick. 307, 311.

"The plaintiff was entitled to the possession of the note until it should be paid. Reynolds could pay it in performance of his promise as endorser, be reinstated in his original title, and then prove his own claim in bankruptcy without help. He made no payment, nor did he request the plaintiff either to prove the note or to allow it to be filed in support of any attempted proof. Whether, if he had requested the plaintiff to prove the note, rendering the expenses of such proof with proper indemnity, or had himself attempted to prove his own claim, requesting the plaintiff under proper indemnity to allow the filing of the note in support of such proof, he would have been released by a refusal on the part of the plaintiff, it is not necessary to consider, and upon those points we express no opinion."

§ 613. Surety, on Payment, Subrogated, Pro Tanto, to Creditor's Dividends.—The surety is subrogated to the creditor's dividends, pro tanto, if he has paid anything thereon either before or *after* the bankruptcy.³⁶ But where the surety has paid only a part and a contest arises between him and the creditor as to who shall make the proof the creditor will be preferred.³⁷

§ 614. Signature and Verification.—The deposition must be signed by the "creditor";³⁸ and must be verified.³⁹

It must be signed and sworn to by the claimant in person; except that, for good cause, an agent may make the oath. In the event the agent makes the oath, the affidavit must state the reason why the claimant in person did not make it, and must also show the agent has actual knowledge of the facts. What are sufficient reasons for an agent's making the proof instead of the creditor himself, are varied, as, for instance, that the creditor is sick or is travelling and could not have been reached in time after receipt of the notice for him to have prepared the claim for the first meeting of creditors, and so forth. It is hardly sufficient reason that the creditor himself was merely "absent" from the city, or county, or state, so long as it does not appear that he could not have been reached by proper diligence notwithstanding.

Defective verification may be cured by amendment.⁴⁰

36. Bankr. Act, § 57 (i): "* * * and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor."

In re *Mason*, 2 A. B. R. 60 (Ref. R. I.); In re *Carter*, 15 A. B. R. 126, 133 Fed. 846 (D. C. Ark.); *Livingston v. Heineman*, 10 A. B. R. 42, 120 Fed. 786 (C. C. A. Ohio); inferentially, to same effect, In re *Heyman*, 2 A. B. R. 651, 93 Fed. 800 (D. C. N. Y.).

37. In re *Heyman*, 2 A. B. R. 651, 95 Fed. 800 (D. C. N. Y.).

38. Bankr. Act, § 57 (a).

Who are and who are not "creditors" and what claims are "provable," will be later considered. See ch. XXI.

39. Bankr. Act, § 57 (a).

40. In re *Stevens*, 5 A. B. R. 806, 107 Fed. 243 (D. C. Vt.).

If the creditor is a partnership, the proof of claim must show that the affidavit is made by one of the members of the partnership.⁴¹

If the creditor is a corporation, the proof must be sworn to by the treasurer. In case there be no treasurer, then it is to be made by the officer whose duties most nearly correspond to those of treasurer; as, for instance, the cashier of a national bank.⁴²

The signature and oath must be those of a natural person. One of the most common mistakes is to sign the corporate name to the affidavit, as, for instance, "The _____ Co., by John Doe, Treasurer." This, obviously, is improper, because it purports to be the oath of a corporation, and yet a corporation cannot be sworn, nor can it be put in jail for perjury. It has no "soul" and an oath does not bind it. Therefore, the oath and signature must be those of an individual; who, of course may, and should, describe, in the body of the affidavit, his relation to the corporation which owns the claim.

The verification may be made by oath, or in case of conscientious scruples, by affirmation; and may be made before a referee in bankruptcy, any officer authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the State where the same are to be taken; or before any diplomatic or consular officer of the United States in any foreign country.⁴³ The same rules apply as to acknowledgments of powers of attorney.⁴⁴

The verification may be made before the attorney of the claimant.⁴⁵

A notary public's official character, even in another State than the one wherein the bankruptcy proceedings are pending, needs no certification of its authenticity in the first instance, other than the signature and seal that purport to be his.⁴⁶

§ 615. Several Claims by Same Creditor.—Different claims of the same creditor need not be included in one proof.

In *re Ball*, 10 A. B. R. 564, 123 Fed. 164 (D. C. Vt.): "She had previously proved an unsecured claim, and that is insisted to be a waiver of all not there included. But the law does not seem to require that all claims should be brought into one. No good reason appears for holding that one should be barred by not being combined with the others, and there may be good reasons why secured and unsecured claims should not be put together."

But it is usual, and the better practice, to include all in one proof.

§ 616. Single Claim Not to Be Split.—And a single claim may not be split, else allowance or disallowance of one part will be *res adjudicata* as to all.

41. Gen. Order No. XXI.

42. Gen. Order No. XXI.

43. Bankr. Act, § 20.

44. In *re Sugenhimer*, 1 A. B. R. 425, 91 Fed. 744 (D. C. N. Y.).

45. In *re Kimball*, 4 A. B. R. 144, 100 Fed. 177 (D. C. Mass.).

46. In *re Pancoast*, 12 A. B. R. 275, 129 Fed. 643 (D. C. Penn.).

In re Drumgoole, 15 A. B. R. 261 (D. C. Pa.): "But, assuming the correctness of the claimant's position, and conceding that the contract was not as Mr. Etting has found it, I think the claimant cannot now succeed because he has split his cause of action, and therefore is forbidden to recover more than he claimed before Mr. Hunter. He could have had all the whiskey reguaged at that time, and presented his full claim for damages. Instead of doing this, he chose to confine himself to the loss on two of the barrels only, and on familiar principles he cannot sue again for the loss on the others."

§ 617. Proofs of Claim Amendable.—Proofs of claim may be amended ⁴⁷

In re Stevens, 5 A. B. R. 806, 107 Fed. 243 (D. C. Vt.): "Amendments are allowed for the correction of misstatements and minor inaccuracies, including verification."

In re Myers & Charni, 3 A. B. R. 760, 99 Fed. 601 (D. C. Ind.): "This is a motion in behalf of James McCormick, one of the creditors of the bankrupt, to amend his proof of claim heretofore filed, by adding thereto a statement of a security in the nature of a claim to an equitable lien upon certain real estate under a notice of lis pendens in a suit pending against the bankrupt and his wife prior to the adjudication in bankruptcy, no mention of which was made in the proof of claim filed. The reason assigned for asking leave to amend is, in order that the complainant in that suit may not be embarrassed in its prosecution by the contention that the complainant had waived his lien by the filing of his claim in bankruptcy as a wholly unsecured claim. * * *

"There is no doubt of the power of the court to allow the amendment asked for; but in the administration of the bankruptcy law, its fundamental principle of equal distribution among creditors seems to me to forbid the exercise of this discretionary power in the interest of one creditor to the prejudice of others, where there is no perfected lien or established security in the creditor's favor, but only a contingent and inchoate lien, in the effort to secure a preference by litigation. (See In re Lesser, 3 Am. B. R. 758, 99 Fed. 913.) The equities of the general creditors through the trustee should be preferred.

"If the omission of the creditor to disclose the existence of his suit and the lien claimed thereby, would have the effect of disabling him from obtaining a judgment for his own benefit alone, the court should not aid the creditor in securing a preference by granting the present application."

And they may be amended where mistake has been made, either of fact or law, so long as there is no fraud, and when all the parties can be placed in the same situation that they would have been in had the error not occurred.⁴⁸

§ 618. Amendment to Be Based on an Original Proof Filed.—An amendment must be based upon an original claim filed. And the power

⁴⁷ Hutchinson v. Otis, 10 A. B. R. 135, 190 U. S. 552; In re Creasinger, 17 A. B. R. 540 (Ref. Calif., affirmed by D. C.); In re Roeber, 11 A. B. R. 464 (C. C. A. N. Y.); inferentially, McCallum & McCallum, 11 A. B. R. 448, 127 Fed. 768 (D. C. Pa.); inferentially, In re Pettingill, 14 A. B. R. 763, 137 Fed. 840 (Ref. Mass.); inferentially, In re Thompson's Sons, 10 A. B. R. 581, 123 Fed. 174 (D. C. Pa.); inferentially, In re Scott, 1 A. B. R. 553 (D. C. Tex.); impliedly, In re Robinson, 14 A. B. R. 626, 136 Fed. 994 (D. C. Mass.).

⁴⁸ In re Myers & Charni, 3 A. B. R. 760, 99 Fed. 601 (D. C. Ind.).

of permitting amendment must not be perverted to let in dilatory creditors who have failed to file any proof of claim within the statutory year limited for filing claims.⁴⁹

§ 619. **Amendment Changing Legal Nature of Cause of Action.**—The amendment may allege the facts to make a different case, but the facts must be substantially the same.⁵⁰

§ 620. **Conditions May Be Imposed.**—The court may impose conditions upon granting leave to amend.⁵¹

§ 621. **Amendment May Be Refused.**—The court may refuse to permit amendment.⁵² As, for instance, where the amendment proposed would change the claim into one not provable.

Impliedly, *In re Robinson*, 14 A. B. R. 626, 136 Fed. 994 (D. C. Mass.): "A creditor sought to prove a note made in New York at a usurious rate of interest. On due objection the claim was disallowed, and the creditor has moved to amend his original proof by substituting therefor a claim 'for money fraudulently obtained by said bankrupt and received to the deponent's use.' The frauds alleged were representations of fact concerning the bankrupt's business, his assets, and his intended application of the money borrowed. The referee refused to permit the amendment, on the ground that the claim as amended would not be provable. If provable as amended, it should be allowed. The law of New York so taints with illegality a usurious contract that money borrowed thereby cannot be recovered as money had and received. * * * The creditor cannot recover upon the usurious contract itself, nor yet upon the common counts, since any implied contract to pay money advanced is merged in the express usurious contract actually made. If, however, the creditor can establish a provable claim apart from the usurious contract, and unaffected by it, he will prevail. * * * If a creditor can prove for money, had and received without regard to a non-usurious note, he can here prove without regard to the usurious note."

Also, for instance, where the amendment would prejudice general creditors.⁵³

§ 622. **Amendment Permissible after Expiration of Year for "Proving" Claims.**—Proofs of claim may be amended after the expiration of the year limited by statute for filing (proving) claims.⁵⁴

49. See post, subject, "Year's Limitation for Filing Claims, Amendment of Claims after Expiration of Year," ch. XXII, § 734, et seq.

50. Inferentially, *In re Robinson*, 14 A. B. R. 626, 136 Fed. 994 (D. C. Mass.).

51. Note to *In re Friedman*, 1 A. B. R. 510.

52. *In re Wilder*, to be found in note to 3 A. B. R. 761 (D. C. Ind.).

53. *In re Wilder*, 3 A. B. R. 761 (D. C. Ind.). This decision seems to be treading on doubtful ground. If the failure to allege the security, originally, was purposeful or operated to mislead creditors to their hurt the claimant may be estopped, of course. Otherwise leave to amend should not be refused.

54. *Hutchinson v. Otis*, 10 A. B. R. 135, 190 U. S. 550; contra, *In re Moebins*, 8 A. B. R. 590, 116 Fed. 47 (D. C. Pa.).

But for further discussion of the subject of amendment of proofs of claim after expiration of the statutory year for proving claims, see post, ch. XXII, § 734, et seq.

§ 623. **Withdrawal of Proofs of Claim.**—Proofs of claim may be withdrawn.⁵⁵ Thus, they may be withdrawn as unsecured and new proofs be made as secured.⁵⁶

But though “withdrawn,” yet the deposition for proof of debt itself should remain in the files.

§ 624. **Attorney at Law Competent to Withdraw without Written Power.**—An attorney at law duly admitted to practice in the United States District Court need not present written power of attorney for the purpose of withdrawing a client's claim.⁵⁷

55. In re Friedman, 1 A. B. R. 510 (Ref. N. Y.).

56. See post, “Secured Claims,” ch. XXIV, div. 1, § 765.

57. In re Pauley, 2 A. B. R. 333 (Ref. N. Y.).

CHAPTER XXI.

PROVABLE DEBTS.

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§ 717. If Liquidated by Litigation within 30 Days before or after Expiration of Year, Then 60 Days Longer Granted.

§ 625. Only Such Are "Provable" Debts as Statute Declares.—Only such claims are provable debts as the statute declares to be such. Thus, as to costs.

In re Marcus, 5 A. B. R. 19, 104 Fed. 331 (D. C. Mass., affirmed in 5 A. B. R. 365): "To be provable, they must be included within the definition of § 63."

In general, only contract claims, judgments, taxes and court costs are capable of being proved in bankruptcy and of being allowed to participate in dividends.¹

The reason of this is plain—bankruptcy is concerned with business obligations. It is the law concerned with traders and merchants chiefly.

Brown & Adams v. Button Co., 17 A. B. R. 566 (C. C. A. Del.): "Bankruptcy is supposedly concerned only with commercial matters and was early confined to traders. And while it has been gradually extended and enlarged, the original idea has not been altogether departed from. Its purpose is to free a person from his debts, or to subject him to proceedings on account of them. This may not be controlling but it is suggestive; and a construction which goes outside of it has certainly to be justified."

Moreover, other kinds of claims are too indefinite, such as damages for torts, etc., etc., until they are reduced to judgment.

DIVISION 1.

MEANING OF "DEBT" AND "PROVABILITY."

§ 626. "**Debt.**"—By "debt" is meant any debt, demand or claim provable in bankruptcy.²

§ 627. **Includes Demands and Claims Not Technically "Debts."**—It includes not only "debts," as the term technically is used, but also demands or claims.³

In *re Gerson*, 6 A. B. R. 12, 107 Fed. 897 (C. C. A. Penna.): "The indorser's engagement is to pay a sum certain at a fixed date, to-wit, the amount of the bill or note at its maturity, if it is not paid upon due presentment by the party primarily liable, upon due notice of its dishonor being given to the indorser. If it can be affirmed that such an unmatured liability is not a "debt," in a technical sense, certainly it is a 'demand' or 'claim,' and comes it seems to us, within the scope of the fourth subdivision of § 63 of the act. The primary purpose of the

1. Bankr. Act, § 63 (a): "Debts of the bankrupt may be proved and allowed against his estate which are,

"1st. A fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him (or by him) whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest.

"2d. Due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice.

"3d. Founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt.

"4th. Founded upon an open account or upon a contract express or implied.

"5th. Founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgments."

2. Bankr. Act, § 1 (11).

3. Bankr. Act, § 1 (11).

Bankrupt Act was to relieve insolvent debtors from their pecuniary liabilities, and to secure ratable distribution of their estates among their creditors."

In re Mahler, 5 A. B. R. 457, 105 Fed. 428 (D. C. Mich.): "The general intent of Congress in the enactment of the statute was to make every debt and demand existing against the bankrupt at the time of his adjudication which was recoverable, either at law or in equity, provable in bankruptcy."

Likewise, by "debt" is not meant the certain, liquidated sum which the technical term implies.⁴ And by "debt" is not meant merely obligations that could be reduced to judgments in personam. Obligations enforceable only in equity against particular property, as contracts of a married woman enforceable only against her separate estate, are "debts" within the meaning of the Bankruptcy Act;⁵ likewise, obligations arising not by direct contract but by implication of law, as subrogation in favor of a wife, in States where the wife and husband may not contract directly with each other.⁶ Also, even where not enforceable at all, either in law or in equity, claims and demands have been held "provable" in bankruptcy, as a wife's claim for money loaned to her husband, in Massachusetts.⁷

But it has been held, that, where by state statute, attachment costs are a priority claim against the debtor's property but not against him personally, they lack an essential element of a provable debt in bankruptcy.

In re The Copper King, 16 A. B. R. 150 (D. C. Calif.): "This definition leaves open the question as to the meaning of the word 'debts' in the particular clause under consideration; and, in my opinion, it is there used in its technical sense, and refers only to such debts as are based upon contract, express or implied, or to personal obligations for the payment of money imposed upon the bankrupt by statute. The insolvency law of California does not make the insolvent upon the contingency therein named, personally liable for the costs incurred by his creditor, in an action in which a writ of attachment has been issued. The liability is not personal, but is against his estate. The liability for such costs, therefore, even if considered as a debt, is not a debt 'owing' by the bankrupt."

§ 628. **What Is "Provable" Debt.**—A provable debt means an obligation susceptible of being presented in such form as to come within some one or more of the classes of debts designated in § 63 (a) as "provable" debts, whether actually so presented or not.

Crawford v. Burke, 12 A. B. R. 666, 195 U. S. 176: "Under this section, whether the discharge of the defendants in bankruptcy shall operate as a discharge of plaintiff's debt, it not having been reduced to judgment, depends upon

4. MacDonald v. Tefft-Weller Co., 11 A. B. R. 800, 128 Fed. 381 (C. C. A. Fla.); inferentially, In re Talbott, 7 A. B. R. 29, 110 Fed. 924 (D. C. Mass.).

5. MacDonald v. Tefft-Weller Co., 11 A. B. R. 800, 128 Fed. 381 (C. C. A. Fla.); compare, In re Talbott, 7 A. B. R. 29, 110 Fed. 924 (D. C. Mass.); compare, In re Gerson, 6 A. B. R. 12, 107 Fed. 897 (C. C. A. Penna.); In re Mahler, 5 A. B. R. 45, 105 Fed. 428 (D. C. Mich.).

6. In re Nickerson, 8 A. B. R. 707 (D. C. Mass.).

7. James v. Gray, 12 A. B. R. 573 (C. C. A. Mass., declining to follow In re Talbott, 7 A. B. R. 29, 110 Fed. 924, D. C. Mass.).

the fact whether that debt was 'provable' under the bankruptcy act, that is, susceptible of being proved.

"We are clear that the debt of the plaintiff * * * might have been proved under § 63 (a) had plaintiff chosen to waive the tort and take his place with the other creditors of the estate."

Thus, claims may be "provable" although not permitted to be "proved" because of the expiration of the year's time limited for "proving" claims.⁸

§ 629. Whether "Provable" or Not Depends on Status at Date of Filing Bankruptcy Petition.—The question whether or not a debt is provable turns upon its status at the time of the filing of the petition.⁹

In re Pettingill & Co., 14 A. B. R. 728, 137 Fed. 840 (D. C. Mass.): "The provability of a claim under the Bankrupt Act of 1898 depends upon its status at the time the petition in bankruptcy is filed: if then 'provable' within the definition of § 63, it may be proved; otherwise not."

In re Swift, 7 A. B. R. 374, 112 Fed. 315 (C. C. A. Mass.): "The trustee maintains that the form of proof prescribed by the Supreme Court requires that it should state that the debt proved existed 'at and before the filing' of the petition for adjudication of bankruptcy; but in view of the statute, this must be construed, as is commonly done, to give such effect to the word 'and' that it may read either 'or' or 'and,' as circumstances may require. That part of the present Bankruptcy Act which describes what debts may be proved does not repeat at all points the words 'owing at the time of the filing of the petition,' but it is impossible to consider it other than as though it did thus repeat them. There can be no question that it is sufficient if the debt existed at the point of time of the filing of the petition in bankruptcy."

§ 630. "Provability" and "Validity" Different Terms.—The provability of a claim is not dependent upon its validity. Provability and validity are different terms. The claim may be wholly false and improper in fact and yet it will be a provable claim if on its face it comes within any of the classes mentioned.¹⁰

See Hargardine-McKittrick Dry Goods Co. v. Hudson, 10 A. B. R. 225, 122 Fed. 232 (C. C. A. Mo.): "The plaintiff's judgment was a provable debt, and the fact that a recovery upon it might be defeated by the plea of payment or a

8. Norfolk & W. R'y Co. v. Graham, 16 A. B. R. 616 (C. C. A. W. Va.); Morgan v. Wordell, 6 A. B. R. 167, 178 Mass. 350.

9. In re Bingham, 2 A. B. R. 223, 94 Fed. 796 (D. C. Vt.); Swarts v. Fourth Nat'l Bk., 8 A. B. R. 673, 117 Fed. 1 (C. C. A. Mo.); Swarts v. Siegel, 8 A. B. R. 689, 117 Fed. 13 (C. C. A. Mo.); Bray v. Cobb, 3 A. B. R. 790, 100 Fed. 270 (D. C. N. Car., reversed, on other grounds, in Cobb v. Overman, 6 A. B. R. 324, 109 Fed. 65); In re Graff, 8 A. B. R. 745, 117 Fed. 343 (D. C. N. Y.); Steinhart v. Nat'l Bk., 18 A. B. R. 87, 52 Misc. (N. Y.) 465. See post, "Contingent Claims," § 640, et seq. See post, "Claims Not Owing at Time of Filing of Petition," § 668, et seq.

10. See note to Morgan v. Wordell, 6 A. B. R. 167, 59 N. E. 1037 (Mass. Sup. Jud. Ct.); obiter, In re Grant Shoe Co., 12 A. B. R. 349, 130 Fed. 881 (C. C. A. N. Y.). Also, see In re Dillon, 4 A. B. R. 63, 100 Fed. 627 (D. C. Mass.); (1867) In re Kingsley, Fed. Cases 7,819, 1 N. B. Reg. 329.

For cases where this distinction seems to have been lost sight of, see In re Burlington Malting Co., 6 A. B. R. 369, 109 Fed. 777 (D. C. Wis.); In re Farmer, 9 A. B. R. 19, 116 Fed. 763 (D. C. N. Car.), wherein a judgment barred by the statute of limitations was held not "provable."

plea of the Statute of Limitations or any other plea in bar, did not take it out of the class of provable debts. The term 'provable debts' does not mean only such debts as are valid and against the allowance of which no defense can be successfully interposed."

§ 631. **Whether a "Debt," "Claim" or "Demand" Dependent on State Law.**—Nevertheless, whether it be a "debt," "claim" or "demand" is determined by state law; and a claim, which in its nature is such that, by the law of the state, it is not enforceable, is not provable, although elsewhere it might be enforceable; thus, as to wife's claims in Massachusetts and elsewhere.¹¹

§ 632. **"Provability" and "Allowability" Different Terms.**—"Provability" and "allowability," likewise, are different terms. Likewise different are the "proof" and "allowance" of claims.¹²

"Provability" refers to the nature of the obligation, whether a contract obligation, etc., while "allowability" refers to its right to share in dividends. "Allowability" implies not only "provability," but also "validity." If for any reason the claim is improper—if it be too large, if it be fraudulent, if it has been paid, if it be founded upon illegal consideration or if there be no consideration at all for it or if it be barred by the statute of limitations or incapable of proof because of the statute of frauds, or if for any other of the thousand and one defenses that may be made to claims the claim be improper—it is not "allowable," that is to say, will not be allowed to participate in the estate, yet all the time it may be a "provable" claim notwithstanding, as the term is used, for its provability is to be determined by its face and form and is not affected by what it may be proved to be in substance.

Allowability perhaps implies even more than provability and validity. A claim may be a claim on contract and a valid one at that and yet not be "allowable" because "secured" to its full amount. Allowability refers to the right to share in the general dividends; claims are "allowed," to share in dividends.

Hence, for instance, "secured" claims may be provable although "allowable" only for the amounts found owing over and above the value of any securities held therefor.¹³

However, it would seem on principle that a priority claim should nevertheless be "allowable," it being simply granted priority in the distribution of the estate out of the assets not appropriated to particular creditors before the bankruptcy; yet § 57 (e) places priority claims and secured claims in the same class, and grants them "allowability" only to the extent of the deficit thereon.¹⁴

11. In re Talbott, 7 A. B. R. 29, 110 Fed. 924 (D. C. Mass.).

12. In re Mertens & Co., 16 A. B. R. 829 (C. C. A. N. Y.).

13. Compare, impliedly, to this effect, Bankr. Act, § 57 (e).

14. In re Eagles & Crisp, 3 A. B. R. 735, 99 Fed. 695 (D. C. N. Car.); In re Columbia Iron Wks., 14 A. B. R. 527, 142 Fed. 234 (D. C. Mich.); obiter, In re Pettingill & Co., 14 A. B. R. 765 (Ref. Mass.).

Likewise preferred claims and claims upon which the creditor holds a lien, obtained on the insolvent's property by legal proceedings within four months, may be "provable" and be "proved," although not "allowable" nor, "allowed" except upon surrender of the preference.¹⁵

In *re Hornstein*, 10 A. B. R. 308, 122 Fed. 266 (D. C. N. Y.): "The distinction between 'proved' and 'allowed' is always made apparent throughout the Bankruptcy Act, and the term 'provable claims,' in § 59 B, providing that three or more creditors who have provable claims against any person, etc., may file a petition to have him adjudged a bankrupt, is not to be given the same meaning as allowable claims."

"A creditor with an unsurrendered preference should always be allowed to 'prove' his claim and may be a petitioner in bankruptcy but the claim will be 'allowed' only upon condition that the preference is surrendered."

Stevens v. Nave-McCord Co., 17 A. B. R. 610, 150 Fed. 71 (C. C. A. Colo.): "A creditor who holds a voidable preference has a claim that is provable in the sense that formal written proof of it may be made and filed, but which he may not procure an allowance of, nor vote at a creditors' meeting nor obtain any advantage by, under the bankruptcy law, until he has surrendered his preference."

§ 633. "**Provability**" Not Dependent on "**Dischargeability**."—Nor is provability dependent upon dischargeability. A claim may be a provable claim and be allowed to participate in dividends and yet not be affected by the bankrupt's discharge. This is illustrated by the instance of debts for property obtained by false representations or pretenses.¹⁶

§ 634. **Nor on Right to Share in Dividends in Any Particular Order of Priority.**—Nor is provability dependent on the right to share in the dividends in any particular order of priority. Provability depends upon the nature of the liability—not upon whether there are any assets applicable thereto. Thus, a partnership debt is also a provable debt against the individual estate of a bankrupt member though entitled to share in dividends therefrom only after individual debts are satisfied.¹⁷

However, "allowability" may be thus dependent; for a priority claim—for example, a claim for the wages of a workman, clerk or servant, rendered within the prescribed time—is "provable," though "allowable" only for any deficit remaining after application of the priority.¹⁸

DIVISION 2.

CLAIMS EX DELICTO.

§ 635. **Claims "Ex Delicto" for Money Not Provable unless in Judgment.**—Claims *ex delicto*, for money cannot be proved as such. Thus, an unliquidated claim for damages for personal injury is not

15. Bankr. Act, § 57 (g). In *re Richard*, 2 A. B. R. 512, 94 Fed. 633 (D. C. N. Car.).

16. Instance, *Katzenstein v. Reid*, 16 A. B. R. 740 (Ct. App. Tex.).

17. See post, § 2230, et seq., subject of "Distribution in Partnership Cases."

18. Bankr. Act, § 56 (b) and §§ 57 (e), 57 (h). See ante, § 632.

a provable claim, and is not susceptible of being made into a provable claim.¹⁹

In *re Yates*, 8 A. B. R. 70, 114 Fed. 365 (D. C. Calif.): "But a cause of action against him for unliquidated damages for a personal tort, such as is involved in the action of *Risdon v. Yates*, before referred to, is not within either of the classes named."

But if reduced to judgment before the filing of the bankruptcy petition, may be proved as a judgment.²⁰

§ 636. But Provable Where Tort Waivable and Claim Presentable as in Contract.—However, in cases where the tort may be waived and suit be brought in contract, the claim may be proved in bankruptcy; but may not be so proved, where the tort cannot be waived and suit be brought in contract.²¹

In *re United Button Co.*, 15 A. B. R. 391, 140 Fed. 495 (D. C. Del., affirmed sub nom. *Brown & Adams v. Button Co.*, 17 A. B. R. 566, 149 Fed. 48): "A claim for unliquidated damages resulting from injury to the property of another, not reduced to judgment and unaccompanied and unconnected with any contractual or quasi contractual liability is not susceptible of liquidation under § 63b of the Bankruptcy Act of 1898."

Crawford v. Burke, 12 A. B. R. 666, 195 U. S. 176: "We are clear that the debt of the plaintiff was embraced within the provision of paragraph a, as one 'founded upon an open account, or upon a contract, express of implied,' and might have been proved under § 63a had plaintiff chosen to waive the tort, and take his place with the other creditors of the estate."

In *re Hirschman*, 4 A. B. R. 715, 104 Fed. 69 (D. C. Utah): "Section 63, subsection 'a,' does not authorize the proof of any claim arising *ex delicto*, unless a recovery may be had quasi *ex contractu*."

Not every tort is of such a nature that it may be waived and suit be brought on an implied contract. Only those torts that have resulted in the enrichment of the wrongdoer are such, for the measure of the enrichment is the measure of the implied contract. Thus, one who has converted the property of another, or has obtained goods under false pretences, has thereby enriched himself to the extent of the value of the goods so obtained, and

19. *Beers v. Hanlin*, 3 A. B. R. 745, 99 Fed. 695 (D. C. Ore.); In *re Brinckmann*, 4 A. B. R. 551, 103 Fed. 65 (D. C. Ind.); In *re Wigmore*, 10 A. B. R. 661 (D. C. Calif.).

20. *Burnham v. Pidcock*, 5 A. B. R. 590, 68 N. Y. Supp. 1007 (affirming 5 A. B. R. 45).

21. *Brown & Adams v. Button Co.*, 17 A. B. R. 565, 149 Fed. 48 (C. C. A. Del., affirming *In re United Button Co.*, 15 A. B. R. 391); *Machel v. Rochester*, 14 A. B. R. 431, 135 Fed. 904 (D. C. Mont.); In *re Wigmore*, 10 A. B. R. 661 (Ref. Calif.); In *re Filer*, 5 A. B. R. 834, 125 Fed. 261 (D. C. N. Y.); In *re Brinckmann*, 4 A. B. R. 551, 103 Fed. 65 (D. C. Ind.); (1867) *Dusar v. Murgatroyd*, Fed. Cas. 4,199; (1867) *Duggett v. Emerson*, Fed. Cas. 3,962; (1867) *In re Hennocksburgh*, Fed. Cas. 6,367; (1867) *In re Schuchardt*, Fed. Cas., No. 12,483; (1867) *Black v. McClelland*, Fed. Cas. 1,462; inferentially, *obiter*, In *re Mertens*, 16 A. B. R. 825, 147 Fed. 177 (C. C. A. N. Y.).

their value will be the measure of the implied contract to pay for goods "had and received," in case the tort be waived.²²

In *re United Button Co.*, 15 A. B. R. 396 (D. C. Del.): "On the facts alleged no contract on the part of the bankrupt can be implied in fact, and no circumstances are disclosed giving rise to a contract implied in law or quasi contract. It does not appear that the tortfeasor obtained or derived from the petitioners through the commission of the tort any property for the value of the proceeds of which it could be held liable under any quasi contractual obligation. It is not like the case of a wrongful conversion of personal property, where there is an election of remedies. The alleged claim is for damages for a tort pure and simple. No election between a remedy *ex delicto* and one *ex contractu* was or is possible. Keener on Quasi Contracts, 159, 160. The doctrine of 'waiver of tort' can have no application."

But no enrichment could be predicated of the tort, assault and battery or of the tort, personal injury. Therefore, the waiving of such torts does not entitle one to prove in bankruptcy his claim for the damages resulting from the assault and battery or the personal injury, for no such claim can be brought within any of the classes of provable debts.²³

§ 637. **Claimant Must Elect.**—The claimant must elect whether he will retain his claim as one *ex delicto*, in which event it will be not provable or will waive the tort and sue upon an implied contract.²⁴

§ 638. **Not to Waive Tort as to Part and Affirm It as to Balance of Same Transaction.**—A claimant may not affirm contractual relations a

²² Inferentially, *In re Heinsfurter*, 3 A. B. R. 113, 97 Fed. 198 (D. C. Iowa). See able and interesting discussion, to same general effect, in *In re Wigmore*, 1 A. B. R. 661 (Ref. Calif.). See discussion in *In re Cushing*, 6 A. B. R. 22 (Ref. N. Y.).

²³ In *re United Button Co.*, 15 A. B. R. 391, 140 Fed. 495 (D. C. Del.); *In re Wigmore*, 10 A. B. R. 661 (Ref. Calif.); *In re Filer*, 5 A. B. R. 582, 125 Fed. 261 (Ref. N. Y.); compare, *In re Hirschman*, 4 A. B. R. 715, 104 Fed. 69 (D. C. Utah).

See interesting article upon "The Provability of Tort Claims in Bankruptcy," by Stanley Folz, Esq., in the *American Law Register* for August, 1904.

Compare, also, where tort appears to have been insisted on but referee allowed the claim evidently as a contract debt notwithstanding, *In re Lazarovitch*, 1 A. B. R. 478 (Ref. Kas.), distinguished in 6 A. B. R. 23.

Compare, also, the following instances of waiving tort and proving in contract: (1) fraudulent scheme for inducing persons to deposit money to be used in gambling, *In re Arnold & Co.*, 13 A. B. R. 320, 133 Fed. 789 (D. C. Mo.); (2) child's funds held in trust by father but converted to his own use, he giving note to himself therefor, as child's guardian, *In re Upson*, 10 A. B. R. 602, 12 Fed. 807 (D. C. N. Y.); (3) broker converting stock of customer (bought on margin but exceeding in value the customer's debt) by pledging the stock to third person, *In re Swift*, 9 A. B. R. 385, 114 Fed. 947 (D. C. Mass.); broker's relation to customer for whom he buys and sells stock on margin is that of debtor and creditor and not fiduciary and beneficiary, and a payment on a money account between them may be a preference, *In re Gaylord*, 7 A. B. R. 577 (D. C. Mo.). But, even if that of fiduciary and beneficiary, yet the claim would be provable.

²⁴ Compare, *In re Mertens & Co.*, 16 A. B. R. 827 (C. C. A. N. Y.). See cases cited, next paragraph following, § 638.

to part of the property and claim as a creditor thereon, and, as to the remainder, involved in the same transaction, repudiate contractual relations and sue in tort for the recovery of specific property.²⁵

In *re Heinsfurter*, 3 A. B. R. 113, 97 Fed. 198 (D. C. Iowa): "Precedents are not wanting in which the owner of property converted by another to his own use has been permitted to waive the tort and sue upon an implied contract that the party so converting the property is impliedly held as thereby promising to pay the value thereof. But no case has been cited by counsel for claimant, nor have I found any case in the limited time at my disposal for the search, wherein a party rescinding, or attempting to rescind, a contract of purchase for fraud on the part of the purchaser, has been permitted to retain part of the property obtained by him under his attempted rescission and then elect to sue for the remainder of the property as upon an implied contract to pay therefor because of the vendee's having converted it to his own use."

Varnish Wks. v. Haydock, 16 A. B. R. 287, 143 Fed. 318 (C. C. A. Ohio): "* * * it was open to the petitioner, the purchase having been procured by fraud, to elect whether to confirm the sale notwithstanding, and maintain the position of a creditor for the price, or to repudiate the sale and recover the goods. But the vendor must make his election promptly on discovery of the fraud. This is the settled law. Upon this principle Judge Ray held, in *In re Hildebrant* (D. C.), 120 Fed. 992, that a vendor could not affirm the contract of sale as to part of the goods, and claim the price, and disaffirm as to another part, and recover the goods in specie. * * * And having made his election in such circumstances, the vendor makes it once for all."

Nevertheless, to petition the bankruptcy court for an order for the return of property obtained by the bankrupt's fraudulent misrepresentations and still in the possession of the court, and at the same time to present a claim for the portion already sold before bankruptcy, have been held not to be inconsistent; that the original contract was disaffirmed in both instances, but that the implied contracts to return the property remaining and to pay for that converted, are affirmed.²⁶

In *re Hildebrant*, 10 A. B. R. 184, 120 Fed. 992 (D. C. N. Y.): "While it is undoubtedly true that a party cannot both affirm and disaffirm a contract, when induced by fraud; that an election to proceed on the contract is an affirmation thereof, and waives the fraud—still it cannot be doubted that, when a party is induced to part with his property by fraudulent representations, he may, on discovery of the fraud, retake, by replevin or other appropriate proceedings, such of the property as he can find, and recover in an appropriate action the value of the goods not found, or, more properly speaking, damages for the fraud. But such claim and action for the damages could not be based on the contract, and the action would not be for the contract price, but simply for the damages, measured by the value of the goods not found. This court knows of no deci-

²⁵. But compare, apparently contra, *In re Lewensohn*, 3 A. B. R. 594, 99 Fed. 73 (D. C. N. Y., distinguished in 6 A. B. R. 23), to the effect that proof of a debt before the referee in no way prejudices the creditors' remedy under the State law by arrest on account of the fraud by which sale and delivery of the goods were obtained.

²⁶. In *re Hirschman*, 4 A. B. R. 715, 104 Fed. 69 (D. C. Utah); inferentially, to same general effect, *In re Wilcox & Wright*, 1 A. B. R. 544 (Ref. Tenn.); compare, analogously, apparently to same general effect, *In re Lewensohn*, 3 A. B. R. 594, 99 Fed. 73 (D. C. N. Y.).

or rule of law that will deprive a person of the right to retake such of his property, fraudulently obtained, as he can find in the possession of the wrongdoer, and then maintain an action against such wrongdoer for the value of that disposed of. This is not an election of remedies, nor is it pursuing two inconsistent remedies nor is it both an attempted affirmation and disaffirmance of the contract. It is a disaffirmance of the contract in toto, and such acts are open to any other construction. See *Welch v. Seligman*, 72 Hun 138, 25 Y. Supp. 363; Abb. N. Y. Cyc. Dig. 542. So in this proceeding in bankruptcy petitioner had the right to demand a return of such of the goods fraudulently gained as it found in the hands of the trustee, and, by any proper proceeding, compel such return, and also present and prove its claim for the value of the goods not found as damages, first, however, having the amount liquidated in the manner provided by the Bankrupt Act. The question is, did the petitioner affirm its claim in such form and take such proceedings as to indicate a purpose to affirm the contract and proceed thereunder? It is certain that this petitioner could not split its demand and affirm the contract as to a part of the goods recovered on certain days, and repudiate as to the other part."

To the same effect, *Silvey & Co. v. Tift*, 17 A. B. R. 9, 123 Ga. 804, 51 S. E. 748: a vendor in reliance upon material misrepresentations has made a sale, and rescinded it on discovery of the fraud, but all of the property sold is not in possession of the purchaser, and some of it has been sold or disposed of by him so as to be beyond the reach of the vendor, the latter may reclaim all the property which can be recovered. As to that which he cannot recover, he may have a right of action against the purchaser, not upon the contract, but based upon the theory of the conversion of the goods not found, or an action based upon the contract implied by law where a vendee has disposed of the goods for money and the seller has waived the tort. * * * He cannot, however, proceed both to affirm the contract of sale and against it. He cannot take back such of the goods as remain on hand as part payment of the indebtedness arising from the contract of sale, and retain a claim or seek payment for the balance of the purchase price. These two positions would be inconsistent."

Thus, a debtor obtained by fraudulent misrepresentations certain goods before filing his petition in bankruptcy. Some of the goods he himself sold before going into bankruptcy. The rest were found in the trustee's session. The seller asked for an order on the trustee for the redelivery to him of the goods still in the trustee's hands and for the allowance of a claim against the estate for the value of those sold by the bankrupt beforehand. The court held these demands were not inconsistent—that he rested on the rescission of the original sale, the waiving of the tort and the claim upon an implied contract, to-wit: Upon the debtor's contract, as trustee by implication, to turn over the property still unsold and proceeds of the property sold, to his principal. This was the reasoning in the case *In re Hirschman*, 4 A. B. R. 716, 104 Fed. 69.

The reasoning of that case does not appear sound. In that case the object of claim was not a petition for the recovery of the proceeds of the converted property; it was not a petition for the recovery of the property itself nor its proceeds but was a petition to share in *dividends*, whether such dividends were the proceeds of the property converted or not—an affirmation of the contract relation which the claimant had expressly disaffirmed in his other application for surrender of the property in specie.

Likewise, in the case *In re Hildebrant*, "damages for the fraud" are not a provable claim in bankruptcy, and the only way such damages can be placed in provable form is to *affirm* a contract to pay for the goods. The courts in the cases *In re Hirschman* and *In re Hildebrant* and other cases similarly reasoned seem to fail to retain consistency throughout. In effect, these cases disaffirm the contractual relations to the extent of reclaiming the property that can be come at and affirm contractual relations for the purpose of sharing in dividends for the value of the property that could not be come at—inconsistent positions, surely. The decisions proceed on the theory that there is no inconsistency in waiving the tort and claiming on a contract so long, as the contract is an implied contract and not the actual express contract originally existing between the parties. But this distinction ought not in reason to prevail. The affirmation of contract relations, whether based on the fiction of an implied contract or on an actual express contract, is alike inconsistent with a claim *ex delicto*. Whether implied or express, it is a *contract relation* that is affirmed, and the inconsistency consists in affirming and disaffirming contractual relations at the same time.

§ 639. **After Election, Claimant Foreclosed.**—Where the claimant has elected to waive the tort and claim upon implied contract and has prosecuted the elected remedy to judgment, he is foreclosed from any other remedy.²⁷

Varnish Wks. v. Haydock, 16 A. B. R. 286 (C. C. A. Ohio): "Not only did the petition make no claim that the petitioner was ignorant at the time of proving its claim of the facts in regard to the representations of the bankrupt and of its intention in making the purchase, but the facts stated by the referee are sufficient, *prima facie*, to support the conclusion that the petitioner had knowledge of the essential facts when it voted for the trustee. In these circumstances, the election of the petitioner to prove its claim as a general creditor was final. * * * The assumption of the position of a general creditor toward the assets would naturally be a strong inducement to the other creditors in pursuing the bankruptcy proceedings, for this would imply a sharing of the assets, and this result would be defeated if their associates were permitted to turn about and reclaim the assets in specie."

DIVISION 3.

CONTINGENT CLAIMS INCLUDING CLAIMS OF SURETIES.

§ 640. **Contingent Claims Not "Provable."**—Contingent claims are not provable.²⁸

27. *In re Hirschman*, 4 A. B. R. 715, 104 Fed. 69 (D. C. Utah).

28. Compare discussions: *In re Ells*, 3 A. B. R. 564, 98 Fed. 967 (D. C. Mass.); *In re Pettingill & Co.*, 14 A. B. R. 728, 137 Fed. 143 (D. C. Mass.); *In re Swift*, 7 A. B. R. 381, 112 Fed. 315 (C. C. A. Mass.); *In re Mahler*, 5 A. B. R. 457, 105 Fed. 428 (D. C. Mich.); *In re Arnstein*, 4 A. B. R. 246, 101 Fed. 705 (Ref. N. Y.); *In re Collignon*, 4 A. B. R. 250 (Ref. N. Y.); *Watson v. Merrill*, 14 A. B. R. 453, 136 Fed. 359 (C. C. A. Kas.).

Stockholders' Double Liability.—See post, "Unliquidated Claims," § 709, et seq.

§ 641. **Test of Contingency.**—The test as to whether a claim is really contingent or is simply unliquidated or unascertained by legal proceedings would seem to be this: Have all the facts necessary to be proved to fasten liability already occurred? If so, the claim is not contingent, although the liability and the extent of damages may not yet have been ascertained by consideration of a court as evidenced by judgment or decree, nor even full extent of damages arising been already suffered. The contingency, in other words, is a contingency of facts necessary to fasten liability at all, not a contingency of the court's judgment on the facts nor a contingency to the extent of the damages resulting from the injury. Again, so long as it remains uncertain whether a contract or liability will ever give rise to actual duty or liability, and there is no means of removing the uncertainty by calculation, it is too contingent to be a provable debt.²⁹

Obiter, *Dunbar v. Dunbar*, 10 A. B. R. 145, 190 U. S. 340: "We do not think it by the use of the language in § 63 (a) it was intended to permit proof of contingent debts or liabilities or demands, the valuation or estimation of which was substantially impossible to prove."

The subject of contingent claims is an abstruse subject and one that has not been clearly analyzed in the decisions. On the one hand, it is to be borne in mind that neither the adjudication of bankruptcy nor the discharge affects merely *contractual relations*, unless such relations at the time of bankruptcy, by virtue of the bankruptcy, have become merged in a "debt, demand or claim," as noted heretofore in the discussion of the effect of adjudication of bankruptcy upon the rights of parties.³⁰

On the other hand, it is equally to be borne in mind that if it has become thus merged at the time of bankruptcy, whether it amounts to the certain, unliquidated and definite money demand technically known as a "debt" or constitutes merely a "claim" or "demand" against the debtor, it constitutes a provable debt" as the term is used in bankruptcy.³¹

29. (1841) *Riggin v. Magwire*, 15 Wall. 549.

The English Bankrupt Act (1869) includes almost all kinds of contingent claims among provable debts. The 31st section of that Act makes every kind of debt or liability provable in bankruptcy except demands in the nature of unliquidated damages arising otherwise than by reason of contract or promise, so long as the value of the liability is capable of being ascertained by fixed rules or assessable only by a jury, or as matter of opinion. *Ex parte Neal*, 14 Chancery Div. 579.

The Acts of 1841 and 1867 were each different from that of 1898 on the subject of the provability of contingent claims. Section 5 of the Act of 1841 provided in terms for the holders of uncertain or contingent demands coming in and proving such debts under the Act. The Act of 1867, § 19, provided expressly for cases of contingent debts and contingent liabilities contracted by the bankrupt, and permitted application to be made to the court to have the present value of the debt or liability ascertained and liquidated, which was to be done in such manner as the court should order and the creditor was then to be allowed to prove for the amount so ascertained. *Dunbar v. Dunbar*, 10 A. B. R. 145, 190 U. S. 340.

30. Ante, § 451.

31. Ante, § 627.

§ 642. **Endorsers, Sureties, etc., for Bankrupt Impliedly Excepted by Statute.**—The principal difficulties have arisen in regard to indorsements of commercial paper and obligations of sureties and others similarly situated, before maturity and default have made the obligations absolute; and have arisen in the endeavor to reconcile the rule that contingent claims are not provable in bankruptcy, with the apparently inconsistent rulings that obviously contingent claims on commercial paper and other similar obligations are nevertheless provable.

Distinctions are made to show that indorsements of commercial paper and similar obligations are nevertheless contracts, and hence provable debts before default has fixed the indorsers or surety's liability. But such distinctions, while doubtless valid, evade the point at issue, which is: Are such obligations not contingent? And if so, while so, are they not for that reason not provable? That they are provable is not to be denied. That they are contingent ought, also, not to be denied. It would be better frankly to place their provability upon the fact that the statute, by force of its special provisions allowing proofs by those secondarily liable in the name of the creditor, places such persons, *sub modo*, in the shoes of the creditor, though their own obligation is contingent. Such, really, is the basic trouble.

By virtue of the statutory provisions those secondarily liable to a creditor are made to stand in the creditor's shoes.³²

§ 643. **Bankrupt Surety, Guarantor or Endorser.**—The liability of the bankrupt as endorser or surety, upon his contract of endorsement or suretyship, is a provable debt although default has not been made by the principal until after the filing of the petition or until after adjudication. It constitutes a "demand" or "claim" even if not a "debt." Most of the decisions in support of the proposition add the qualification "provided it become fixed and absolute within the statutory period of one year from the date of adjudication limited for proving claims."³³

In *re Ph. Semmer Glass Co.*, 14 A. B. R. 25, 135 Fed. 77 (C. C. A. N. Y.): "The appellant seeks to differentiate the case at bar on the ground that the notes held by the First National Bank were not due at the date of adjudication (they have since matured), and that the bankrupt was not the maker, but the endorser, wherefore the notes did not constitute a 'debt' of the bankrupt. His

32. Compare, In *re Smith*, 17 A. B. R. 112 (D. C. R. I.).

33. In *re Gerson (Moch v. Market St. Bk.)*, 6 A. B. R. 11, 107 Fed. 897 (C. C. A. Penn., affirming In *re Gerson*, 5 A. B. R. 89); In *re Rothenberg*, 15 A. B. R. 485, 140 Fed. 798 (D. C. N. Y.); In *re Smith*, 17 A. B. R. 112 (D. C. R. I.), in which case the liability became absolute by default after adjudication but before proof. In *re Stout*, 6 A. B. R. 505, 109 Fed. 794 (D. C. Mo.). In *re Marks & Garson*, 6 A. B. R. 641 (Ref. N. Y.); contra, *Morgan v. Wordell*, 6 A. B. R. 167, 59 N. E. 1037, 178 Mass. 350 (Mass. Sup. Jud. Ct.); also, contra, *Goding v. Rosenthal*, 6 A. B. R. 641, 180 Mass. 43, 61 N. E. 222 (Mass. Sup. Jud. Ct.); also, contra, In *re Chambers, Calder & Co.*, 6 A. B. R. 707 (Ref. R. I.); impliedly, In *re O'Donnell*, 12 A. B. R. 621, 131 Fed. 150 (D. C. Mass.); impliedly, In *re Pettigill & Co.*, 14 A. B. R. 733, 137 Fed. 143 (D. C. Mass.).

argument is interesting and ingenious, but entirely disregards § 1, subd. 11, Bankruptcy Act, which provides that the word 'debt,' when used in said Act, shall include any debt, demand, or claim provable in bankruptcy.' * * *

"We concur with the Court of Appeals for the Third Circuit (*Moch v. Market St. Nat. Bank*, 6 Am. B. R. 11, 107 Fed. 897) in the conclusion that the ability of a bankrupt indorser of commercial paper which did not become absolute till after the filing of the petition is a debt provable in bankruptcy."

§ 644. Bankrupt as Principal—Surety Is Creditor before Default, and from Date of Signing.—The indebtedness of a bankrupt principal to his surety who subsequently discharges the obligation in whole or in part, takes effect from the date the surety signs the obligation.³⁴

In *re Stout*, 6 A. B. R. 508, 109 Fed. 794 (D. C. Mo.): "As between the principal and surety, Potter's undertaking was contingent upon Stout's default. The implied contract or obligation was therefore, raised by law between the surety and the principal that the latter should indemnify the former, and this implied contract took effect from the date of the surety's signing the note, and not merely from the time he paid the money; the payment in such case relating to the inception of the implied liability."

Livingston v. Heineman, 10 A. B. R. 39, 120 Fed. 787 (C. C. A. Ohio, reversing *in re New*, 8 A. B. R. 566, D. C.): "A surety, when he assumes the relation, becomes contingently the creditor of the debtor and the debtor of the creditor."

Swarts v. Siegel, 8 A. B. R. 694, 695, 117 Fed. 13 (C. C. A. Mo.): "There is another reason why Siegel & Bro. are not entitled to the allowance of their claim unless the \$14,600 is repaid. It is that they were creditors of the dry goods company when the amount was paid to the bank. A creditor is 'one who gives credit in business transactions.' Cent. Dict., p. 1341, tit. 'Creditor.' Siegel & Bro. gave credit to the dry goods company in a business transaction. They signed its notes, became absolutely liable to pay them, and thereby gave it credit. If they had simply indorsed them, and thus become only contingently liable, the same result would have followed. One who loans his credit to another is as much his creditor as one who loans his money to him. A creditor is 'one who has the right to require the fulfillment of an obligation or contract.' Bouv. Law Dict., p. 435. An indorser, an accommodation maker, or a surety on an obligation of a debtor has a right to require the fulfillment of the obligation or contract of that debtor. "'Creditor" shall include any one who owns a demand or claim provable in bankruptcy.' Section 1, subd. 9, Bankr. Law 1898. 'Debts of a bankrupt may be proved and allowed against his estate which are (1) a fixed liability * * * (4) founded upon an open account or upon a contract express or implied.' Section 63. Provision is here made for the proof of two classes of debts—those which evidence fixed liabilities of the debtor, and those founded upon contracts, which evidence contingent or uncertain liabilities. The debt of

³⁴ Inferentially, *Swarts v. Fourth Nat. Bk.*, 8 A. B. R. 673, 117 Fed. 1 (C. C. A. Mo.); impliedly, *In re Lyon*, 10 A. B. R. 25, 121 Fed. 723 (C. C. A. N. Y., affirming 7 A. B. R. 412); *Crandall v. Coats*, 13 A. B. R. 712, 133 Fed. 965 (D. C. Iowa); *In re Mathews & Rosenkraus*, 15 A. B. R. 72 (Ref. Mass.); inferentially, *Landry v. Andrews*, 6 A. B. R. 281 (Sup. Ct. R. I.). Compare, to same effect, under law of 1841, *Mace v. Wells*, 7 How. 272, and under law of 1867, *Hunt v. Taylor*, 108 Mass. 508.

a principal debtor to his indorser, his accommodation maker, or his surety before the latter has paid the obligation is a contingent liability founded upon contract, and falls directly within the terms and meaning of subdivision 4 of this section. To make assurance doubly sure, however, Congress expressly provided that 'whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor.' Section 57i. An indorser, an accommodation maker, or a surety on the obligation of a bankrupt is a person whose individual undertaking secures the claim against the bankrupt estate of the holder of that obligation, and by the terms of this section he may prove that claim whenever the creditor fails to do so. The language is broad, comprehensive, and without exception. He has the same right to prove it before as after he discharges the obligation in whole or in part, and if he is an indorser he has the same right to make his proof before as after his liability ceases to be contingent and becomes fixed. The last clause of the paragraph, 'and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditors,' neither limits the class who may prove their claims under this paragraph to those who have discharged their undertakings entirely or partly, nor in any way restricts the class which the earlier portion of the paragraph permits to establish their demands against the estate of the bankrupt. On the other hand, it adds emphasis and certainty to the patent meaning of the earlier portion of the paragraph that the indorser or surety may prove the claim in the name of the holder of the bankrupt's obligation whenever the creditor fails to do so, and before, as well as after, the surety discharges his undertaking, because, while such proof in the name of the creditor would send the dividends to the original holder of the claim, the latter portion of the paragraph adds the provision that if the surety discharges his undertaking he shall then be subrogated to the rights of the original holder, and hence to the right to receive the dividends. Sections 57i and 63 (4) were obviously intended to prevent the injustice that would be inflicted upon indorsers and sureties for the bankrupt whenever the holders of their obligations should elect to make no proof of their claims against the bankrupt estates, and to reply exclusively upon the liabilities of the sureties if the latter were not allowed to prove the claims. These sections have accomplished their purpose. The remedy they provided is as broad and comprehensive as the evil which they were passed to prevent, and an indorser or a surety has a provable claim against the estate of a bankrupt, and is his creditor under the act of 1898 before, as well as after, his liability becomes fixed."

In *re O'Donnell*, 12 A. B. R. 621, 131 Fed. 150 (D. C. Mass.): "Was Reichenbacher a creditor preferred by the assignments? He was then an indorser of the respondents' paper. His liability was contingent. In *re Moch v. Market Bank*, 6 Am. B. R. 11, 107 Fed. 897, a noteholder was held to have a provable claim against a bankrupt indorser, and in *Swarts v. Siegel*, 8 Am. B. R. 689, 117 Fed. 13, 54 C. C. A. 399, it was said that an accommodation indorser, even before payment, is a creditor of the bankrupt debtor whose paper he has indorsed. See pages 696, 697, Am. B. R., and pages 17, 18, 117 Fed. Reichenbacher was, therefore, the bankrupt's creditor at the time of both assignments. If the assignments stand, Reichenbacher will receive a greater percentage of his debt than other creditors. Whether he can hold the assignments by paying to the estate the amount he has preferred, need not now be determined."

Smith v. Wheeler, 5 A. B. R. 46 (C. C. A. N. Y. Sup. Ct. App. Div.): "If the claim of the plaintiff was a provable debt within the meaning of the Bank-

rupt Act, then the discharge is a bar. By subdivision 'i' of § 57 of the act it is provided as follows:

"Whenever a creditor, whose claim against a bankrupt is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor.' * * * It must be held, I think, that the claim of the plaintiff was provable under the Bankrupt Act, and that, therefore, the discharge is a bar."

Obiter, In re Dillon, 4 A. B. R. 64, 100 Fed. 627 (D. C. Mass.): "There is difficulty in holding that the present Bankrupt Act allows the proof of contingent claims in general but the contingent claims of sureties are specially provided for by § 57 (i). * * *

"The provisions of the two acts, though quite differently worded, yet reach in most respects the same result. Under both acts the surety can get nothing by way of dividend unless he pays the original debt in whole or in part. If he discharges the whole debt, then, under the first clause above quoted of § 19 of the Act of 1867, and under § 57i of the Act of 1898, he stands in the place of the original creditor, or is subrogated to his rights. This is true whether the payment is made before or after the bankruptcy. Plainly the words, 'if he discharge such undertaking,' in § 57i, are not limited to the time before adjudication. If the surety pays only a part of the original debt, then, by the express provisions of § 57i of the Act of 1898, the surety is subrogated to the original creditor 'to that extent.'"

But compare, *Goding v. Rosenthal*, 6 A. B. R. 641, 61 N. E. 222 (Mass. Sup. Jud. Ct.): "By the execution of the bond of March 29th, 1898, to August, in which the present plaintiff was a surety for the present defendant the latter incurred an obligation to the present plaintiff to reimburse him any amount which he might be compelled as surety to pay upon the bond. This obligation was in force when, on February 13, 1900, the present defendant's petition in bankruptcy was filed. It was an obligation founded upon an implied contract, and it was evidenced by an instrument in writing and in one sense it was a fixed liability. But no debt was absolutely owing at the time of the petition. The obligation was contingent upon the happening of a breach of the bond and a payment by the surety. The payment by the surety was not until June 12, 1900, and there seems to have been no breach of the bond before that date. Therefore, neither the obligee in the bond nor the surety could prove in the bankruptcy proceedings a claim founded upon the bond, unless merely contingent claims are provable under the Bankruptcy Act of 1898."

§ 645. Surety Paying Principal's Debt after Principal's Bankruptcy.—Thus, even where the surety pays his principal's debt after the principal has been adjudged bankrupt, the surety holds a claim for indemnity that had its origin before the bankruptcy and is therefore a provable and dischargeable debt.

This rule has for its basis the peculiar provisions of the Bankruptcy Act permitting proof of claims in the name of the creditor by sureties and others secondarily liable therefor even before payment by the sureties, where the creditor fails or refuses to make the proof himself; and also subrogating *pro tanto* such persons, thus secondarily liable, to the creditor's dividends in so far as such persons shall discharge the obligations (§ 57i) making, in short, such persons thus secondarily liable, quasi "owners" of the claims,

hence qualified "creditors;" "creditors" including not only owners of "debts" but those owning "demands or claims provable in bankruptcy."³⁵

Compare similar reasoning, *In re Gerson*, 5 A. B. R. 89 (D. C. Pa., affirmed sub nom. *Moch v. Market St. Bk.*, 6 A. B. R. 11, 109 Fed. 897): "A debt is defined by § 1 of the act to be 'any debt, demand or claim provable in bankruptcy,' and § 63 sets forth in detail the classes of provable debts. There are: (1) certain fixed liabilities, (2) and (3) certain liabilities for costs, (4) any debt, claim or demand founded upon an open account or upon a contract express or implied; and (5) provable debts reduced to judgment after the filing of the petition. It is the scope of clause 4 that is now in controversy, and this I think is broad enough to include a claim founded upon the contract of endorsement even before the liability under such a contract has become fixed. The endorser's engagement may not be a 'debt,' strictly so called, until there has been demand and notice of non-payment but even before demand and notice there is certainly a contingent liability, and this may be clearly embraced within the words 'demand or claim.' I did not consider this clause of the section when I decided *Schaefer's* case, but, now that it has been brought to my attention, I cannot avoid the conclusion that clause 4 ought to have been applied in that decision, and if applied, should have brought me to the conclusion that a contract of endorsement is a provable debt even if the note does not fall due until after the petition is filed. It is provable not under clause 'A' (1), but under clause 'A' (4). The contract of indorsement is an express contract (*Martin v. Cole*, 104 U. S. 37), and the holder of the note has a demand or claim founded thereon, which may ripen into a debt or fixed liability, or may be defeated by his failure to take certain steps. But it is a contingent right of some sort founded upon the contract, and is, I think, embraced in words of such excessive scope as 'demand or claim.'"

Hayer v. Comstock, 7 A. B. R. 495, 115 Ia. 187 (Sup. Ct. Iowa): "This debt was a fixed liability evidenced by an instrument in writing, and absolutely owing by the defendant at the time of the filing of the petition in bankruptcy, and therefore might be proved against the estate as it was. It is the fact that the bankrupt absolutely owed this fixed liability, evidenced in writing, at the time of the filing of the petition, that made it provable, regardless of the person to whom it was owing. If the creditor had failed to prove the claim, the plaintiff could have done so in its name, not because the debt was then due to him,

35. Bankr. Act, § 1 (9): "'Creditor' shall include any one who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy."

Swarts v. Siegel, 8 A. B. R. 694, 695, 117 Fed. 13 (C. C. A. Mo.); *Livingston v. Heineman*, 10 A. B. R. 39, 120 Fed. 787 (C. C. A. Ohio). Compare, similar reasoning, *In re Gerson* (*Moch v. Market St. Bk.*), 6 A. B. R. 11, 109 Fed. 897 (C. C. A. Penn., affirming 5 A. B. R. 89). Compare, contra, *Goding v. Rosenthal*, 6 A. B. R. 641, 180 Mass. 43, 61 N. E. 222 (Mass. Sup. Jd. Ct.); *Morgan v. Wordell*, 6 A. B. R. 167, 59 N. E. 1037 (Mass. Sup. Jud. Ct.); also, apparently contra, *In re Marks & Gerson*, 6 A. B. R. 641 (Ref. N. Y.); also, contra, *In re New*, 8 A. B. R. 566, 116 Fed. 116 (D. C. Ohio, reversed sub nom. *Livingston v. Heineman*, 10 A. B. R. 39, 120 Fed. 787, C. C. A. Ohio); compare, also, *Swarts v. Fourth Nat'l Bk.*, 8 A. B. R. 673, 117 Fed. 1 (C. C. A. Mo.).

Under the laws of 1841 and 1867, "contingent and uncertain" claims were provable by express provision, *In re Brew. Co.*, 16 A. B. R. 110, 115, 143 Fed. 579 (D. C. Mo.): "It is a noteworthy fact that under the Bankrupt Act of 1841 and 1867 the right was given to prove 'uncertain and contingent demands' against the estate. This provision was omitted from the present Bankrupt Act of 1898."

but because it was a fixed liability, evidenced in writing, and absolutely owing by the defendant. Being proved as it was by the creditor, it was not required that the surety should take any further steps. We do not overlook the distinctions that exist as between liability of the debtor to the creditor and his liability to his surety, but we emphasize the fact that it was the fixed liability, evidenced in writing, 'absolutely owing' by the defendant, that made this a provable claim against his estate. Said paragraphs in § 57 and in the general orders of the Supreme Court recognize the right of the surety to protect himself before payment, and when his liability is contingent, and to share in the dividends of the estate after payment."

In re Schmechel Co., 4 A. B. R. 719, 104 Fed. 64 (D. C. Mo.): "Congress having thus by statute made an express provision (§ 57i) on this subject, under well-settled rules of construction, it is conclusive of any other rule or method. The claim of the creditor being 'secured by the individual undertaking of' the guarantor, if the creditor fail to prove up the debt against the estate, the guarantor could 'do so in the creditor's name,' or having as he claims discharged 'such undertaking' by executing to the creditor his individual note for the balance thereof, 'he shall be subrogated to that extent to the rights of the creditor.' Unquestionably, had he pursued the first course, of presenting the debt 'in the creditor's name' for allowance, he could have done so only by bringing to the estate the amount of the preferred payment. Having chosen, after the adjudication in bankruptcy, to discharge his collateral undertaking, he can only 'be subrogated to that extent to the rights of the creditor.'"

Contra, Phillips v. Dreher Shoe Co., 7 A. B. R. 326, 112 Fed. 404 (D. C. Pa.): "No one has any rights under the Bankrupt Law outside of what it gives him, and those of a surety are defined by this section, beyond which he cannot go. By it he has the right to prove, in case the principal creditor fails to do so. He does not indeed have to discharge the obligation in order to have his privilege, but in case he does do so, in whole or in part, he becomes entitled to that extent to the right of subrogation, and in any event, when he proves the debt, he proves it not in his own name, but in that of the original holder. In re Christensen, 2 N. B. N. 1094. The particular point to be noticed in the present connection with regard to the position of the surety, is that he only has a right to prove, in case the principal creditor fails to do so; and the latter cannot be said to fail until he has had an opportunity and passed it by, which can only occur when, by proceedings duly instituted, the estate of the debtor has been drawn into the bankruptcy court to be there administered, and all parties have been called upon to make known their claims. When that has been done, and he neglects to act, the surety, so as not to be prejudiced, may himself prove the debt in his stead. This, so far as I can see, is all the relief given by the act, and whether adequate or inadequate, it must suffice. It follows from this that at the outstart, the surety who has not taken up the obligation, has no provable claim, and therefore has no standing to petition."

The statutory provision of § 57i giving sureties the status of quasi owners of provable claims prevents any new debt arising against the bankrupt by the sureties making payment after bankruptcy. Being made thereby quasi owners of provable claims their "demands" and "claims" are pro tanto discharged.

§ 646. Where Principal's Liability Not Provable in Favor of Creditor, Not Provable in Favor of Surety.—Where the principal debtor's

liability is not a "provable" claim in favor of the creditor at the time of the principal debtor's bankruptcy, of course, it is not a provable claim in favor of the surety.

§ 647. Sureties for Bankrupt's "Faithful Discharge of Duty," etc., Where No Default Till after Petition Filed, Not "Provable."

—But would a bankrupt be considered as discharged from his liability to a surety upon a bond given for the performance of a duty and not for the payment of money, where the bankrupt's default does not occur until after bankruptcy? Contractual obligations are not severed by the discharge unless claim thereunder (at any rate in the creditor's name) can be made at the time of bankruptcy. Thus, the rule probably would be different in cases of sureties on official and other similar bonds from what it would be in cases of sureties and endorsers on commercial paper. Creditors themselves upon bonds given merely for the faithful performance of duty or for other obligations than the payment of money have not provable claims at the date of bankruptcy as to defaults occurring afterwards and are not therefore "creditors," even within the meaning of the Bankrupt Act; therefore, much less would the sureties on such bonds be creditors and have provable claims.

Thus, a bankrupt's liability upon a redelivery bond, given by him before bankruptcy to the sheriff to obtain repossession of property taken on replevin, is too contingent to be provable where the judgment in favor of the plaintiff against him is not rendered until after discharge.³⁶

§ 648. Obtaining of Judgment Prerequisite to Liability on Bond.—

A judgment itself may be a fact without which no liability can arise, in which event, if the judgment be not obtained until after the surety's bankruptcy, it is not a provable debt.

Thus, it was held, in the lower court, that the liability of a bankrupt as surety on the bond of an administrator who was charged with and found liable for misappropriation of funds but who, by order of the orphan's court, was directed to retain the funds until further order, was not "absolutely owing," because the court had not yet ordered the fund turned over at the time of bankruptcy; but the reviewing court reversed the holding on the ground that the prior adjudication of the orphan's court finding the amount due from the administrator had fixed the surety's liability.³⁷ Thus, also the right of a wife by statute on divorce to one third of personalty, in Arkansas, is not, before divorce, a provable claim.³⁸

It is not upon this principle that a surety on an appeal bond is released by the bankruptcy of the principal. The suretyship obligation is still ex-

36. *Clemmons v. Brinn*, 7 A. B. R. 714 (Sup. Ct. N. Y. App. Term).

37. See *In re Wiseman & Wallace*, 10 A. B. R. 545, 123 Fed. 185 (D. C. Pa., reversed sub nom. *Hibbard v. Bailey*, 12 A. B. R. 104, 129 Fed. 575, C. C. A. Pa.).

38. *Hawk v. Hawk*, 4 A. B. R. 563, 102 Fed. 679 (D. C. Ark.).

istent but the cause of action thereon is dependent on the obtaining of a judgment against the principal, whose discharge prevents such judgment being obtained.

§ 649. **Cosurety's Claim for Contribution for Payments after Bankruptcy.**—The liability of a cosurety or comaker for contribution it would seem would follow the same rule as that of a principal to a surety; such cosurety simply being subrogated to the rights of the creditor against the other cosurety in case he has discharged the obligation in the proportion in which he is cosurety.

In *re Bingham*, 2 A. B. R. 223, 94 Fed. 796 (D. C. Vt.): "The bankrupt was impliedly bound to save him harmless from this part of that debt, and has not done so; but the detriment has occurred since the filing of the petition; and till that occurrence Hartshorn had no provable claim on that account. By this Bankruptcy Act all claims turn upon their status at the time of the filing of the petition; and decisions upon statutes having different provisions in this respect will not afford safe guides for the construction of this. It affords relief for a surety when the creditor does not prove the claim by allowing the surety to prove it for subrogation, but nothing more. The relief is the same that the surety would have if the creditor should prove the claim, and get what could be had upon it, voluntarily. The creditor has no right to anything more than payment; and the surety who has borne the burden is entitled to the benefit. These rights arise, not from the original contract of suretyship, but from the equities of the subsequent transactions. *Miller v. Sawyer*, 30 Vt. 412. Subrogation of the surety to the rights of the creditor does not enlarge them. They extend only to such dividends as the creditor can have. Here Hartshorn should pay the balance due between him and the bankrupt to the trustee, now, for administration; and the trustee should pay the dividends on the bankrupt's half of the note, when declared, to Hartshorn."

§ 650. **Bankrupt's Guaranty of Dividends Not Yet Declared nor Due.**—The bankrupt's guaranty of dividends to the holder of stock is not a provable claim as to dividends not falling due until after bankruptcy.³⁹

§ 651. **Bond for Annuity, Annuitant Still Living.**—A bond to secure the payment of an annuity, the annuitant still living, has been held to be a provable debt; that it is a liability fixed and absolutely owing although the extent of the future damages is not yet fully suffered. The court avoids the obviously contingent nature of the claim by saying that damages are ascertainable by computation on the basis of the tables of mortality.

Cobb v. Overman, 6 A. B. R. 324, 109 Fed. 65 (C. C. A. N. Car.): "It is hard to see what sum was evidenced by the bond as absolutely owing except the penalty itself. The claim would seem provable more easily under Clause 4." This case is criticized in *In re Pettingell & Co.*, 14 A. B. R. 733, 137 Fed. 143 (D. C. Mass.).

39. In *re Pettingill & Co.*, 14 A. B. R. 728, 137 Fed. 143 (D. C. Mass.).

Thus, a husband's liability on a contract to support a divorced wife as long as she lives is a provable debt, the contingency being sure to occur and the expectancy being a subject of calculation.

Obiter, Dunbar v. Dunbar, 10 A. B. R. 139, 190 U. S. 340: "A simple annuity which is to terminate upon the death of a particular person may be valued by reference to the mortality tables."

A contract to support her until she remarries, however, is not a liability provable in bankruptcy, for the contingency may never happen or may happen to-morrow and there is no basis of experience, as in cases of annuities for life.⁴⁰

Dunbar v. Dunbar, 10 A. B. R. 139, 190 U. S. 340: "* * * if the contract had come within the category of annuities and debts payable in future, which are absolute and existing claims, that the value of the wife's probability of survivor-

40. Annuity to wife contingent on not remarrying is a provable claim under the English Act. *Dunbar v. Dunbar*, 10 A. B. R. 139, 190 U. S. 340: "It is true that this has been done in England under the English Bankruptcy Act of 1869. In *Ex parte Blakemore* (1877), 5 Chan. Div. 372, 22 Eng. Rep. 139, it was held, by the court of appeal, that the value of the contingency of a widow's marrying again was capable of being fairly estimated, and that proof must be admitted for the value of the future payments as ascertained by an actuary. That decision was made under the thirty-first section of the Bankruptcy Act of 1869. James, Lord Justice, said:

"No doubt it is uncertain whether the appellant will marry again, just as the duration of any particular life is uncertain. But, though the duration of any particular life is uncertain, the expectation of life at a given age is reduced to a certainty when we have regard to a million of lives. The value of the expectation of life is arrived at by an average deduced from practical experience."

"Although the English statute makes it necessary to arrive at a conclusion upon this point, yet there is no 'practical experience' as to the chances of continuance of widowhood, such as may be referred to where the probable continuance of life is involved. In the latter case we have the experience tables in regard to millions of lives, and under such circumstances there is, as Lord Justice James said, almost a certainty as to the valuation to be put on such a contingency. But under the English Statute, the thirty-first section makes every kind of debt or liability provable in bankruptcy except demands in the nature of unliquidated damages arising otherwise than by reason of a contract or promise, so long as the value of the liability is 'capable of being ascertained by fixed rules, or assessable only by a jury, or as matter of opinion.' So under the Act, in *Ex parte Neal*, 14 Chan. Div. 579, there was a separation deed between husband and wife, and the husband was to pay an annuity to the wife, which was terminable 'in case the wife should not lead a chaste life; in case the husband and wife should resume cohabitation; and in case the marriage should be dissolved in respect of anything done, committed or suffered by' the other party, after the date of the deed. The annuity was also to be proportionately diminished in the event of the wife's becoming entitled to any income independent of the husband, exceeding a certain amount a year. After the execution of the deed the husband went through bankruptcy, and it was held that the value of the annuity was capable of being fairly estimated, and was provable in the liquidation. In that case, speaking of the thirty-first section of the Act of 1869, it was stated that 'words more large and general it is impossible to conceive; they cover every species of contingency.' It was also stated that it was 'difficult to see how any case could arise which would not come within' the language of this act. Bramwell, Lord Justice, said: 'But for the present Bankruptcy Act our decision must have been the same as that in *Mudge v. Rowan*' (1868, 3 Ex. 85; but he said that the present Bankruptcy Act was very different in its terms from the act which was in force when that case was decided.

"In the case of *Mudge v. Rowan*, supra, there was a deed of separation be-

ship after death of her husband might have been calculated on the principles of life annuities.

"But how can any calculation be made in regard to the continuance of widowhood when there are no tables and no statistics by which to calculate such contingency? How can a valuation of a probable continuance of widowhood be made? Who can say what the probability of remarrying is in regard to any particular widow? We know that some of the factors might be in the question; inclination, age, health, property, attractiveness, children. These would at least enter into the question as to the probability of continuance of widowhood, and yet there are no statistics which can be gathered which would tend in the slightest degree to aid in the solving of the question.

"In many cases where actions are brought for the violation of contracts, such as *Pierce v. Tennessee Coal, etc., R. Co.*, 173 U. S. 1; *Rochm v. Horst*, 178 Id. 1. and *Achell v. Plumb*, 55 N. Y. 592, it is necessary to come to some conclusion in regard to the damages which the party has sustained by reason of the breach of the contract, and in such cases resort may be had to the tables of mortality

tween husband and wife, in which the husband covenanted to pay an annuity to his wife by quarterly installments, the annuity to cease in the event of future cohabitation by mutual consent. It was held that this was not an annuity provable under the Bankruptcy Act of 1849, 12th and 13th Vic., ch. 106, § 175; nor a liability to pay money under the 24th and 25th Vic., ch. 134, § 154.

"The 175th section of the Act of 1849 expressly provided that the creditor might prove for the value of any annuity, which value the court was to ascertain. Kelly, Chief Baron, said:

"The annuity seems to me to be so uncertain in its nature as to be impossible to be valued. In many cases the commissioner of bankruptcy may have to deal with contingencies the value of which depends upon a variety of circumstances, and where the valuation is very difficult. But here I am at a loss to see any single circumstance upon which a calculation of any kind could be based."

"Martin, Baron, said:

"This contingency depends upon an infinite variety of circumstances, into which it is idle to suppose a commissioner could inquire."

"Channell, Baron, concurring, said:

"The tendency of recent legislation, and the course of recent decisions, has been to free a debtor who becomes a bankrupt, from all liability of every kind; but I do not think an order of discharge a bar to such a claim as the present. * * * I quite admit that, to bring an annuity within the Act of 1849, it is not necessary to have any actual pecuniary consideration. I also feel that in many cases the difficulty of calculating the present value of contingencies may be very great, and yet they may be within the acts. But here it appears to me that the difficulty is insuperable."

"In *Parker v. Ince* (1859), 4 Hurl & Norm. 52, there was a bond conditioned to pay an annuity during the life of the obligor's wife, provided that if the obligor and his wife should at any time thereafter cohabit as man and wife the annuity should cease, and it was held that the annual sum thus covenanted to be paid by the defendant was not an annuity within the 175th section of the Bankruptcy Law or Consolidation Act of 1849, nor a debt payable upon a contingency within the 175th section, nor a liability to pay money upon a contingency within the 178th section, and consequently the discharge in bankruptcy was no bar to an action for recovery of a quarterly payment due on the bond.

"Martin, Baron, said:

"That cannot be such an annuity as would fall within the one hundred and seventy-fifth section, because a value cannot be put upon it. How is it possible to calculate the probability of a man and his wife who are separated living together again? Their doing so depends upon their character, temper and disposition, and it may be a variety of other circumstances. Then is it money payable upon a contingency within the one hundred and seventy-eighth section? I think it is not."

"It is only, therefore, by reason of the extraordinary broad language contained in the 31st section of the English Bankruptcy Act of 1869 that the Eng-

and to other means of ascertaining as near as possible what the present damages are for a failure to perform in the future, but we think the rules in those cases are not applicable to cases like this under the Bankruptcy Act.

"Taking the liability as presented by the contract, if the mortality tables were referred to for the purpose of ascertaining the value so far as it depended upon life, the answer would be no answer to the other contingency of the continuance of widowhood; and if having found the value as depending upon the mortality tables you desire to deduct from that the valuation of the other contingency, it is pure guesswork to do it."

DIVISION 4.

CLAIMS FOR RENT.

§ 652. **Provability of Rent Involved in Provability of Contingent Claims.**—The subject of the provability of claims for rent is somewhat involved in the subjects of the provability of contingent claims and of claims not owing at the time of the filing of the bankruptcy petition; but it is better treated separately as an entirety.⁴¹ Compare discussions as to rent, leases, unliquidated and contingent claims.

There has been an apparent divergency of opinion among the decisions on the subject, arising chiefly as to the provability of claims for future installments of rent.

§ 653. Does Bankruptcy Sever Relation of Landlord and Tenant?

—The question whether or not installments of rent accruing in the future are provable debts in bankruptcy, hinges a good deal (although not wholly, *Atkins v. Wilcox*, 5 A. B. R. 319, 105 Fed. 595) upon the further question, whether or not the bankruptcy of the tenant operates to sever the relation

lish courts have endeavored to make a fair estimate of the value of a contract based on the continuance of widowhood, even though the value was not capable of being ascertained by fixed rules, nor assessable by a jury, but was simply to be estimated by the opinion of the court or of some one intrusted with the duty.

"In the *Blakemore* case, 5 Cha. Div. 372, 22 Eng. Rep. 139, after the announcement of the judgment, the report states that it was then arranged that it should be referred to an actuary to ascertain the annuity as a simple life annuity, and to deduct from that value such a sum as he should estimate to be the proper deduction for the contingency of widowhood. In other words, it was left to the actuary to guess the proper amount to be deducted."

As to claims for installments of rent to accrue in the future, which involve somewhat the subject of contingency, see, next succeeding, Division "4."

Other Instances of Contingency and Not Contingency.—Subcontractor not to be paid by head contractor until owner pays contractor for same work and materials.

In *re Ellis*, 16 A. B. R. 225 (C. C. A. Ohio): "The contract governs, and under its terms he agrees to pay only for the labor and material for which he is paid. He assents to become the medium of payment to the subcontractor, but assumes no independent liability. His obligation, his debt, is altogether dependent upon the payment to him by the owners."

41. In *re Ellis*, 3 A. B. R. 564, 98 Fed. 967 (D. C. Mass.); In *re Arnstein*, 4 A. B. R. 246, 101 Fed. 706 (Ref. N. Y.); In *re Collignon*, 4 A. B. R. 250 (Ref. N. Y.); *Watson v. Merrill*, 14 A. B. R. 453, 136 Fed. 359 (C. C. A. Kan.); In *re Pettingill & Co.*, 14 A. B. R. 332, 137 Fed. 143 (D. C. Mass.).

of landlord and tenant—itself a branch of the subject previously considered, “The Effect of the Adjudication upon the Rights of the Parties.”⁴²

That it is severed, see⁴³ *In re Jefferson*, 2 A. B. R. 213, 93 Fed. 951 (D. C. Ky., rejected in *In re Ells*, 3 A. B. R. 566, 98 Fed. 967, D. C. Mass.):

“And yet the court sees no way to avoid the conclusion that the relation of landlord and tenant in all such cases ceases, and must, of necessity, cease, when the adjudication is made. If the relation does cease, the landlord afterwards has no tenant and the tenant has no landlord. At the time of the adjudication the bankrupt is clearly absolved from all contractual relations with, and from all personal obligations to, the landlord growing out of the lease, subject to the remote possibility that his discharge may be refused—a chance not worth considering. After the adjudication there is no obligation on the part of the tenant growing out of the lease. He not only owes no subsequent duty, but any attempt on his part to exercise any of the rights of a tenant would make him a trespasser. His relations to the premises and to the contract are thenceforth the same as those of any other stranger. He cannot use nor occupy the premises. No obligation upon his part to pay rent can arise when he can neither use nor occupy the property. The one follows the other, and it seems clear that no provable debt, and, indeed, no debt of any sort against the bankrupt, can arise for future rent. No rent can accrue after the adjudication in such a way as to make it the debt of the bankrupt, and future rent had not, in any just sense, accrued before the adjudication. This result grows unavoidably out of the peculiar relations of landlord and tenant, and the peculiar contract between them, by which rent accrued monthly as the occupation and use of the property progressed.”

In re Hays, 9 A. B. R. 144, 117 Fed. 879 (D. C. Ky.): “Under these circumstances there is no ‘fixed liability’ for a demand ‘absolutely owing’ to the landlord at the time of the adjudication, except for the rent which had accrued or been earned up to that date; and certainly, in the nature of the case, no such debt can accrue against the bankrupt after the adjudication, and, if not, it cannot be proved against his estate as one of his debts. Section 63. There is no just reason why the bankrupt’s estate should bear any such burden. The landlord cannot have every advantage while other creditors are probably losing most of their demands. Other creditors irremediably lose their debts. The landlord loses only his tenant, and may recoup that loss by reletting the premises.

“The trustee succeeds to the legal title in the assets and property of the bankrupt, but does not succeed to the duty of performing any of his obligations. They are discharged by the proceeding in bankruptcy, leaving no one bound to perform them further than the distribution of the assets under the orders of the referee will do it. A leasehold or term bought and paid for in advance would

42. See interesting article in 39 Am. Law Reg. (N. S.) 656 on the subject, “Does the Relation of Landlord and Tenant Become Severed by the Operation of the Bankrupt Law?” Also, see note to *In re Jefferson*, 2 A. B. R. 208 (D. C. Ky.); compare, *Atkins v. Wilcox*, 5 A. B. R. 317, 105 Fed. 598 (C. C. A.). Ante, § 451.

43. *In re Hinckel Brew. Co.*, 10 A. B. R. 484, 123 Fed. 942 (D. C. N. Y.); *Bray v. Cobb*, 3 A. B. R. 788, 100 Fed. 270 (D. C. N. Car., reversed in *Cobb v. Overman*, 6 A. B. R. 324, 109 Fed. 65, C. C. A.; *Cobb v. Overman* itself criticised in *In re Pettingill & Co.*, 14 A. B. R. 733, 137 Fed. 143, D. C. Mass.); compare, under law of 1867, *Bailey v. Loeb*, 11 N. B. R. 271, Fed. Cases 739, 2 Fed. Cas. 376; *In re Webb*, 29 Fed. Cases 494; *In re Breck*, 4 Fed. Cases 43.

be an asset, but a mere right to use real estate upon the condition of paying full current rent for it, if property or an asset at all (unless in cases too rare to change the result), is so in a sense so attenuated as not to be worth considering in practical affairs, and so unimportant as not to affect the common sense rule followed in the Jefferson case.

"As pointed out in the opinion in the Jefferson case, rent and use or occupation, or the right or opportunity to occupy, are dependent and correlative terms. Rent cannot accrue without a tenant. The bankrupt himself manifestly ceases to be such at the adjudication, and the trustee is not authorized by law to become such in his stead. * * * The Bankruptcy Act, however, dissolves and discharges the liability of a tenant to his landlord, as well as every other, and makes it legally impossible for him, after the adjudication, to continue the liability to pay rent, unless there is a new contract."

However, all the cases holding that the tenant's bankruptcy severs the relation of landlord and tenant, further hold (where the question is adverted to) that the landlord's bankruptcy does not so operate.

Obiter, In re Hays, 9 A. B. R. 144, 117 Fed. 879 (D. C. Ky.): "To avoid any misconception, it may be advisable to add that it is entirely possible that different reasons would require a different result in case a landlord should become bankrupt. In that case, where the legal title to the real estate would devolve upon the trustee in bankruptcy, and who would then be the substituted but temporary landlord by operation of law, the land itself might be regarded as performing such duties to the tenant as his needs required. He would doubtless have rights to the use of the land, which could not and need not be taken from him because of a mere change of ownership of the naked legal title to the premises. Change of ownership of real estate never affects the rights of the tenant. It is a matter with which, in normal cases, he has no concern. The act clearly authorizes the trustee to sell the remainder interest of the bankrupt in the land. But this does not require the destruction of the tenant's rights therein. His interest in the premises depends upon his obligation and ability to pay rent for the use. So long as this obligation and ability continue, his rights continue. When they cease, his rights end. With his bankruptcy both obligation and ability to pay rent terminate. But when the landlord becomes bankrupt the land still remains to serve all the purposes of the tenant. It may be sold quite as well with as without a paying tenant, though, if there be a tenant in possession, he thereafter becomes the tenant of the purchaser. In short, when the tenant is adjudged bankrupt the landlord no longer has one, inasmuch as § 47 does not authorize the trustee to become such, and the relations of the landlord with the tenant cease by virtue of the adjudication; but when a landlord is adjudged bankrupt the tenant by operation of law still has a landlord in the trustee, who, under § 70, holds the legal title to the premises, and in such case the relation of landlord and tenant may continue. This may clearly mark the distinction between the two cases. In one there is both a landlord and a tenant, each capable of performing his respective duties, while in the other there is not. Upon these considerations it may be that, the reason for the rule stated in the Jefferson case ceasing, the rule would not apply to the case of a bankrupt landlord. The question does not, of course, arise in this case, but I am glad of the opportunity of pointing out what may be a marked difference."

But the better and more logical rule is that *the bankruptcy of the tenant, even, does not sever the relation of landlord and tenant.* and that the tenant

and his surety remain liable, and that the rent obligation is not discharged as to future rent, unless the trustee elects to retain the lease as an asset.⁴⁴

Watson v. Merrill, 14 A. B. R. 458, 136 Fed. 359 (C. C. A. Kas.): "An adjudication in bankruptcy does not dissolve or terminate the contractual relations of the bankrupt, notwithstanding the decisions to the contrary in *In re Jefferson* (D. C.), 2 A. B. R. 206, 93 Fed. 448; *Bray v. Cobb* (D. C.), 3 A. B. R. 788, 100 Fed. 270; and *In re Hays, Foster & Ward Co.* (D. C.), 9 A. B. R. 144, 117 Fed. 879. Its effect is to transfer to the trustee all the property of the bankrupt except his executory contracts, and to vest in the trustee the option to assume or to renounce these. It is the assignment of the property of the bankrupt to the trustee by operation of law. It neither releases nor absolves the debtor from any of his contracts or obligations, but, like any other assignment of property by an obligor, leaves him bound by his agreements, and subject to the liabilities he has incurred. It is the discharge of the bankrupt alone, not his adjudication, that releases him from liability for provable debts in consideration of his surrender of his property, and its distribution among the creditors who hold them. Even the discharge fails to relieve him from claims against him that are not provable in bankruptcy, and, since his obligation to pay rents which are to accrue after the filing of the petition in bankruptcy, may not be the basis of a provable claim, his liability for them is neither released nor affected by his adjudication in bankruptcy, or by his discharge from his provable debts. One agrees to pay monthly rents for the place of residence of his family or for his place of business, or to render personal services for monthly compensation for a term of years; he agrees to purchase or to convey property; and he then becomes insolvent and is adjudicated a bankrupt. His obligations and liabilities are neither terminated nor released by the adjudication. He still remains legally bound to pay the rents, to render the services, and to fulfill all his other obligations, notwithstanding the fact that his insolvency may render him unable immediately to do so. Nor are those who contracted with him absolved from their obligations. If he or his trustee pays the stipulated rents for his place of residence or for his place of business, the lessors may not deny to the payor the use of the premises according to the terms of the lease. If he renders the personal services, he who contracted to pay for them may not deny his liability to discharge this obligation. His trustee does not become liable for his debts, but he does acquire the right to accept and assume or to renounce the executory agreements of the bankrupt, as he may deem most advantageous to the estate he is administering, and the parties to those contracts which he assumes are still liable to perform them. And so throughout the entire field of

44. Also, *In re Curtis*, 9 A. B. R. 286, 109 Fed. 171 (Sup. Ct. La.); *Witthaus v. Zimmerman*, 11 A. B. R. 314, 91 App. Div. 202 (Sup. Ct. N. Y.); *obiter*, *In re Adams*, 12 A. B. R. 368, 130 Fed. 788 (D. C. Mass.); *In re Ells*, 3 A. B. R. 564, 58 Fed. 967 (D. C. Mass., distinguished in *Atkins v. Wilcox*, 5 A. B. R. 319, 105 Fed. 595, C. C. A.); *In re Koester*, 17 A. B. R. 391 (Ref. Ohio). Compare discussion, *In re Pettingill & Co.*, 14 A. B. R. 728, 137 Fed. 143 (D. C. Mass.); compare, analogously, *In re Brew Co.*, 16 A. B. R. 110, 143 Fed. 579 (D. C. Mass.).

Compare, under law of 1867, *Ex parte Houghton*, Fed. Cases 6,725: "The earlier law of England, which we have adopted in this country, was that the assignees of a bankrupt have reasonable time to elect whether they will assume a lease which they find in his possession; and, if they do not take it, the bankrupt retains the term on precisely the same footing as before, with the right to occupy, and the obligation to pay rent. If they do take it, he is released, as in all other cases of valid assignment, from all liability, excepting on his covenants; and from these he is not discharged in any event."

contractual obligations; the adjudication in bankruptcy absolves from no agreement, terminates no contract, and discharges no liability."

In *re Pennewell*, 9 A. B. R. 490, 119 Fed. 139 (C. C. A. Mich.): "The adjudication of a tenant as a bankrupt does not ipso facto terminate his lease and put an end to his estate in the leased premises, so as to give a subtenant a claim for damages against the bankrupt's assets." Yet, see the later remark in the court's opinion in this case: "It may be true that if the trustee had elected not to adopt the lease and realized its value to the estate, the lease would have come to an end."

Thus, bankruptcy and the bankrupt's subsequent discharge not operating to sever the relation, then the bankrupt remains liable for rent accruing after adjudication, where the trustee rejects the lease.⁴⁵

Bankruptcy does not ipso facto sever all contractual relations. To be sure, adjudication in bankruptcy operates as a date of cleavage between the old estate and the new estate of the debtor; on that date all property of the bankrupt (which was itself in existence at the time of the filing of the petition, or its proceeds) passes to creditors in satisfaction of the claims of creditors (owing at the time of the filing of the petition); and the discharge of the bankrupt frees (as of the date of adjudication) all property acquired subsequently to the adjudication from all subsequently incurred indebtedness; but all this is far different from saying that bankruptcy dissolves all contractual relations, or that the discharge releases the debtor therefrom. Bankruptcy affects property and debts; it passes title to the property and divides it among the debts. It is not concerned with contractual relations nor obligations but with "*debts, claims and demands*" and "provable" debts, claims and demands at that. Liabilities and obligations that are neither "*debts, claims nor demands*," or that are not by the statute itself specifically given the attributes of provable debts, claims or demands, are not dissolved nor discharged. Where a contractual relation exists which has not become merged in a right of action provable as a debt, claim or demand in bankruptcy, such contractual relation continues to exist unimpaired. If the contractual relation is such as may be assumed by another, the trustee may assume it, assuming at the same time all the contractual obligations not already merged into "provable" claims. If the contractual relation is not such, or if the trustee refuses to assume it, then the original parties remain bound on it for all future obligations arising therefrom, though *not for any obligations arising therefrom that had already become crystallized or merged into provable debts*; so that, if all obligations arising therefrom are so merged, then the original parties are no longer bound at all.⁴⁶

Now, some contractual relations are, by virtue of the bankruptcy itself, absolutely terminated. The obligations thereon, ipso facto, terminate—are merged in the breach of the contract, which becomes thereupon a "provable"

45. *Watson v. Merrill*, 14 A. B. R. 453, 136 Fed. 359 (C. C. A. Kas.); obiter, In *re Collignon*, 4 A. B. R. 251 (Ref. N. Y.).

46. In *re Brew Co.*, 16 A. B. R. 111, 143 Fed. 579 (D. C. Mo.); In *re Mahler*, 5 A. B. R. 457, 105 Fed. 428 (D. C. Mich.).

claim in bankruptcy. Such contractual relations are, therefore, rightly said to be dissolved by the bankruptcy, but it is so not because they are contractual relations but because they have become completely and absolutely absorbed and merged in a right of action for breach of contract.⁴⁷

Other contractual relations there are of a continuing and recurrent nature, giving rise, not to one single obligation, but to recurring obligations arising from time to time. Of such nature is the relation of landlord and tenant. It is a contract, or rather a relation, with intermitted or recurrent obligations. It is a series of obligations connected by a contract. The particular obligation may or may not be broken as it comes and thus may or may not be a provable debt; but the contract itself—unless by its terms bankruptcy is a breach of it as an entirety—still subsists, unmerged.

Historically, also, this theory of the nature of the relation of landlord and tenant, is borne out. The tenant's rights were not themselves a debt but a mere relation, giving rise at regular and stated intervals to separate and distinct obligations—knight service, rent service, etc., etc.—whose respective breaches, as the defaults occurred, would occasion separate debts to arise.⁴⁸

Bosler v. Kuhn (Act of 1841), 8 Watts & S. 183: "A rent service is not a debt, and a covenant to pay it is not a covenant to pay a debt. It is a security for the performance of a collateral act. The annual payments spring into existence, and for the first time become debts, when they are demandable; for, while they are growing due, the landlord has no property in anything distinct from the corpus of the rent or the realty of which they are the product; and the fruit must be severed from the tree which bears it before it can become personal property and a chose in action. A debt is an entire thing although it be payable by installments; and to admit it to be proved when thus constituted would require the installment to be combined by a penalty, such as formerly was called in aid of an annuitant, or else to be consolidated by the contract. To whatever length the law may go for the purpose of liquidating a contingent demand, it must necessarily stop short when the demand is not only uncertain in itself, but incapable of being reduced to a certainty."

In re Mahler, 5 A. B. R. 457, 105 Fed. 428 (D. C. Mich., affirming 2 N. B. N. & R. 70): "A covenant to pay rent quarterly creates no debt until it becomes due. * * * It is not an unliquidated claim, capable of valuation, which may be proved and allowed after its amount has been ascertained."

In re Arnstein, 4 A. B. R. 247, 101 Fed. 706 (Ref. N. Y.): "A contract of lease is peculiar in its nature, and differs in many respects from other contracts. Rent, as such, is an incident to, and grows out of, the use and occupancy, and is the consideration therefor. Unaccrued rent cannot be said, therefore, to be a fixed liability then absolutely owing, payable in the future, or, indeed, a 'debt' of any kind, as that word seems to be used in the act. It is only an unmatured obligation to pay in the future a consideration for future enjoyment and oc-

47. *In re Pettingill & Co.*, 14 A. B. R. 733, 137 Fed. 143 (D. C. Mass.).

48. *In re Mahler*, 2 N. B. N. & R. 70 (Ref. Mich., affirmed in 5 A. B. R. 453). Compare, to same effect, the following decisions under the law of 1867: *Ex parte Houghton*, Fed. Cas. 6,725; *In re Week*, 12 N. B. Reg. 215, Fed. Cas. 1,822; *Bailey v. Loeb*, 11 N. B. Reg. 271, Fed. Cas. 739; *In re May*, 9 N. B. Reg. 419, Fed. Cas. 9,325.

cupancy. This cannot be said to be, properly speaking, a present debt, demand or claim at all, as these words are apparently used in the foregoing provisions, due regard being had to the context, and cannot come within either the clause as to fixed liability then owing or a debt founded on contract. The authorities, both under the earlier act in 1841, and the last act, and the present one, seem unanimous to this effect. *Ex parte Houghton*, 1 Low. 554, Fed. Cas. No. 6,725; *In re Breck*, 12 N. B. R. 215 Fed. Cas. 1,822; *Bailey v. Loeb*, 11 A. B. R. 271, Fed. Cas. No. 739; *In re May*, 9 N. B. R. 419, Fed. Cas. No. 9,325. The above are under the late act."

§ 654. Rent Accrued Up to Date of Filing Bankruptcy Petition, Provable.—Rent accrued up to the date of the filing of a petition in bankruptcy is provable, like any other debt.⁴⁹

§ 655. Rent Due and Payable before Such Filing, but for Occupancy to Occur Afterwards, Provable.—Rent due and payable before the filing of the petition but for occupancy to occur in the future, is also a provable debt.⁵⁰

Wilson v. Penna. Trust Co., 8 A. B. R. 169, 114 Fed. 742 (C. C. A. Pa.): "The rent for the entire residue of the term would be provable as an unpreferred debt, entitled only to a pro rata dividend and the unexpired portion of the term would become an asset of the bankrupt's estate, to be disposed of by the trustee in bankruptcy for the benefit of the estate."

§ 656. Installments Accruing after Adjudication, for Occupancy Thereafter, Not Provable.—Rent accruing after adjudication of bankruptcy and not due before adjudication, is not provable against the estate,⁵¹ except so far, or course, as it may constitute part of the expense of administration.

49. *In re Arnstein*, 4 A. B. R. 246, 101 Fed. 706 (D. C. N. Y.).

50. *In re Mitchell*, 8 A. B. R. 327, 116 Fed. 87 (D. C. Del.); *obiter*, *inferentially*, *English v. Key*, 29 Ala. 115.

But the bankruptcy act of 1867 contained a provision not found in the act of 1898: "Where the bankrupt is liable to pay rent or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof, up to the time of the bankruptcy, as if the same grew from day to day and not at such fixed and stated periods. § 19." See also, *Atkins v. Wilcox*, 5 A. B. R. 317, 105 Fed. 595 (C. C. A.).

51. *In re Hays*, 9 A. B. R. 144, 117 Fed. 879 (D. C. Ky.); *In re Jefferson*, 3 A. B. R. 206, 93 Fed. 948 (D. C. Ky.); *Atkins v. Wilcox*, 5 A. B. R. 313, 105 Fed. 595 (C. C. A.); *In re Hinckel Brewing Co.*, 10 A. B. R. 484, 123 Fed. 942 (D. C. N. Y.); *In re Mahler*, 2 N. B. N. & R. 70 (Ref. Mich., affirmed by D. C., 3 A. B. R. 453); *In re Curtis*, 9 A. B. R. 286, 109 La. Ann. (Sup. Ct. La.); *obiter*, *In re Adams*, 12 A. B. R. 368, 130 Fed. 788 (D. C. Mass.); *quære*, *In re Arnstein*, 4 A. B. R. 246, 101 Fed. 706 (Ref. N. Y.); compare, *In re Ellis*, 3 A. B. R. 654, 98 Fed. 967 (D. C. Mass.); *Bray v. Cobb*, 3 A. B. R. 788, 100 Fed. 270 (reversed, on other grounds, in *Cobb v. Overman*, 6 A. B. R. 324, 109 Fed. 65 (C. C. A. N. Car.); *contra*, *In re Mitchell*, 8 A. B. R. 324, 113 Fed. 87 (D. C. Del.).

Likewise under the law of 1841. *Bosler v. Kuhn*, 8 Watts & S. 183; *Savory v. Stockings*, 4 Cush. 607.

Likewise under the law of 1867. *In re Webb*, 6 N. B. Reg. 302, Fed. Cases 17,315; *Bailey v. Loeb*, 11 N. B. Reg. 271, Fed. Cas. 739; *Ex parte Houghton*, Fed. Cas. 6,725; *In re Breck*, 12 N. B. Reg. 215, Fed. Cas. 1,822.

Likewise under English Bankruptcy Law: 1 H. B. L. 433, 4 Term Reps. 94; *Aurrol v. Mills*, 8 East 318; *S. P. Cotterell v. Hook*, Dog. 97; *Marks v. Upton*, 7 Term Rep. 305.

In re Collignon, 4 A. B. R. 250 (Ref. N. Y.): "In principle and on authority a rent charge to accrue is not a present debt (*Lansing v. Prendergast*, 9 Johns. 127). Nor is it contingent, like the liability of an endorser on an insolvent's note not yet due, which is capable of valuation and would probably be admitted to proof at any time before the winding up of the estate. * * *

"Entirely apart, therefore, from the question of the provability of the rent to accrue at the time of the first meeting, I hold that this claimant in now proving up a claim which has been 'liquidated' by her reletting the premises, is not within the intendment of § 63. Her debt is a new debt, due to new acts on her part, for which she can doubtless hold the lessee, but which should not be recognized here to the detriment of other creditors."

Watson v. Merrill, 14 A. B. R. 453, 136 Fed. 359 (C. C. A. Kas.): "Rents which the bankrupt had agreed to pay at times subsequent to the filing of the petition in bankruptcy do not constitute a provable claim under the Bankruptcy Law of 1898, because they are not a 'fixed liability * * * absolutely owing at the time of the filing of the petition against him,' and because they do not constitute an existing demand, but both the existence and the amount of the possible future demand are contingent upon future events, such as default of lessee, re-entry of lessor, and assumption by trustee, so that they neither form the basis of an unliquidated nor a liquidated provable claim."

Not even where the lease provides that all remaining installments shall at once become due on bankruptcy.⁵²

§ 657. Rent Accruing before Adjudication but after Filing of Petition.—Whether rent accruing before adjudication, but after the petition has been filed, is provable, has been variously decided.⁵³

That it may not be proved, see obiter, *In re Adams*, 12 A. B. R. 368, 130 Fed. 788 (D. C. Mass.): "That a landlord, as an ordinary creditor, can prove against the bankrupt estate for rent falling due between the filing of the petition and adjudication, I do not believe. The cases cited do not support the proposition, and as adjudication, ipso facto, does not ordinarily terminate a lease, the latter part of the argument is not applicable."

§ 658. Bankruptcy Stipulated to Terminate Lease, Future Rents Not Provable.—Where the lease contains condition that the tenant's bankruptcy may terminate the lease, neither future rent nor damages for loss upon such termination, may be proved.⁵⁴

§ 659. Bankruptcy or Default in Payment Maturing Future Installments.—There are leases which provide that upon the lessee becoming bankrupt or defaulting in the payment of any one installment, all the remaining installments of rent for the unexpired term shall at once become

⁵². *In re Winfield Mfg. Co.*, 15 A. B. R. 257, 140 Fed. 185 (D. C. Pa.).

⁵³. That it may be proved, see *In re Hinckel Brew. Co.*, 10 A. B. R. 484, 123 Fed. 942 (D. C. N. Y., distinguished in *In re Adams*, 12 A. B. R. 368, 130 Fed. 788, D. C. Mass.); and *In re Mahler*, 5 A. B. R. 453, 105 Fed. 428 (D. C. Mich.).

⁵⁴. *In re Shaffer*, 10 A. B. R. 633, 124 Fed. 111 (D. C. Mass.).

due and payable.⁵⁵ Nevertheless such rent for the unexpired term has been held not provable,⁵⁶ or at least doubtfully so.⁵⁷

In *re Winfield Mfg. Co.*, 15 A. B. R. 25, 137 Fed. 984 (D. C. Pa.) and 15 A. B. R. 257, 40 Fed. 185 (D. C. Pa.): "The lease contained the following provision: 'The said lessees further agree in case of their insolvency, or the entering of a judgment against them in any court of record, or the filing of a petition by or against them or any of them, in bankruptcy, or insolvency, that the entire rent reserved for the term of this lease shall immediately become due and payable. * * *' The present claimant accepted a surrender of the premises on May 10th and has since that date been in exclusive possession. He has been paid in full all the rent that was due when the petition in bankruptcy was filed, and has been allowed compensation at the rental rate for the receiver's use and occupation. By accepting the surrender he assented to the position that the lease had been brought to an end by the proceedings in bankruptcy, and I am unable to see, therefore, in what essential respect his situation differs from the situation of the landlord whose claim was rejected in *Wilson v. Trust Co.* As the court there said, and I may now repeat:

"The contract was not divisible. If the claimant desired to avail himself of the stipulation as to bankruptcy for the purpose of securing a preference for one year's rent, he was bound to conform to the contract as a whole. But this he declined to do."

But compare, obiter inferentially, contra, *Atkins v. Wilcox*, 5 A. B. R. 316, 103 Fed. 965 (C. C. A.): "The lease does not provide in express terms that the bankruptcy of the lessee would have the effect to mature the notes and render them exigible."

The reasoning by which the conclusion is reached that such maturing of future installments cannot create provable debts is not always clear; but perhaps at bottom it rests on the duty that the landlord has of reducing the damage as much as possible by procuring a new tenant to take the bankrupt's place, and that so there is no amount that is absolutely owing at the time of the bankruptcy—that other facts may later occur to change the entire amount. It is not that the claim simply is unliquidated, as appears to be the reasoning in the case *In re Colignon*, 4 A. B. R. 250; for the claim is

55. See *Wilson v. Penna. Trust Co.*, 8 A. B. R. 169, 114 Fed. 742 (C. C. A. Penna.); *In re Winfield Mfg. Co.*, 15 A. B. R. 24, 137 Fed. 984 (D. C. Pa.), and 15 A. B. R. 257, 140 Fed. 185 (D. C. Pa.). Whether condition for forfeiture upon bankruptcy is legal, *quære*. *Wilson v. Penna. Co.*, 8 A. B. R. 169, 114 Fed. 742 (C. C. A. Penna.).

But, if a lien upon the bankrupt's property is reserved which under the State law is good against levying creditors would it not be good in bankruptcy, the trustee simply taking the leasehold as an asset? Compare, *In re Goldstein*, 3 A. B. R. 603 (Ref. Pa.).

56. Compare, inferentially, *In re Shaffer*, 10 A. B. R. 633, 124 Fed. 111 (D. C. Mass.).

57. Obiter, in *Wilson v. Penn. Trust Co.*, 8 A. B. R. 169, 114 Fed. 742 (C. C. A. Penn.). In the case of *Wilson v. Penna. Trust Co.* occurs an interesting discussion of the situation in law where the bankrupt's lease provided that on bankruptcy all remaining installments for the term should become due at once; where three months were already in arrears: where the trustee occupied for two months; and a third party for three months: and where the State law gave the landlord a lien on the goods on the premises for one year's rent.

not simply unliquidated, but furthermore all the facts have not at the time of bankruptcy occurred that will fix the liability, for the landlord may succeed in getting a tenant who will pay the same or even better rent, thus eliminating all damage, and then there would be nothing "absolutely owing" nor "fixed."

In *re Shaffer*, 10 A. B. R. 633, 124 Fed. 111 (D. C. Mass.): "The liability is contingent, not only upon re-entry by the lessor, but upon loss of rent or other damage occurring."

In *re Ells*, 3 A. B. R. 564, 98 Fed. 969 (D. C. Mass.): "If the lessor permitted the lease to continue or if the rent subsequently obtained by him equalled or exceeded that provided in the lease, the claim would not arise."

Yet it is obvious that a tenant could make a lease whereby the entire rent for the term would be payable at once in the very beginning. In such event, should the tenant pay the rent in one lump sum and afterwards go into bankruptcy, all there would be to it would be that the leasehold would be an asset of the estate, fully paid for. Suppose he had agreed to pay the entire sum at once at the very beginning, but had failed to do so, and the landlord sought to prove the amount in one lump sum against the bankrupt estate. All there would be to it, then, would be that the leasehold would be an asset of the estate, not fully paid for. It is indeed difficult to see how this situation differs in principle from the case of a lease where all the remaining installments at once become due on default in paying one installment or on bankruptcy. The remainder of the rent is a claim against the estate and the leasehold itself is an asset of the estate.

Wilson v. Penn. Trust Co., 8 A. B. R. 169, 144 Fed. 742 (C. C. A. Penna.): "The rent for the entire residue of the term would be provable as an unpreferred debt, entitled only to a pro rata dividend and the unexpired portion of the term would become an asset of the bankrupt's estate, to be disposed of by the trustee in bankruptcy for the benefit of the estate."

§ 660. Even Where Notes Given for Future Rent, Notes Not Provable.—It has been held, even that notes given for future rent are not provable claims against the estate.⁵⁸

Atkins v. Wilcox, 5 A. B. R. 313, 105 Fed. 595 (C. C. A.): "In the absence of an express provision that the bankruptcy of the lessee would have the effect to mature the rent notes given and render them exigible, the amount of rent as yet to accrue should not be allowed as against other creditors."

But are enforceable against the surety and are not discharged by the bankruptcy.

The attitude of the court in the case, *In re Curtis*, well illustrates the conflict in the rulings. The question there was whether the surety for future rent was released by the tenant's bankruptcy. Upon the original hearing

⁵⁸. In *re Hays*, 9 A. B. R. 144, 117 Fed. 879 (D. C. Ky.). See *In re Curtis*, 9 A. B. R. 286 (Sup. Ct. La.); analogously, *Watson v. Merrill*, 14 A. B. R. 453, 136 Fed. 359 (C. C. A. Kas.).

the court held the bankruptcy put an end to the lease as of the date of the adjudication and that therefore no rent could accrue thereafter, and consequently that notes given therefor failed of consideration, and that the surety could avail himself of the failure. Upon rehearing, the court held the bankruptcy did not put an end to the lease, that the claim for rent thereafter accruing was contingent, was not provable against the estate, was not barred by the discharge and that the surety was still liable therefor.

The latter conclusion was correct. Although the claim for the rent was in the form of notes, secured by endorsement, yet the facts in the case undoubtedly were that the notes either were nonnegotiable or that the contest arose between the original parties, and that therefore the notes amounted to no more than the covenant in the lease itself to pay rent in installments. Such claim for rent, as already noted, would have been contingent since all the facts had not occurred prior to the bankruptcy that would have fixed the liability. So the claim was not provable against the estate because contingent. The leasehold was not terminated, but the trustee might accept it or reject it: if he accepted it he would be bound by its covenants; if he rejected it then the bankrupt would be bound by its covenants; precisely as he would by any other contingent claim not provable and hence not dischargeable in bankruptcy.

§ 661. **But Provable if Negotiable and in Hands of Innocent Holders, or Taken as Payment.**—Undoubtedly, in case the tenant has given his negotiable notes and these notes are in the hands of bona fide holders, there would be a different result, for they would amount to a payment in full in advance.

§ 662. **Sureties for Future Rent Not Released by Principal's Bankruptcy.**—At any rate, sureties for rent to accrue in the future are not released by the bankruptcy of the principal.⁵⁹

Witthaus v. Zimmerman, 11 A. B. R. 314 (Sup. Ct. N. Y. App. Div.): "I am also of the opinion that even though it be held that the lease by the adjudication was so far terminated as to release the tenant from thereafter paying rent, that this did not of itself affect the defendant's guaranty or relieve him from liability thereunder. The act, § 16, provides that: 'The liability of a person who is a codebtor with or guarantor, or in any manner a surety for a bankrupt, shall not be altered by the discharge of such bankrupt.' This language seems to negative the idea that the adjudication had any effect upon the defendant. Not only this, but to hold otherwise would destroy the benefit sought to be accomplished by the guaranty—which was the payment of the rent reserved—if the tenant did not choose to, or by reason of insolvency, could not pay. The plaintiff took no part in the bankruptcy proceeding and I am unable to see upon what principle of law a binding contract can be destroyed by an act of a third party in which a party to the contract did not participate and over whom he had no control."

59. Bankr. Act, § 16 (a): "The liability of a person who is a codebtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such a bankrupt." *In re Curtis*, 9 A. B. R. 286 (Sup. Ct. La.).

§ 663. **Likewise, Liens for Future Rent Not Released.**—And if liens exist upon the bankrupt's property as security for rent to become due in the future, or for installments of future rent becoming due at once on default, such liens will be unimpaired in bankruptcy, if good against levying creditors under state law.⁶⁰

§ 664. **But Mere Re-Entry Clause Gives No Lien, on Sale of Leasehold.**—But no lien for overdue rent attaches to the proceeds of the trustee's sale of a leasehold belonging to the bankrupt by virtue of a mere re-entry clause.⁶¹

§ 665. **Landlord Forfeiting Lease or Accepting Surrender Waives Claim for Unexpired Term.**—If the landlord accepts the surrender of the leasehold or forfeits the residue of the term upon the bankruptcy, he waives his right to a claim for the rent for the unexpired portion of the term.⁶²

Wilson v. Penna. Trust Co., 8 A. B. R. 169, 114 Fed. 742 (C. C. A. Pa.): "Notwithstanding the ruling in *Platt v. Johnson*, 168 Pa. 47, 31 Atl. 935, 47 Am. St. Rep. 877, upholding as valid a provision in a lease that the entire rent for the balance of the term should become due if the lessee should become embarrassed, or make an assignment for the benefit of creditors, or be sold out by sheriff's sale, it may well be doubted whether the stipulation here making the whole rent for the whole term due and payable if the lessee 'shall become bankrupt' is enforceable as against the provisions of the Bankrupt Act. But the court below did not pass upon that question, and we do not find it necessary to consider it. Assuming the validity of the stipulation where the lessee is adjudged a bankrupt, these consequences would follow its enforcement. In the first place, under the Pennsylvania Act of 1836 the landlord would be entitled to priority of payment out of the proceeds of sale of the tenant's goods upon the demised premises to the extent of one year's rent. *Longstreth v. Pennock*, 20 Wall. 575, 22 L. Ed. 451. Secondly, the rent for the entire residue of the term would be provable as an unpreferred debt, entitled only to a pro rata dividend, and the unexpired portion of the term would become an asset of the bankrupt's estate, to be disposed of by the trustee in bankruptcy for the benefit of the estate. The latter result, however, this claimant repudiated altogether. He sought a partial and one-sided enforcement of the stipulation. He attempted to secure a preference for one year's rent, and at the same time retain his interest as landlord unimpaired in the residue of the term. He took that position at the start, and held it to the end. His proof was only for a single year's rent as a preferred debt, and then, at the expiration of the year, he took, and has since maintained, exclusive possession of the leased premises. The court held—and we think rightly—that the claimant could not split up the term in that way. The contract was not divisible. If the claimant desired to avail himself

60. In *re Goldstein*, 2 A. B. R. 603 (Ref. Penna.).

61. In *re Ruppel*, 3 A. B. R. 233 (D. C. Pa.).

62. In *re Winfield Mfg. Co.*, 15 A. B. R. 24, 137 Fed. 984, and 15 A. B. R. 257, 140 Fed. 185 (D. C. Pa.); analogously, In *re Shaffer*, 10 A. B. R. 633, 124 Fed. 111 (D. C. Mass.).

of the stipulation as to bankruptcy for the purpose of securing a preference for one year's rent, he was bound to conform to the contract as a whole. But this he declined to do. We are therefore of opinion that the action of the court was right."

And cannot insist on enforcing the provision making all future rent fall due upon bankruptcy;⁶³ nor insist on the restoration of the property to its original condition by the tenant, under a covenant so to do at the end of the term.⁶⁴ And a reletting of the premises, even to the trustee in bankruptcy, will be deemed a forfeiting of the term, unless done expressly to mitigate damages.⁶⁵ But if he does not accept such surrender yet he may not prove for the balance of the term, under a clause making all future rent due on bankruptcy.⁶⁶

Likewise, damages under a covenant to indemnify for loss of rent cannot be allowed where the landlord has re-entered under a clause permitting re-entry on bankruptcy.⁶⁷

In *re Shaffer*, 10 A. B. R. 633, 124 Fed. 111 (D. C. Mass.): "The bankrupt was tenant under a lease which provided that upon his bankruptcy the lessor might terminate the lease and re-enter, and 'in case of such termination the lessee shall be liable to the lessor for all losses and damage sustained by the lessor on account of the premises remaining unleased or being left for the remainder of the term for a less rent than that herein reserved.' The lessor has duly re-entered, and seeks to 'prove for damages sustained on account of breach of condition of a lease.' In *re Ells* (D. C.), 3 Am. B. R. 564, 98 Fed. 967, this court held that the lessor could not prove for a breach of a covenant by the lessee that he would after re-entry indemnify the lessor against all the loss of rents and other payments which might occur by reason of the termination of the lease. In effect the covenant in the case at bar is the same. The liability is contingent, not only upon re-entry by the lessor, but upon loss of rent or other damage occurring. 'If the lessor permitted the lease to continue, or if the rent subsequently obtained by him equaled or exceeded that provided in the lease, the claim would not arise.' 98 Fed. 969. The covenant here is not like that suggested by Judge Lowell in *Ex parte Lake*, 2 Low. 544, 546, Fed. Cas. No. 7,991, 'to pay any loss or damage consequent upon the diminished value of the premises.' The diminished value would be a fact to be proved as of the date of bankruptcy or re-entry. But in the case at bar damages could not be ascertained until the arrival of the term of the lease as originally limited, or until there had been a reletting at a reduced rent."

Likewise, damages, under a covenant to restore the premises to its original condition at the end of the term, cannot be allowed where the landlord has re-entered.⁶⁸

63. *Wilson v. Penna. Trust Co.*, 8 A. B. R. 169, 114 Fed. 742 (C. C. A. Penna.).

64. In *re Arnstein*, 2 N. B. & R. 106 (Ref. N. Y., affirmed by D. C.).

65. In *re Arnstein*, 2 N. B. & R. 106 (Ref. N. Y., affirmed by D. C.).

66. In *re Winfield Mfg. Co.*, 15 A. B. R. 25, 137 Fed. 984, and 15 A. B. R. 257, 140 Fed. 185 (D. C. Pa.).

67. To same effect, In *re Ells*, 3 A. B. R. 564, 98 Fed. 967 (D. C. Mass.).

68. In *re Arnstein*, 2 N. B. N. & R. 106 (Ref. N. Y.).

§ 666. **Bankruptcy of Tenant No Breach of Subtenant's Covenant of Quiet Enjoyment.**—The adjudication of a tenant as a bankrupt does not ipso facto terminate his own lease and put an end to his estate so as to give a subtenant a claim for damages against the bankrupt's assets.⁶⁹

§ 667. **Rent for Occupation after Filing of Petition and before Adjudication, Recoverable at Stipulated Rate.**—Rent of premises occupied by the bankrupt or the officer of the court in charge of the estate after the filing of the petition and before adjudication, is recoverable at the rate stipulated for in the lease.⁷⁰

DIVISION 5.

CLAIMS NOT OWING AT TIME OF FILING BANKRUPTCY PETITION.

§ 668. **Subject of Claims "Not Owing" Involves That of Contingent Claims.**—The subject of the provability of claims not owing at the time of the filing of the bankruptcy petition somewhat involves the subject of contingent claims, but is better treated separately, although undoubtedly the same ground thereby will be partially retraversed.

§ 669. **Claims Not Owing at Time of Filing Bankruptcy Petition, Not Provable.**—Claims not owing at the time of the filing of the bankruptcy petition are not provable, whether the claims be on judgments or written instruments, or upon open accounts or contracts express or implied.

§ 670. **Judgments and Written Instruments Must Be "Absolutely Owing" to Be "Provable."**—It is specifically provided by the statute as to claims upon judgments and written instruments that such claims must be "absolutely owing" at the time of the filing of the bankruptcy petition.⁷¹

69. In re Pennewell, 9 A. B. R. 490, 119 Fed. 139 (C. C. A. Mich.).

Subtenant's Eviction Must Occur before Tenant's Bankruptcy, Else No Provable Claim.—Where a subtenant has not been disturbed before the bankruptcy in his quiet enjoyment, his subsequent eviction by the trustee of the tenant does not give him a provable claim against the bankrupt estate. In re Pennewell, 9 A. B. R. 490, 119 Fed. 139 (C. C. A. Mich.).

Subtenant No Damages Where No Right of Forfeiture Reserved Even Where Tenant Stipulated against Subletting.—Where a lease contains a stipulation against subletting without the landlord's consent but no clause of forfeiture therefor a subtenant has no provable claim for his damages for false representations on the tenant's covenant that he had good right to sublease, for there being no clause of forfeiture the subtenant cannot be dispossessed by the landlord and the latter has merely a personal action against the tenant for breach of the stipulation. In re Pennewell, 9 A. B. R. 490, 119 Fed. 139 (C. C. A. Mich.).

70. In re Hinckel Brew. Co., 10 A. B. R. 489, 123 Fed. 942 (D. C. N. Y.).

71. Bankr. Act, § 63 (a) (1). Instance (leases), *Bray v. Cobb*, 3 A. B. R. 789, 100 Fed. 270 (D. C. N. Car., reversed, on other grounds, in *Cobb v. Overman*, 6 A. B. R. 324); instance, annuities, *Bray v. Cobb*, 3 A. B. R. 789, 100 Fed. 270 (D. C. N. Car., reversed, on other grounds, in *Cobb v. Overman*, 6 A. B. R. 324); instance, annuities, *Dunbar v. Dunbar*, 10 A. B. R. 139, 190 U. S. 340.

§ 671. **Attorney's Collection Fee Stipulated in Note.**—Claims on stipulations for attorneys' collection fees contained in written instruments are not provable where no attorney is employed to collect or enforce the obligation until after bankruptcy. They are not "absolutely owing" at the time of the filing of the bankruptcy petition.⁷²

Nor where they have not matured until after bankruptcy, even though the attorney was employed and performed services before bankruptcy.⁷³

But are provable where such services are rendered before bankruptcy, if otherwise valid.⁷⁴

§ 672. **Open Accounts and Contracts Express or Implied Must Be Likewise Owing.**—Although the statute fails expressly so to require, yet the decisions are that claims founded on open accounts or upon contracts, express or implied, must likewise be owing at the time of the filing of the bankruptcy petition, in order to be provable.⁷⁵

In re Swift, 7 A. B. R. 382, 112 Fed. 315 (C. C. A. Mass.), affirming 5 A. B. R. 335: "That part of the present Bankruptcy Act which describes what debts may be proved does not repeat at all points the words 'owing at the time of the filing of the petition,' but it is impossible to consider it other than as though it did thus repeat them. There can be no question that it is sufficient if the debt existed at the point of time of the filing of the petition in bankruptcy."

In re Bingham, 2 A. B. R. 223, 96 Fed. 796 (D. C. Vt.): "By this Bankruptcy Act, all claims turn upon their status at the time of the filing of the petition."

In re Adams, 12 A. B. R. 368, 130 Fed. 788 (D. C. Mass.): "But a creditor cannot prove for an indebtedness arising between the filing of an involuntary petition and the adjudication of his debtor as a bankrupt. This appears from the analogy of § 63 (a) (1) (2) (3) & (5) as applied to the interpretation of clause (4). In clauses (1) and (4) for example, the limit of time must be the same, inasmuch as the clause (4) includes clause (1) and, if clause (4) were less limited in point of time the limit imposed upon clause (1) would become nugatory. * * * The same result is indicated by the analogy of § 59 (b) (d) & (f)."

Thus, also, attorney's fees rendered after the filing of the bankruptcy petition and before the adjudication, for services not related to the bankruptcy are not provable.

In re Burka, 5 A. B. R. 12, 107 Fed. 674 (D. C. Mo.): "Only such debts are provable as were in existence at the time of filing the petition. The fact that the fourth subdivision contains no words of limitation is considered by claimant's counsel a warrant for his contention that his claim, which is founded on an open account, is provable, notwithstanding the fact that

72. In re Gebhard, 15 A. B. R. 381, 140 Fed. 571 (D. C. Pa.); In re Garlington, 8 A. B. R. 602, 115 Fed. 999 (D. C. Tex.); In re Keeton, Stell & Co., 11 A. B. R. 367, 126 Fed. 429 (D. C. Tex.).

73. In re Milling Co., 16 A. B. R. 456 (D. C. Tex.).

74. Merchants' Bk. v. Thomas, 10 A. B. R. 299, 121 Fed. 306 (C. C. A.); Obiter, In re Milling Co., 16 A. B. R. 456 (D. C. Tex.).

75. Obiter, In re Coburn, 11 A. B. R. 212, 126 Fed. 218 (D. C. Mass., affirmed sub nom. Moulton v. Coburn, 12 A. B. R. 553); In re Garlington, 8 A. B. R. 602, 115 Fed. 999 (D. C. Tex.); In re Pettingill & Co., 14 A. B. R. 728, 137 Fed. 143 (D. C. Mass.); (1867) In re Patterson, Fed. Cas., No. 10,815; (1867) In re Crawford, Fed. Cas., No. 3,363; In re Ward, 12 Fed. 325 (D. C. Tenn.); (1867) In re Nounnan, 7 N. B. Reg. 15.

it was not in existence when the petition was filed. It is not apparent why this subdivision is inserted without words of limitation as to the time the claim should have accrued. Especially is this so when there seems to have been a studied effort to insert such words in relation to all the other provable claims. But I cannot construe this omission into a general provision for allowance of demands against the estate of a bankrupt, irrespective of the time when they accrued. If such construction be given to the statute, there would be no limitation even to such claims as existed at the date of the adjudication. The general language would cover any claim that might accrue during the pendency of the proceedings, even up to the final discharge. In the absence of express provision to the contrary, I think that debts provable under the act must be such as existed at the date of the filing of the petition. That date is one to which many general provisions are referable. For instance, it is enacted in chapter 1, § 1, subdivision 10, that the words 'date of bankruptcy,' 'time of bankruptcy,' 'commencement of proceedings' or 'bankruptcy,' when used in the act with reference to time, 'shall mean the date when the petition is filed.' Moreover, the conclusion reached is in clear analogy with the general rule of procedure in courts charged with the administration of trust estates. According to my observation and experience, the rights of creditors of insolvent estates administered in equity generally relate to the time of the institution of the proceedings which ultimately result in the sequestration of the property which is to be administered.

"It is argued by claimant's counsel that because the trustee is vested with the title not only to property which the bankrupt had at the time of the filing of the petition against him, but also to such property as he may have acquired after that, and prior to the date of adjudication, and because all such property goes into the funds for creditors, therefore all creditors having claims which originated at any time prior to the actual adjudication should participate in the fund; in other words, that, as the property which the bankrupt acquires after the filing of the petition enhances the fund for the benefit of creditors, all creditors whose rights accrued at any time before actual adjudication should participate in it. This is a plausible argument, and I presume it would be true that, if the property acquired by the bankrupt after the filing of the petition and before the adjudication did vest in the trustee, creditors whose rights accrued between those dates should share in the property of the bankrupt, like other creditors; but the argument, in my opinion, is based on false premises. Section 70 of the Bankruptcy Act, which is relied on by claimant's counsel in support of the argument, contains the following provisions:

"The trustee of the estate of a bankrupt upon his appointment and qualification * * * shall be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, * * * to all * * * (5) property which prior to the filing of the petition, he could, by any means, have transferred * * * !"

"After a careful consideration of the provisions of this section, I am persuaded that there are two separate subjects treated of: First, the time at which the title to something vests in the trustee; second, the 'something' or property the title of which is to vest in the trustee. Inasmuch as the trustee, by the provisions of the act, cannot be chosen or qualified until some time after the date of the filing of the petition, and in fact until some time after the date of adjudication, it is appropriate and fit that some time should be fixed, to which his title to whatever he gets should relate; and such, in my opinion, is the subject-matter of the first part of the section in question. Properly interpreted, the trustee is by operation of law vested with the title as of the date the bankrupt was adjudged to be a bankrupt. The further provisions of the section, already quoted, undertake to point out the property of which by operation of law he is

to become the owner, namely, all property which prior to the filing of the petition the bankrupt could have transferred. In other words, the property which the trustee acquires must have been property or rights which so existed prior to the filing of the petition that the bankrupt might have transferred them. This clearly means the property or rights of property which existed at the time. Such being the true interpretation of § 70, it affords no ground for the argument made by the claimant's counsel. Inasmuch as no property which the bankrupt may have acquired after the filing of the petition and before the date of adjudication is taken by the trustee, there is no ground for the argument that the claimant, holding a claim accrued since the filing of the petition, and before adjudication, should participate in the assets. His claim is neither provable, nor is the bankrupt discharged by the final judgment of the court from the obligation to pay such a claim."

Compare, *In re Gerson* (*Moch v. Market St. Bk.*), 6 A. B. R. 11, 107 Fed. 897 (C. C. A. Penn.): "The first and fourth subdivisions of § 63 are distinct provisions, and are, we think, independent of each other. We are unable to agree to the proposition that subdivision 1 qualifies and is to be carried down and read into subdivision 4." This was in a case where the court held a contract of endorsement is a provable debt although it does not become fixed and absolute until after the filing of the bankruptcy petition.

Compare, *In re Smith*, 17 A. B. R. 114 (D. C. R. I.): "It is argued that, because subdivision 1 specifies a fixed liability absolutely owing, it excludes all liabilities which were contingent at the time of filing the petition from proof under other subdivisions. The logical fault is obvious. While contingent liabilities are excluded from class 1 (defined by subdivision 1), it does not at all follow that liabilities now or formerly contingent are excluded from other distinct classes. The specification of certain characteristics for class 1, is no indication that cases comprehended in other classes may not have entirely different characteristics. Assuming that, so long as it is uncertain whether a contract or engagement will ever give rise to an actual liability, and that so long as the demand is contingent, it is not provable, it by no means follows that a demand which has ceased to be contingent before proof should be rejected because it had been contingent before the date of filing the petition. While the language, 'Debts of the bankrupt * * * which are * * * founded upon an open account, or upon a contract express or implied' may not include contingent obligations, it does include obligations no longer contingent, though they were contingent at the date of filing the petition."

Thus, for instance, work done under a building contract after a petition in bankruptcy is filed, is not a provable debt on quantum meruit, but, is provable if for breach of contract.⁷⁶

Thus, where by peculiar contract arrangement, a contractor's obligation to pay his subcontractor for materials was conditioned on the owner's payments, the debt was held insufficient to qualify the subcontractor, to file a petition in bankruptcy against the head contractor.⁷⁷

76. *In re Adams*, 12 A. B. R. 368, 130 Fed. 788 (D. C. Mass.): In this case the court held, that where, in ignorance of a pending petition in bankruptcy against one party to a building contract, the other party furnished material and labor, under the contract, his claim therefor was not a provable debt against the bankrupt estate, but that the damages for breach of contract were provable.

77. *In re Ellis*, 16 A. B. R. 225, 143 Fed. 108 (C. C. A. Ohio).

Whether one "import" the clause "absolutely owing at the time of the filing of the petition," into the subsequent classes or not, nevertheless, from the nature of things, it is a necessary qualification of all the subsequent classes. The date of the filing of the petition is the date of cleavage; contractual relations not then merged into provable debts are not dissolved, and in the absence of the statutory provisions permitting the proof of claims by those secondarily liable for their payment, doubtless claims upon indorsements before maturity and default would be held to be contingent and not provable. But the statute, by thus permitting one who is secondarily liable for the bankrupt's debt to prove the debt in the name of the creditor (which may be done even before the maturity of the debt by proper rebate of interest), makes the debt of the one secondarily liable quasi provable, and therefore dischargeable, thus protecting the rights of the surety and of the bankrupt as well. But all this is done by way of exception, necessarily implied, to the rule that contingent claims are not provable. Based upon their provability being by way of exception, the criticisms and distinctions pointed out in *In re Gerson*, *supra*, and in *In re Smith*, *supra*, become immaterial.

§ 673. But to Be "Owing" Not Necessary to Be "Due" nor Damages Liquidated.—But in order that the debt be "owing," it is not necessary that it be "due" nor that the damages be liquidated.

§ 674. Bankruptcy Operating as Anticipatory Breach.—But the obligor's bankruptcy may itself operate as an anticipatory breach.⁷⁸

In re Pettingill, 14 A. B. R. 733, 137 Fed. 143 (D. C. Mass.): "For admission to proof, however, the claim need not arise before bankruptcy, nor need the contract be broken theretofore. It is sufficient for proof if the breach of contract and bankruptcy are coincident. To some extent bankruptcy operates as a breach of the bankrupt's contracts. This has been deemed true of the bankrupt's commercial paper, even though that paper is made payable after bankruptcy. It is true that the trustee in bankruptcy in some cases may elect to keep the bankrupt's contracts alive and to carry them out. In other cases, the creditor may be able to ignore the breach arising from bankruptcy and to keep a contract alive against the bankrupt. With these limitations upon the rule we need not deal here. If the trustee desires to keep the contract alive, he must manifest his election within a reasonable time. Where he does not do this, and where the creditor, by seeking to prove, manifests his election to treat the contract as broken, the court of bankruptcy may permit proof of claims arising from a breach of contract, which breach did not occur before bankruptcy, but was caused constructively by the adjudication of bankruptcy itself. See *Ex parte Swift*, 112 Fed. 315, 50 C. C. A. 263; *Ex parte Pollard*, 2 Lowell 411, Fed. Cas. No. 11,252. Bankruptcy itself may be treated as a breach of the bankrupt's contracts, analogous to that complete repudiation of the contract before the time of performance which was shown in *Hochster v. Delatour*, 2 E. & B. 678, and in *Roehm v. Horst*, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953, or to a

⁷⁸ Inferentially, *In re Stern*, 8 A. B. R. 569, 116 Fed. 604 (C. C. A. N. Y.).

complete disablement of performance of the contract, as in *Forst v. Knight*, 7 Exch. 111.

"It seems, therefore, that the test of provability under the Act of 1898 may be stated thus: If the bankrupt, at the time of bankruptcy, by disabling himself from performing the contract in question, and by repudiating its obligation, could give the proving creditor the right to maintain at once a suit in which damages could be assessed at law or in equity, then the creditor can prove in bankruptcy on the ground that bankruptcy is the equivalent of disablement and repudiation. For the assessment of damages proceedings may be directed by the court under § 63b."

In *re Adams*, 12 A. B. R. 368, 130 Fed. 788 (D. C. Mass.): "It seems that this contract was broken by bankruptcy as of the date of filing the petition."

In *re Swift*, 7 A. B. R. 379, 122 Fed. 315 (C. C. A. Mass., affirming 5 A. B. R. 335): "As we have already said, the solution of the proper relations of the parties in this case growing out of the assignment, or out of the filing of the petition in bankruptcy, is fixed by the law; and the simple rule, based on fundamental principles, and traceable in the text writers and decisions of the courts for fully a century, must be applied to the effect that, 'where a man has disabled himself from performing his contract, it is unnecessary to make any request or demand for performance.' * * *

"These propositions may be made somewhat clearer by comparing the position of a banker with that of a stockbroker. A banker has not, ordinarily, on hand sufficient funds to meet the checks of all his depositors if they should all draw simultaneously, and he is not expected to do so. A like rule applies to stockbrokers. In the one case as well as in the other, so long as either remains solvent, he is presumed to be able to meet his contracts; and no action can be maintained against a banker by a depositor without first drawing a check or making some other proper demand, nor, in the case of a stockbroker, without a tender by his customer of the balance due him, and a demand of his stock. On the other hand, when either has made a voluntary assignment for the benefit of creditors, or gone into bankruptcy, or, perhaps, when he has committed some other notorious act of insolvency, he has parted with the control of his assets, and the law assumes, as is the fact, that his ability to perform his contracts has terminated, and that a demand and tender would be futile, and, ordinarily, an action may at once be brought. All this, of course, is subject to the rights which we have already stated, of a trustee in bankruptcy, or other representative of an insolvent, to rehabilitate the contract within a reasonable time, if it is for the interest of the estate so to do. These are the simple principles which, in the absence of a demand or tender by either party, the law necessarily applies to the case at bar, and the only doubt is whether the disabling of the present bankrupts to perform their contract arose at the time of the voluntary assignment or out of the proceedings in bankruptcy. * * *

"However, we need not go into the troublesome questions that are raised by this omission, because we have already seen that in the case at bar the proceedings in bankruptcy render unnecessary a demand and tender, and, like the great mass of matters affected by such proceedings, we must hold that this proof of debt relates to the time when they were commenced. From that time the stocks in question were put beyond the power of the stockbrokers to deliver effectually. The contract ripened simultaneously with the beginning of the proceedings in bankruptcy, as the consequence thereof in connection with the adjudication which followed. Of course, as everything related back to the filing of the petition, the ripening of the claim did not occur before it was filed, nor afterwards, but simultaneously with it, as already said. Consequently,

by necessary effect, there was created and existed, when the proceedings commenced a provable claim." Citing also, *Carr v. Hamilton*, 129 U. S. 256; *In re Northern Counties of Eng. Fire Ins. Co.*, 17 Ch. Div. 341, and *Ex parte Stapleton*, 27 Monk's Eng. Rep. 128, 10 Ch. Div. 590.

But bankruptcy has been held not to operate as an anticipatory breach of a continuing contract to buy, as to future installments of goods.⁷⁹ And where a tenant had deposited a fund with his landlord to secure the faithful performance of the covenants of the lease during its entire term, the same eventually to be applied, in case of such faithful performance, upon the last six months' rent, the landlord's bankruptcy will not entitle the tenant to apply the security to rents accruing after bankruptcy and before the last six months of the term of the lease.⁸⁰

§ 675. Bankruptcy Operating by Contract to Mature Future Installments.—Bankruptcy, likewise, may, by contract, be made to mature future installments of debt.⁸¹

DIVISION 6.

JUDGMENTS AND WRITTEN INSTRUMENTS.

§ 676. Judgments and Written Instruments "Absolutely Owing," Provable.—A fixed liability as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the bankruptcy petition, whether then payable or not, is a provable debt in bankruptcy.⁸²

§ 677. Must Be for Money.—Only judgments, and written instruments, the damages for the breach of which can be estimated in money, are provable.

§ 678. Must Be "Absolutely Owing" at Time of Bankruptcy Petition, but Need Not Be Due.—The written instrument must be fixed and absolutely owing at the time of the filing of the bankruptcy petition, else

79. *In re Brew Co.*, 16 A. B. R. 110, 143 Fed. 579 (D. C. Mo.).

80. *In re Banner*, 18 A. B. R. 62 (D. C. N. Y.).

81. See, subject of "Claims for Rent," ante, div. 4, § 659.

82. Bankr. Act, § 63 (a) (1). Instance, judgment, *In re Adler*, 16 A. B. R. 417, 144 Fed. 659 (C. C. A. N. Y.); instance, written instrument, *Hibbard v. Bailey*, 12 A. B. R. 104, 129 Fed. 575 (C. C. A. Pa., reversing *Wiseman v. Wallace*, 10 A. B. R. 545); instance, written instrument, *Cobb v. Overman*, 6 A. B. R. 324, 109 Fed. 65 (C. C. A. N. Car., reversing *Bray v. Cobb*); instance, written instrument, *Bray v. Cobb*, 3 A. B. R. 790, 100 Fed. 270 (D. C. N. Car., reversed, on other grounds, sub nom. *Cobb v. Overman*, 6 A. B. R. 324, 109 Fed. 65).

Proof necessary for judgments as well as for any other claim: Judgments will not be allowed to share in distribution any more than other claims unless due "proof" is made, *In re Rosenburg*, 16 A. B. R. 465 (D. C. La.). But this case seems to hold that the lien of the levy will also be lost if due "proof" be not made. Such would not be the case, however, for lienholders cannot be deprived of their security until they have been notified to set up their rights and have had a chance to defend.

it will not be a provable claim. Thus, claims, where the liability is contingent, are not provable.⁸³ Likewise, claims otherwise not "absolutely owing" are not provable.⁸⁴ But the claim need not be due yet.⁸⁵

§ 679. **Interest.**—Interest, if any would have been recoverable at the date of the filing of the bankruptcy petition, will be provable;⁸⁶ but not interest to accrue.⁸⁷ And a rebate of interest will be required, if the instrument is not yet due and does not bear interest.⁸⁸

§ 680. **Judgments for Personal Injuries and Similar Torts Provable, Though Torts Themselves Not.**—Judgments for personal injury and other similar torts, not capable of being presented in form *ex contractu*, are provable although the unliquidated claims for the torts themselves would not be provable.⁸⁹

§ 681. **Judgments Provable, Though Not Dischargeable.**—A judgment for fraud, conspiracy or deceit, although it be not released by the bankrupt's discharge, may be provable.⁹⁰

§ 682. **Judgments, Though Rendered within Four Months, Provable.**—A judgment itself, although rendered within the four months preceding the filing of the petition, and while the bankrupt was insolvent, is a provable claim, notwithstanding § 67 (f) declares such judgments "void," the voidability referring merely to the lien created thereby and not to the judgment itself.⁹¹

Doyle v. Heath, 4 A. B. R. 705 (Sup. Ct. R. I.): "Literally construed, again § 67f avoids 'all judgments' against a bankrupt rendered within four months of the filing of the petition, irrespective of the time of the institution of the suit in which the judgment was ordered, and all such judgments are avoided, although no lien or preference was created thereby, for the language is without limitation or exception. But the difficulty and unreasonableness of adopting a

83. See ante, Division 3, "Contingent Claims."

84. See ante, Division 5, "Claims Not Absolutely Owing."

85. Bankr. Act, § 63 (a) (1). *Hibbard v. Bailey*, 12 A. B. R. 104, 129 Fed. 575 (C. C. A. Penn., reversing *Wiseman v. Wallace*, 10 A. B. R. 545). *Bray v. Cobb*, 3 A. B. R. 790, 100 Fed. 270 (D. C. N. Car.).

86. Bankr. Act, § 63 (a) (1). *Bray v. Cobb*, 3 A. B. R. 788, 790, 100 Fed. 270 (D. C. N. Car.).

87. *Bray v. Cobb*, 3 A. B. R. 790, 100 Fed. 270 (D. C. N. Car.).

88. Bankr. Act, § 63 (a) (1).

89. *In re Lorde*, 16 A. B. R. 201 (D. C. N. Y.), wherein a judgment against a landlord for the bite of a vicious dog kept by a tenant was held dischargeable. *Obiter* and inferentially, *Beers v. Hanlin*, 3 A. B. R. 745, 99 Fed. 695 (D. C. Ore.); *obiter*, *Burnham v. Pidcock*, 5 A. B. R. 45 (affd. in 5 A. B. R. 490); (1867) *Manning v. Keyes*, 9 R. I. 224; (1867) *Howland v. Cason*, 16 N. B. Reg. 372.

90. Under law of 1867, *In re Van Buren*, 19 N. B. Reg. 149; compare, *In re Lorde*, 16 A. B. R. 201 (D. C. N. Y.).

91. *In re Pease*, 4 A. B. R. 547 (Ref. N. Y.). Also, see cases cited under the subject "Liens by Legal Proceedings Nullified by Bankruptcy," post, § 1448, et seq.; especially, § 1487. Instance, *In re Scully*, 5 A. B. R. 716, 108 Fed. 372 (D. C. Pa.).

literal construction of the words 'all judgments' appear upon considering the effect produced upon other sections of the act, and upon other provisions of the United States statutes concerning judgments. In the first place, the words are found in the act under the subtitle 'Liens,' and they are conjoined with 'levies, attachments or other liens.' Again, under § 63a of the act the debts which may be proved against a bankrupt are defined as including '(1) a fixed liability, as evidenced by a judgment or an instrument in writing absolutely owing at the time of the filing of the petition against him;' and this without restriction as to the date of entry of the judgment. And § 63 (5) also includes debts 'founded upon provable debts reduced to judgment after filing of the petition.' Under § 17, among debts not affected by a discharge are '(2) judgments in actions for fraud or obtaining property by false pretenses or false representations, or for willful and malicious injury to the person or property of another—a manifest inconsistency if the words 'all judgments' are to be taken literally. Again, § 905, Rev. St. U. S., provides that 'the record and judicial proceedings of the courts of any State or Territory when duly authenticated as therein specified, shall have such faith and credit given to them in every court in the United States as they have by law or usage in the courts of the state from which they are taken.' And it is hardly to be supposed that this general provision of federal legislation, first substantially enacted in 1790, was intended to be repealed by the single addition of the word 'judgments' in this clause of the bankrupt act of 1898. And, if the words 'all judgments' are to be literally construed, they must include judgments rendered in the courts of foreign countries, irrespective of treaty stipulations, and even the judgments of the very court in which the estate of the bankrupt is being administered. We decline to adopt such a construction of the language of the act, and we construe the words 'all judgments' to be qualified and defined by their context, and to be limited to the lien or preference created by such a judgment."

The judgment, when offered for proof, may be attacked only for fraud, collusion or want of jurisdiction,⁹² under the usual rules.

§ 683. Judgments for Penal Fines, Alimony, Support, etc., Not Provable.—But even certain classes of judgments have been construed not to be claims provable in bankruptcy, such as judgments by way of penal fines, for alimony, and judgments and agreements for the support of a wife or children or of a bastard child.⁹³ The reasoning appears to be

⁹². In re Pease, 4 A. B. R. 547 (Ref. N. Y.); contra, see erroneous decision, *St. Cyr. v. Daignault*, 4 A. B. R. 638 (D. C. Vt., rejected in 5 A. B. R. 373).

⁹³. *McKittrick v. Cahoon*, 95 N. W. 223 (Minn.), etc., etc.; *Wetmore v. Wetmore*, 13 A. B. R. 1, 196 U. S. 68. See *Dunbar v. Dunbar*, 10 A. B. R. 139, 190 U. S. 340, wherein the court held, that a husband's obligation to support his divorced wife under an agreement to pay her an annuity "during her life or until she remarries" is not a liability provable under the Bankruptcy Act and his discharge in bankruptcy does not release him therefrom. Also that a father's liability under an agreement with his divorced wife to pay to her for the support of their minor children until they respectively become of age is not a provable nor dischargeable debt.

In re Moore, 6 A. B. R. 590, 111 Fed. 145 (D. C. Ky.). Fine imposed upon conviction for crime was held not to be a provable debt, declining to follow In re Alderson, 3 A. B. R. 544, 98 Fed. 583 (D. C. W. Va.).

In re Baker, 3 A. B. R. 101, 96 Fed. 954 (D. C. Kas.). Judgment for support of bastard child.

In re Hubbard, 3 A. B. R. 528, 98 Fed. 710 (D. C. Ills.). Support of minor child.

that bankruptcy is concerned only with civil debts and judgments and that these judgments are police regulations to compel obedience to police laws, in which the state itself is an interested party, and as such they are not within the purview nor intent of the Act.⁹⁴ And in the case of alimony decrees that they also are not "fixed liabilities."⁹⁵

But even in these cases there seems to have been a looseness of thought and a confusion in the minds of the courts between the term "provability" and the term "dischargeability," the court holding in one instance that because the fine was not "dischargeable" it was not "provable"—a clear non sequitur.⁹⁶

§ 684. **Dormant Judgments.**—Whether dormant judgments are provable or not will depend somewhat on local law. Nevertheless, it would seem that such judgments are "provable," although by virtue of the statute limiting their operation, etc., they may not be "allowable."⁹⁷

DIVISION 7.

CONTINUING CONTRACTS AND CONTRACTS OF SALE AND OF EMPLOYMENT.

§ 685. **Damages for Breach of Contracts of Sale, Employment and Continuing Contracts, Provable.**—Damages for breach of contracts of sale or of purchase and for breach of continuing contracts and perhaps also of contracts of employment are provable debts, although the time of performance has not expired (if there has been a repudiation or renunciation of the obligation by the bankrupt or if the bankruptcy operates as an

94. See *Audubon v. Shufeldt*, 5 A. B. R. 829, 181 U. S. 575; *In re Baker*, 3 A. B. R. 101, 96 Fed. 954 (D. C. Kas.); *In re Hubbard*, 3 A. B. R. 528, 98 Fed. 710 (D. C. Ills.).

95. *In re Smith*, 3 A. B. R. 67 (Ref. N. Y.).

Provability of Alimony before the Amendment of 1903.—That it was not provable: *Audubon v. Shufeldt*, 5 A. B. R. 829, 181 U. S. 575; *Lynde v. Lynde*, 181 U. S. 183; *Barclay v. Barclay*, 184 Ills. 375 (51 L. R. A. 351); *Welty v. Welty*, 63 N. E. (Ills.) 161; *Young v. Young*, 7 A. B. R. 171 (Sup. Ct. N. Y., C. C. A. N. Y.); *Turner v. Turner*, 6 A. B. R. 289, 108 Fed. 785 (D. C. Ind.); *Maisner v. Maisner*, 6 A. B. R. 295 (Sup. Ct. N. Y. App.); *In re Shepard*, 97 Fed. 187 (D. C.); *In re Anderson*, 97 Fed. 321 (D. C.); *In re Smith*, 3 A. B. R. 67 (Ref. N. Y.). This case bases its rule upon the fact that the alimony was not a "fixed liability." *In re Newell*, 3 A. B. R. 837, 99 Fed. 931 (D. C. Mass.).

That it was provable if a final decree: *Arlington v. Arlington*, 10 A. B. R. 103 (Sup. Ct. N. Car.). See, also, *Arlington v. Arlington*, 13 A. B. R. 89 (D. C. N. Car.).

That it was provable as to such portion as had accrued before bankruptcy: *Fite v. Fite*, 5 A. B. R. 461, 61 S. W. 26 (Ky.); *In re Challoner*, 3 A. B. R. 442, 98 Fed. 82 (D. C. Ills.).

That it was provable even if payable in installments at so much per month during life: *In re Van Orden*, 2 A. B. R. 801, 96 Fed. 86 (D. C. N. J.), rejected by U. S. Sup. Ct. in *Audubon v. Shufeldt*, 5 A. B. R. 829, 181 U. S. 575. Contra, *In re Smith*, 3 A. B. R. 67 (Ref. N. Y.).

96. See *In re Moore*, 6 A. B. R. 590, 104 Fed. 869 (D. C. Ky.).

97. Compare, instance, *In re Rebman*, 17 A. B. R. 767, 150 Fed. 759 (C. C. A. Calif.).

anticipatory breach), so long as the amount is ascertainable that it necessary to be expended to complete the contract or the future profits of the contract or the wages are ascertainable that can be earned during the period contracted for. They may be unliquidated claims, but they are nevertheless provable.

§ 686. **Contracts of Employment.**—Thus, it has been held that damages for breach of a contract of employment are provable, although the term of employment has not expired:

In *re Silverman Bros.*, 4 A. B. R. 83, 101 Fed. 219 (D. C. Mo.): "There can be no question but what if, on the 9th day of January, 1899, there was a breach of the contract between Silverman Bros. and Rosenberg by his discharge from their service, or by their voluntary act, which rendered the performance of the contract on their part impossible, a cause of action at once arose in favor of Rosenberg against Silverman Bros. for damages, and it is equally clear that the subsequent adjudication of bankruptcy in February, 1899, did not put an end to the cause of action, as it was then an existing right, which the mere adjudication in bankruptcy could not destroy. So, the real question in this case is not whether an adjudication in bankruptcy against the employer would put an end to a contract with an employee, like the one in question, so that the discharge of the employee would be under the operation of the bankrupt law, and not by reason of the voluntary act of the employer, but it is whether or not the act of Silverman Bros. in making the deed of trust, and placing Swift in absolute charge of the store and its business, whereby Rosenberg was displaced as manager and employee, did not constitute a breach of the contract, and create a subsisting cause of action, three weeks before the adjudication in bankruptcy. * * *

"On the discharge of Rosenberg without his fault or consent, a cause of action at once arose in his favor against Silverman Bros. He would not have to wait until the expiration of the year covering the term of his employment before he could institute the action. In such action he would be entitled to recover the amount that would have been due him if he had continued to work for Silverman Bros. under the contract from the date of his discharge until the expiration of the contract, after allowing credit for anything which he may have earned from services rendered to others, or under other contracts, after allowing further credit for what the court or jury hearing the case may believe, from the facts and circumstances in evidence, he will be able to earn between the time of trial and the termination of the year."

But not where a corporation employer reserves the right to cancel the contract in case it winds up its affairs.⁹⁸ And probably the claim could not be successfully liquidated until the end of the term.

§ 687. **Continuing Contracts to Supply Goods.**—Thus damages for breach of a continuing contract to supply goods are provable.

In *re Stern*, 8 A. B. R. 569, 116 Fed. 604 (C. C. A. N. Y., affirming *In re Manhattan Ice Co.*, 7 A. B. R. 408): "But in the case at bar, the question is not necessarily whether the claims are liquidated or unliquidated, but whether they are 'provable.' The statute provides that the petitioning creditors shall have

⁹⁸. In *re Sweetser, Pembroke & Co.*, 15 A. B. R. 650, 142 Fed. 131 (C. C. A. N. Y.).

'provable claims.' Counsel for defendant corporation contends that damages to accrue in the future are not provable because they are uncertain in amount, and because not having yet accrued they are not yet in existence. But in actions for personal injuries, or for breaches of warranty in the sale of seeds, or for failure to deliver goods which have no recognized market value, the injured party is entitled to recover compensation for such elements of damage as are shown to be reasonably certain or probable, or such as naturally result in such cases and may be supposed likely to occur in the given case. * * *

"The authorities are conflicting as to whether an action will lie for damages for the breach of an executory contract before the stipulated time of such performance has arrived." The court citing, *Roehm v. Horst*, 178 U. S. 1; *Pierce v. R. R. Co.*, 173 U. S. 1; *Norrington v. Wright*, 115 U. S. 188; *United States v. Behan*, 110 U. S. 338, and others.

§ 688. Uncompleted Building Contracts.—Thus, damages for breach of a partly finished building contract are provable, but not quantum valebat or quantum meruit for materials and labor furnished thereunder after the filing of the petition and before adjudication.

In *re Adams*, 12 A. B. R. 368, 130 Fed. 788 (D. C. Mass.): "Before bankruptcy the creditors here seeking to prove had contracted with the bankrupt to build for him certain houses, at a price to be paid from time to time during construction. No work had been done under the contract before the petition in bankruptcy was filed. Thereafter, and before adjudication, the creditors, in ignorance of the pending petition, furnished materials and labor under the contract. For this they seek to prove. But a creditor cannot prove for an indebtedness arising between the filing of the involuntary petition and adjudication. * * * The creditors seek also to prove their damages for breach of the executory contract. If the contract was broken at or before bankruptcy, they can prove. It seems that this contract was broken by bankruptcy as of the filing of the petition."

§ 689. Continuing Contracts to Buy.—Thus, also, a claim upon the bankrupt's contract to buy at a fixed date or at fixed dates, occurring after his bankruptcy, may be proved, if the bankrupt has repudiated the obligation or if the bankruptcy may operate as an anticipatory breach and the trustee does not assume the contract.⁹⁹ Likewise damages for breach of warranty in contracts of sale are provable, although the amount is undetermined.¹⁰⁰ Thus, also, margin on purchases of marketable commodities for future delivery are provable.¹⁰¹

§ 690. But Not Provable, unless Obligation Renounced or Bankruptcy Itself Operates as Breach.—But unless there has been a repudia-

^{99.} *Obiter*, In *re Brew Co.*, 16 A. B. R. 110 (D. C. Mo.); compare, In *re Pettingill*, 14 A. B. R. 735, 137 Fed. 143 (D. C. Mass.), where the rule is stated without the qualification.

^{100.} In *re Grant Shoe Co.*, 12 A. B. R. 349, 130 Fed. 881 (C. C. A. N. Y., affirming 11 A. B. R. 48).

^{101.} Compare, In *re Knott*, 6 A. B. R. 749, 109 Fed. 626 (D. C. Vt.).

tion or renunciation of the continuing obligation by the bankrupt, or unless the bankruptcy itself operates as an anticipatory breach, the claim is not provable.

In *re Brew Co.*, 16 A. B. R. 111, 143 Fed. 579 (D. C. Mo.): "It may be conceded as the law of this jurisdiction that where a party is bound from time to time, as expressed in the contract, to deliver articles to be manufactured or products to be grown, each parcel as delivered to be paid for at a certain time and in a certain way, a refusal by the vendee to be further bound by the terms of the contract or to accept further deliveries constitutes a breach of the contract as a whole, and gives the vendor a right of action to recover the damages he may sustain by reason of such refusal. In such case the positive refusal of the vendee to perform when tender is made, or notice by him to the vendor before maturity of the time for delivery that he will not carry out the contract, will release the vendor from making any tender, and entitle him to an action in advance of the fixed period for delivery on his part to recover damages as for breach of the whole contract. *Roehm v. Horst*, 178 U. S. 1. * * *

"The sole reliance of the claimant to bring it within this rule for such breach is predicated of the adjudication in an involuntary proceeding in bankruptcy against the vendee, I am unable to consent to the proposition that such an adjudication in bankruptcy, *ex vi termini*, is in law tantamount to a refusal of the bankrupt to perform, or that it hereby permanently disabled itself from performance, to bring the claim asserted by petitioner within the operation of the rule laid down in *Roehm v. Horst*, *supra*. * * *

"Why should a rule be applied to a corporation—a legal entity—different in this respect from a natural person? Section 1, cl. 19, of the Bankruptcy Act (Act July 1, 1898, ch. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), declares that 'persons' shall include corporations, except where otherwise specified. An adjudication in bankruptcy of a corporation does not work a dissolution of the corporation or a forfeiture or loss of its franchise. The very policy of the bankrupt law is that by the adjudication and the surrender to the trustee of all assets of the bankrupt then owned he may thereby be manumitted from the burden of existing debts, and by his unimpeded energies and industry the better be enabled to prosecute his business and earn a livelihood and a competency. Why should any different rule be applied to a corporation coerced into bankruptcy, which but represents the aggregate co-operation and capital of a number of individual stockholders? Its stockholders may decide to infuse new life into it by assessments or otherwise, and its directors resume business, go ahead, and perform any executory contract. And if they had an advantageous contract with the vendor for providing it with hops in its business, why should it not be left in position to avail itself of the yet unexecuted contract?

"In *Lovell v. St. Louis Life Insurance Company*, 111 U. S. 264, the court held that where an insurance company had terminated its business and transferred its assets and policies to another company, whereby it totally abandoned the performance of its contracts by transferring all of its assets and obligations to the new company, it thereby authorized the insured to treat the contract as at an end and to sue to recover back the premiums already paid, although the time for performance of the obligation, to-wit, the death of the insured, had not arrived. For, as said by Mr. Justice Bradley, referring to a life insurance company which had gone into liquidation, in *Car v. Hamilton*, 129 U. S. 252, 256, 9 Sup. Ct. 295, 32 L. Ed. 669:

"By that act the company becomes *civilter mortuus*, its business is brought to an absolute end, and the policyholders become creditors to an amount equal

to the equitable value of their respective policies, and entitled to participate pro rata in its assets.'

"In re Swift, 7 Am. B. R. 374, 112 Fed. 315, a broker had made a contract to deliver certain stock to a customer. It was held that he made it impossible to fulfill his agreement to deliver the stock by his adjudication in bankruptcy, for the reason that it took the stock from him and vested it, with all his property, in his trustee. But that is clearly not this case.

"As to *In re Pettingill & Co. (D. C.)*, 14 Am. B. R. 728, 137 Fed. 143. relied upon by the petitioner, I may say that I can concur in the syllabus of that case that under the Bankrupt Act the provability of a claim depends upon its status at the time of the filing of the petition in bankruptcy. If not then a provable debt, as defined in the Act, it cannot be proved, although it may thereafter come within such definition. 'If a bankrupt, at the time of bankruptcy, by disabling himself from performing a particular contract, and by repudiating its obligation, could give the other party the right to maintain at once a suit in which damages could be assessed at law or in equity, then such party may prove as a creditor in bankruptcy, on the ground that bankruptcy is the equivalent of disenfranchisement and repudiation.'

"If, however, it was intended to hold that, as applied to an executory contract for the sale of annual crops to be raised in successive years, where no breach had occurred at the time of an involuntary adjudication in bankruptcy, the mere act of such declared statutory insolvency constituted such a breach of the contract as to enable the vendor to prove up against the estate the contingent damages, as on a repudiation of the contract by the vendee, I cannot consent thereto. There was no renunciation by the vendee company of the contract after the commencement of performance or renunciation before the time for performance had arrived. Nor has the vendee deliberately incapacitated itself or rendered performance of the contract impossible within the rule laid down in *Roehm v. Horst*, 178 U. S. 18."

DIVISION 8.

CLAIMS FOR COSTS.

§ 691. **Costs as Provable Claims.**—Costs taxable against an involuntary bankrupt, who was at the time of the filing of the petition against him, plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice, are provable against the bankrupt estate.¹⁰² And taxable costs incurred in good faith by a creditor before the filing of the bankruptcy petition, in an action to recover a provable debt, are provable debts against the bankrupt estate.¹⁰³

§ 692. **Part Incurred before Filing of Petition, Part Afterward.**—Where part of the costs were incurred before and part after the filing of the petition against the debtor, the part incurred before the filing is provable against the estate and is discharged by the bankrupt's discharge.¹⁰⁴

^{102.} Bankr. Act, § 63 (a) (2). But compare, *In re Marcus*, 5 A. B. R. 19, 104 Fed. 331 (D. C. Mass.).

^{103.} Bankr. Act, § 63 (a) (3).

^{104.} *Aiken, Lambert & Co. v. Haskins*, 6 A. B. R. 46 (N. Y. Sup. Ct.).

And the part incurred afterwards is neither provable nor dischargeable and the bankrupt remains liable thereon.¹⁰⁵

In *re Marcus*, 5 A. B. R. 365, 105 Fed. 907 (C. C. A. Mass.): "The bankrupt was adjudicated such on his own petition, filed before the judgment for costs was rendered, as already said. Therefore the costs were not provable against the estate. * * *

"Section 63a directs specifically what taxable costs are provable, and its provisions with reference thereto must be held to cover that entire subject-matter." This decision says "after adjudication," but it was a case of voluntary bankruptcy and therefore the date of the filing of the petition and of the adjudication were likely the same.

§ 693. **Costs Where Attachment or Execution Dissolved.**—Costs incurred in good faith prior to the filing of the bankruptcy petition on attachment or execution, where the lien of the attachment or execution is dissolved by the subsequent bankruptcy within four months, are provable claims.¹⁰⁶

DIVISION 9.

OPEN ACCOUNTS AND CONTRACTS EXPRESS OR IMPLIED.

§ 694. **Open Accounts and Contracts Express or Implied, Provable.**—Debts founded upon open accounts or upon contracts express or implied are provable.¹⁰⁷

This class of provable claims is the most extensive of all classes, but the discussion of the different points involved is taken up in other Divisions of this chapter and elsewhere in the treatise in paragraphs too numerous even to refer to in detail.

DIVISION 10.

PROVABLE DEBTS REDUCED TO JUDGMENT AFTER BANKRUPTCY PETITION FILED AND BEFORE DISCHARGE.

§ 695. **Provable Debts Reduced to Judgment after Bankruptcy but before Discharge, Provable.**—Debts founded upon provable debts reduced to judgment after the filing of the petition and before the consid-

^{105.} *Aiken, Lambert & Co. v. Haskins*, 6 A. B. R. 46 (N. Y. Sup. Ct.).

^{106.} Bankr. Act, § 63 (a) (3). In *re Allen*, 3 A. B. R. 38, 96 Fed. 512 (D. C. Calif.); In *re Thompson Mercantile Co.*, 11 A. B. R. 579 (Ref. Minn.).

Where, however, the lien is preserved for the benefit of the estate under § 67f, the lien for costs is also preserved, *Receivers v. Staake*, 13 A. B. R. 281, 133 Fed. 717 (C. C. A. Va.). Obiter, In *re Thompson Mercantile Co.*, 11 A. B. R. 579 (Ref. Minn.); inferentially, In *re Goldberg Bros.*, 16 A. B. R. 522, 144 Fed. 566 (D. C. Me.). See post, § 1490.

Some cases have also seemed to lead to the inference that in some instances—probably where the attachment proceedings have operated to the benefit of all creditors—the court would consider the costs to be an equitable lien on the property. In *re Francis-Valentine Co.*, 2 A. B. R. 522, 94 Fed. 793 (C. C. A. Calif.). See ante, § 400; also, see post, §§ 2001, 2063, et seq., "Costs of Administration," "Expenses of Petitioning Creditors."

^{107.} Bankr. Act, § 63 (a) (4).

eration of the bankrupt's application for a discharge are provable, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgment.¹⁰⁸

§ 696. **Object—To Prevent Effect of Merger.**—The object of this provision appears to be the avoidance of the injustice both to creditors and debtors of the doctrine that judgments operate as mergers of original causes of action so that original causes of action are lost in the judgments and yet the judgments are not provable nor dischargeable debts because not rendered until *after* the filing of the petition.

In *re Pinkel*, 1 A. B. R. 333 (Ref. N. Y.): "This is the old question of the effect of the entry of a judgment on a provable debt between the filing of the petition in bankruptcy and the discharge, the action having been begun prior to the filing of the petition. The numerous and contradictory District Court decisions on this point under the Law of 1867 would be amusing were an examination of them productive of anything better than confusion. Under the Acts of 1800 and 1841, there seems to have been little question; and the Federal courts so far modified the doctrine of a merger resulting from a reduction of a contract debt to a judgment, as to permit the proving of a debt in bankruptcy even after it had been merged in a judgment for all other purposes. But the Law of 1867 (§ 21, or R. S. 5106) both prohibited a creditor having a provable debt from prosecuting the same to judgment before the bankrupt's right to a discharge should be determined, and gave the bankrupt the right to a stay to prevent such prosecution at any time. Arguing from this that no judgment between the filing of the petition and the granting of the discharge could have validity, if attacked, and that after the discharge was granted it could be plead in bar, many of the District Courts settled back on the old doctrine of merger, and held that the debt which antedated the application in bankruptcy was gone and that the judgment when obtained was a new debt, which, being after the filing of the bankrupt's petition, could not be proven and therefore was not discharged. Typical cases holding this doctrine are: *Re Williams*, 2 N. B. R. 229; *Re Gallison*, 5 N. B. R. 353; *Re Mansfield*, 6 N. B. R. 388. Other district judges, notably Judge Blatchford, in the Southern District of New York, early insisted that such a ruling would be unjust to the creditor in preventing him from sharing in dividends to which he seemed entitled, and equally unjust to the bankrupt in permitting some of his creditors to begin actions and, by withholding the entry of judgments until after a petition in bankruptcy was filed, to preserve their claims undischarged and thus subsequently collect them out of after-acquired property. This view led to a series of decisions (*Re Brown*, 3 N. B. R. 585; *Re Rosey*, No. 12,066, Fed. Cases; *Re Vickery*, No. 16,930, Fed. Cases; *Re Stansfield*, No. 13,294, Fed. Cases) which held that the debt was not merged in the judgment, and that therefore the debt or claim as it stood at the time of filing the petition in bankruptcy and not the judgment entered thereafter should be proved. There were also cases betwixt and between, notably that of *Re Crawford*, 3 N. B. R. 385, and *Monroe v. Upton*, 50 N. Y. 593, who held so far to the doctrine of merger as to compel the proof of the judgment not as a new debt, but as the old debt in a new form. * * *

"The exact question did not come before the United States Supreme Court

¹⁰⁸. Bankr. Act, § 63 (a) (5). In *re McBryde*, 3 A. B. R. 729, 99 Fed. 686 (U. C. N. Car.).

until 1887. In the case of *Boynton v. Ball*, 121 U. S. 457, Mr. Justice Miller writing the opinion, that court, in a case which arose under the Law of 1867, lays down the broad doctrines that, notwithstanding the change in the form of the debt from that of a simple contract by merger into a judgment, it in bankruptcy still remains the same debt, the existence of which was provable in bankruptcy. This is tantamount to saying that the doctrine of merger does not apply in bankruptcy, but no more.

"The law of 1898 agrees with the law of 1867 in giving the bankrupt the right to stay pending suits, and, though it does not in so many words prohibit the prosecution of suits on provable debts, the right to stay puts the question in much the same form as that which led to such confusion under the former law. *Boynton v. Ball* would therefore settle the question, were there not a new clause in the present statute which must now be interpreted. Section 63 of the Law of 1898 provides: 'Debts of the bankrupt may be proved and allowed against his estate which are * * * (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments.'"

The object, also, is to permit judgment to be taken after bankruptcy, where judgment is necessary to fix the liability of those secondarily liable for the bankrupt, without destroying the bankrupt's right of discharge therefrom.

By the operation of this Class V, judgments obtained after the filing of the bankruptcy petition, but before the discharge hearing, are themselves discharged, if founded on a debt itself provable, whether stay is granted or not.

By the operation of this Class V, on the other hand, opportunity may be given to creditors to obtain judgment where the obtaining of a judgment is necessary to take advantage of certain remedies, as, for instance, where creditors levying execution on exempt property may have special rights in the exempt property denied to creditors without judgments; and also where judgment is necessary to fix the liability of a surety on an appeal bond conditioned to pay any "judgment" that might be rendered against the debtor; and also where a mechanic's lien is dependent upon suit being started in a particular way within a limited time.

§ 697. Original Obligation Must Have Been "Provable."—The original obligation must itself have been a provable debt; that is to say, must have been a judgment, or written instrument, or costs, or taxes, or an open account or a contract, express or implied; and it must also have been in existence at the time of the filing of the bankruptcy petition.¹⁰⁹

§ 698. Original Debt, Not the Judgment, to Be Proved.—Evidently it is the original debt, not the judgment, that is to be proved;¹¹⁰ and claims

109. In re Pinkel, 1 A. B. R. 333 (Ref. N. Y.).

110. In re Pinkel, 1 A. B. R. 333 (Ref. N. Y.).

thus reduced to judgment retain the character of the indebtedness out of which they arise.¹¹¹

§ 699. Whether Judgment Itself Still Valid, for Other Purposes.

—It has been held that the judgment itself is not annulled, simply its lien.¹¹²

In re Richard, 2 A. B. R. 513, 94 Fed. 633 (D. C. N. Car.): "Respondents have received, and can receive no preference, lien or advantage by reason of, or under the judgments of the magistrate's court. They are nullities in this court to this extent, but they establish the claim. Section 63, in prescribing what debts may be proved, provides '(5) for provable debts reduced to judgment after the petition is filed, etc.'"

§ 700. Does Not Enlarge Time for Proving Claims nor Confer Lien, etc.—On the other hand, class 5 does not enlarge the time for proving claims in bankruptcy;¹¹³ nor does it confer a lien in bankruptcy or otherwise confer additional rights therein.¹¹⁴

DIVISION 11.

TAXES.

§ 701. Taxes.—Taxes also are "provable" in their nature.¹¹⁵

§ 702. Taxes Not to Be Proved in Form of Other Debts.—Taxes do not need to be proved in the form prescribed for other claims, the treasurer's receipt therefor being sufficient.¹¹⁶

§ 703. Trustee to Search Out Taxes.—And there is no obligation upon the tax officers to present the claim at all, the obligation resting upon the trustee to search out and pay the taxes.

DIVISION 12.

UNLIQUIDATED CLAIMS.

§ 704. Claim May Be "Provable" Though "Unliquidated."—A claim may be "provable" even if "unliquidated."¹¹⁷

111. In re McBryde, 3 A. B. R. 729, 99 Fed. 686 (D. C. N. Car.).

112. Apparently, but not really, contra, *St. Cyr. v. Daignault*, 4 A. B. R. 638 (D. C. Vt.).

113. In re Leibowitz, 6 A. B. R. 268, 108 Fed. 617 (D. C. Tex.).

114. In re McBryde, 3 A. B. R. 729, 99 Fed. 686 (D. C. N. Car.).

115. **Taxes Considered under Subject of "Distribution."**—As to what are and what are not taxes within the purview of this section, and the duties of the trustee in relation thereto, see post, subject of "Distribution," § 2133, et seq.

116. Bankr. Act, § 64 (a). Compare, *In re Cleanfast Hosiery Co.*, 4 A. B. R. 702 (Ref. N. Y.); *In re United Button Co.*, 15 A. B. R. 400, 140 Fed. 495 (D. C. Del.).

117. Bankr. Act, § 63 (b). *In re Stern*, 8 A. B. R. 569, 116 Fed. 604 (C. C. A. N. Y., affirming *In re Manhattan Ice Co.*, 7 A. B. R. 408, 114 Fed. 400); *In re Grant Shoe Co.*, 11 A. B. R. 48 (D. C. N. Y., affirmed in 12 A. B. R. 349, 130 Fed. 881, C. C. A.); *In re Hilton*, 4 A. B. R. 774, 164 Fed. 981 (D. C. N. Y.). Contra. *In re Big Meadows Gas Co.*, 7 A. B. R. 697, 113 Fed. 974 (D. C. Penn.).

Thus, damages for breach of contract to marry are "provable," though unliquidated.¹¹⁸ But unliquidated claims must be liquidated before being allowed.¹¹⁹ The statute says "proved and allowed," but it is obvious that some sort of "proof" must be filed before the court may "direct" the manner of liquidation, and doubtless such proof is sufficient to base an amendment upon, the amendment likely being the "proved" claim here meant.¹²⁰

§ 705. "**Unliquidated Claims**" **Do Not Enlarge Classes of "Provable" Debts.**—Clause (b) of § 63 does not enlarge the classes of provable debts but simply provides for reducing into form in which they may be proved those debts which if liquidated (that is to say, made certain and definite in amount), could be proved under clause (a) as being either judgment debts, contract debts, taxes or costs.¹²¹

Dunbar v. Dunbar, 10 A. B. R. 139, 190 U. S. 349: "This paragraph (b), however, adds nothing to the class of debts which might be proved under paragraph (a) of the same section. Its purpose is to permit an unliquidated claim, coming within the provisions of § 63a to be liquidated as the court shall direct."

Brown & Adams v. Button Co., 17 A. B. R. 565, 149 Fed. 48 (C. C. A. Del., affirming *In re United Button Co.*): "The first of the two paragraphs into which it is divided is given up to an enumeration of the debts which are entitled to be proved against the estate, among which is to be found everything in the way of a fixed obligation, or which, as being of a commercial character, a bankrupt could expect to be relieved from; and, complete in itself, it is not to be added to. The other paragraph plainly has to do with a mere matter of procedure; how unliquidated claims founded upon open account or contract, specified in the preceding paragraph, may be liquidated or settled."

In re Yates, 8 A. B. R. 69, 114 Fed. 365 (D. C. Calif.): "This subdivision is not to be construed as authorizing the proof of claims not declared in subdivision (a) to be provable. Its object is simply to provide that unliquidated claims which fall within the scope of subdivision (a) are to be liquidated in such manner as the court shall direct."

In re United Button Co., 15 A. B. R. 397, 140 Fed. 496 (D. C. Del., affirmed sub nom. *Brown & Adams v. Button Co.*, 17 A. B. R. 565, 149 Fed. 48): "There is no legitimate ground for an assumption that Congress intended by so providing for the liquidation, proof and allowance of 'unliquidated claims' to add to the classes of provable demands mentioned in § 63a. Such an assumption would be not only uncalled for, but wholly inadmissible. For, unless the 'un-

118. *In re Fife*, 6 A. B. R. 258, 109 Fed. 880 (D. C. Pa.); *In re Crocker*, 8 A. B. R. 188 (Ref. N. Y.); *In re McCauley*, 4 A. B. R. 122, 101 Fed. 223 (D. C. N. Y.); *Finnegan v. Hall*, 6 A. B. R. 648 (N. Y. Sup. Ct.); impliedly (because dischargeable), *Bond v. Milliken*, 17 A. B. R. 811, 109 N. W. 774 (Iowa); *Desler v. McCauley*, 7 A. B. R. 138 (N. Y. Sup. Ct., App. Div., reversing 6 A. B. R. 491).

119. Bankr. Act, § 63 (b). *In re Cushing*, 6 A. B. R. 22 (Ref. N. Y.); *In re Silverman Bros.*, 4 A. B. R. 83, 101 Fed. 219 (D. C. Mo.).

120. Suggestively, *In re Mertens*, 16 A. B. R. 829 (C. C. A. N. Y.).

121. *In re Marcus*, 5 A. B. R. 19 (D. C. Mass., affirmed in 5 A. B. R. 365, 105 Fed. 907); *In re Hirschman*, 4 A. B. R. 715, 104 Fed. 69 (D. C. Utah); *In re Wigmore*, 10 A. B. R. 664 (Ref. Calif.); compare, *Crawford v. Burke*, 12 A. B. R. 659, 195 U. S. 176; compare, *Beers v. Hanlin*, 3 A. B. R. 745, 99 Fed. 695 (D. C. Ore.), where the court seems to hold the doctrine that the bankruptcy court might permit suit to be maintained upon a purely personal tort in order that it might become "provable" as a judgment. However, the court in fact does not go to that extent.

liquidated claims' of § 63b be restricted to those made provable by § 63a, there is no limitation upon the provability of unliquidated demands of whatsoever nature against a bankrupt. Such a result would be repugnant to the express enumeration contained in § 63a, and, further, would, as hereinafter appears, involve a wide departure from the settled policy of every system of bankruptcy heretofore in force in the United States."

Inferentially, *In re Grant Shoe Co.*, 12 A. B. R. 350, 130 Fed. 881 (C. C. A. N. Y., affirming 11 A. B. R. 48): "To hold, as is contended by the alleged bankrupt, that a claim is not provable because the amount of the claim itself is not determinable, or its validity is disputed, would defeat the involuntary provisions of the Bankrupt Act. The court below has found that the claim, although unliquidated is a provable one and under the provisions of § 63 (b) of said Act, has provided for its liquidation. * * * The order of the District Court is affirmed."

§ 706. Only Contract Claims and Tort Claims Capable of Presentation as if on Implied Contracts, Liquidatable.—Inasmuch as all classes under clause (a) save and except contract debts are, from their very nature already liquidated—as judgments, taxes and costs—clause (b) simply provides for the liquidation of unliquidated contract debts, as, for instance, for determining the amount of damages for a breach of contract, etc., etc.,¹²² including tort claims when the tort has been waived.

§ 707. Damages on Contracts Accruing after Bankruptcy.—Thus, as to unliquidated contract debts: Damages for breach of continuing contracts to supply goods or render services or pay money may be liquidated, even before the expiration of the term, if the future damages are ascertainable.

Thus, as to continuing contracts to sell or buy goods;¹²³ as to annuity bonds;¹²⁴ as to contracts for annual salary, where dismissal occurs before the end of the term.¹²⁵ Thus, also, as to breach of contract to marry, which, it has been held, may be liquidated by the bankruptcy court (the referee).¹²⁶ Thus, likewise as to the prospective profits lost by breach of contract to furnish goods;¹²⁷ as well as damages for refusal to receive goods contracted for.¹²⁸

^{122.} See cases cited under the subject "Damages for Breaches of Continuing Contracts and of Contracts of Sale and of Employment," ante, Div. 7. See also, instances hereinafter cited. And for liquidating such unliquidated claims for tort, as are capable of being presented as implied contracts, see ante, "Claims Ex Delicto," Div. 2, this chapter.

^{123.} In *re Stern*, 8 A. B. R. 569, 116 Fed. 604 (C. C. A. N. Y.); In *re Manhattan Ice Co.*, 7 A. B. R. 408, 114 Fed. 400 (D. C. N. Y., affirmed sub nom. In *re Stern*, 8 A. B. R. 569, 116 Fed. 604 (C. C. A. N. Y.)). Also compare, to same effect, In *re Pettingill & Co.*, 14 A. B. R. 728, 137 Fed. 143 (D. C. Mass.); also compare, to same effect, In *re Stoeve*, 11 A. B. R. 345, 127 Fed. 394 (D. C. Pa.).

^{124.} Compare, to same effect, *Cobb v. Overman*, 6 A. B. R. 324, 109 Fed. 65 (C. C. A. N. Car.).

^{125.} In *re Silverman Bros.*, 4 A. B. R. 83, 101 Fed. 219 (D. C. Mo., reversing 2 A. B. R. 15).

^{126.} In *re Crocker*, 8 A. B. R. 188 (D. C. N. Y.).

^{127.} In *re Structural Steel Car Co.*, 13 A. B. R. 373 (Ref. Ohio); In *re Saxton Furnace Co.*, 15 A. B. R. 445, 142 Fed. 293 (D. C. Pa.), including commissions paid to an agent by the seller.

^{128.} In *re Structural Steel Car Co.*, 13 A. B. R. 385 (Ref. Ohio).

Annuity installments accruing after bankruptcy may be liquidated and the claim proved.¹²⁹ Again, damages for breach of contract to supply the government with goods can be liquidated, and the claim is provable;¹³⁰ likewise damages for breach of contract to supply customers with goods.¹³¹

And for breach of contract of a stockbroker with his customer to purchase shares on margin.¹³²

And a subscription to a mercantile agency, is a provable claim, although the period has not elapsed.

In *re Mirror & Beveling Co.*, 15 A. B. R. 122 (Ref. N. Y.): "A contract between a mercantile agency and a customer, whereby, in consideration of an annual subscription fee, such agency agrees to supply such customer with its reference book and detailed report during the year, is an enforceable contract against the bankrupt; and even though at the time of the bankruptcy a large portion of the contract year has yet to elapse, such mercantile agency has a provable debt for the full subscription price."

And damages for breach of warranty of goods has been held likewise provable, though the damages were not ascertained at the time of bankruptcy.¹³³

The query arises, however, in case the term were of long duration, how could the damages be liquidated within the statutory time since the employee is bound to use his best efforts to get employment meantime and thus to reduce the damages, and it cannot be known until the end of the term what his damage will amount to? The same reasoning probably would apply here as in the case of rent, as to which, see ante, "Claims for Rent," Div. 4, this chapter, § 652, et seq.

But where the bankruptcy does not, in and of itself, disable the bankrupt from the performance of the contract it is difficult to see how the debt is provable for possible future failure to meet its obligations as they accrue from time to time.¹³⁴

§ 708. Liquidated Amount Stipulated in Contract.—Where a liquidated amount is stipulated in a contract as damages for its breach, such stipulated amount may or may not be regarded as the true amount of the claim, according to circumstances; and where the actual damages sustained are clearly much less than the sum stipulated, the stipulated sum will be regarded as a mere penalty to secure performance.¹³⁵

129. In *re Cobb v. Overman*, 6 A. B. R. 324, 109 Fed. 65 (C. C. A. N. Car.).

130. In *re Stoeve*, 11 A. B. R. 345, 127 Fed. 394 (D. C. Pa.).

131. In *re Manhattan Ice Co.*, 7 A. B. R. 408, 114 Fed. 400 (D. C. N. Y., affirmed sub nom. In *re Stern*, 8 A. B. R. 569, 116 Fed. 604, C. C. A. N. Y.).

132. In *re Swift*, 7 A. B. R. 374, 112 Fed. 315 (C. C. A. Mass.); In *re Swift*, 3 N. B. N. & R. 271 (D. C. Mass.); In *re Hurlbutt, Hatch Co.*, 15 A. B. R. 198 (C. C. A. N. Y.).

133. In *re Morales*, 5 A. B. R. 425, 105 Fed. 761 (D. C. Fla.). In this case the claim was held to sound in tort, not in contract.

134. In *re Brew Co.*, 16 A. B. R. 110, 143 Fed. 579 (D. C. Mo.).

135. *Northwest Fixture Co. v. Kilbourne & Clark*, 11 A. B. R. 725 (C. C. A. Wash.).

§ 709. **Stockholder's Liability.**—Stockholder's double liability for debts of the corporation in some of the States is not only a debt created by the statute, but is also one founded upon an implied contract, and it is provable in bankruptcy if the circumstances are such that the claimant could have maintained a suit to enforce the stockholder's liability. It is fixed and not contingent, for all the facts necessary to fix it have already occurred. It is simply unascertained and unliquidated and upon liquidation being made, it becomes provable and allowable.¹³⁶

A bankrupt's liability for his unpaid stock subscription also is a provable debt.¹³⁷

§ 710. **Liquidation of Claims Ex Delicto Not Authorized, unless.**—This clause does not authorize the liquidation of claims ex delicto, unless they are of such nature that the claimant may waive the tort and sue on the implied contract.¹³⁸

§ 711. **Contingent Claims Not to Be Liquidated and Proved under § 63 (b).**—Contingent claims, not being provable, may not be liquidated and then proved under § 63 (b); thus, as to claims for rent to accrue after bankruptcy.¹³⁹

^{136.} In re Rouse, 1 A. B. R. 393 (Ref. Ohio); also In re Remington Automobile & Motor Co., 9 A. B. R. 533, 119 Fed. 441 (D. C. N. Y.).

Dight v. Chapman, 12 A. B. R. 743, 65 L. R. A. 793 (Ore.): A judgment determining the amount to be contributed by the stockholders of an insolvent corporation for the payment of its debts under constitutional and statutory provisions making stockholders liable for debts to the amount of the par value of the stock held by them was held in this case to render the amount due from each stockholder a debt provable in bankruptcy proceedings, against him so as to be cancelled by a discharge although he did not appear in the proceedings against the corporation, where the judgment therein is binding upon him.

In some of the States it is, however, in the nature of a penalty and not a contract.

The receiver appointed to collect the judgment on the stockholder's liability may prove the claim against the bankrupt stockholder. Dight v. Chapman, 12 A. B. R. 743 (Sup. Ct. Ore.).

^{137.} Impliedly, In re Watkinson, 16 A. B. R. 245 (D. C. Pa.). But it is due to the corporation or its receiver and not to a purchaser of a debt of the corporation, In re Watkinson, 16 A. B. R. 245 (D. C. Pa.).

^{138.} In re United Button Co., 15 A. B. R. 396, 140 Fed. 495 (D. C. Del.); see In re Hirschman, 4 A. B. R. 716, 104 Fed. 69 (D. C. Utah); In re Wigmore, 10 A. B. R. 664 (Ref. Calif.); In re Filer, 5 A. B. R. 582, 835 (D. C. N. Y.); see In re Yates, 8 A. B. R. 69, 4 Johns 317, 9 Johns 395; In re Morales, 5 A. B. R. 423, 105 Fed. 761 (D. C. Fla.); compare, In re Cushing, 6 A. B. R. 22 (Ref. N. Y.); compare, Crawford v. Burke, 12 A. B. R. 659, 195 U. S. 176; compare, Hawk v. Hawk, 4 A. B. R. 463, 102 Fed. 679 (D. C. Ark.). See ante, this ch., Div. 2, "Claims Ex Delicto."

Apparently contra, by inference, Beers v. Hanlin, 3 A. B. R. 745, 99 Fed. 695 (D. C. Ore.): "An unliquidated claim is not a provable debt in bankruptcy, and when arising out of tort must be reduced to judgment, or, pursuant to application to the court be liquidated as the court shall direct in order to be proved."

^{139.} In re Arnstein, 4 A. B. R. 246 (Ref. N. Y.); In re Collignon, 4 A. B. R. 250 (Ref. N. Y.). See ante, this ch., "Contingent Claims," Div. 3. Also, ante, this ch., "Claims for Rent," Div. 4.

§ 712. **Manner of Liquidation.**—The court will direct the manner of the liquidation upon the claimant making application to that end.¹⁴⁰

In re United Button Co., 15 A. B. R. 390, 140 Fed. 495 (D. C. Del.): "Under the power conferred on the court by § 63b, to direct the manner in which unliquidated claims against a bankrupt may be liquidated, ample authority exists to adopt any procedure appropriate to the particular case, whether it be submission to a jury on an issue framed, or production of evidence before the referee or some other method."

§ 713. **Bankruptcy Court Itself May Liquidate.**—The bankruptcy court may itself undertake the liquidation.¹⁴¹

And it was held, in one case, although wrongly, that the bankruptcy court may call in a jury to aid in assessing the damages.

Obiter, In re United Button Co., 15 A. B. R. 395, 140 Fed. 495 (D. C. Del.): "A jury constitutes part of the machinery of a district court of the United States, and the ascertainment of the amount of unliquidated damages is, in general, a function appropriate to a jury. The power of the court under the Act of 1867 to cause unliquidated damages for which the bankrupt was liable 'to be assessed in such mode as it may deem best' and under the Act of 1898 to 'direct' the 'manner' in which unliquidated claims against a bankrupt may 'be liquidated' was and is broad enough to include authority to provide for their submission to a jury."

§ 714. **Liquidation by Litigation.**—The Court may direct litigation to be instituted, or if already instituted, to be maintained.¹⁴²

And this is usually done in cases of stockholder's double liability, where the facts are complex and the usual procedure has been in the State Courts.¹⁴³ Where only creditors with judgments may enforce stockholders' liability on unpaid subscriptions, the bankruptcy court will permit them to reduce their claims to judgment after the adjudication of bankruptcy, but will thereupon permit only one subsequent proceeding in behalf of all, to marshal the conflicting claims.¹⁴⁴ But even in stockholders' liability cases, if the facts are few and simple, as they likely would be were the corporation itself penniless and all its stockholders insolvent, the court will itself liquidate the claim.¹⁴⁵

§ 715. **Original Proof Not Necessarily Formal.**—But the original proof need not have been formal and may have lacked some of the usual

140. In re Silverman Bros., 4 A. B. R. 84, 101 Fed. 219 (D. C. Mo.). As to the corresponding provisions of the preceding bankruptcy acts of 1800, 1841 and 1867 and discussion of the same, see In re United Button Co., 15 A. B. R. 394, 140 Fed. 495 (D. C. Del.).

141. Obiter, In re Rouse, 1 A. B. R. 394 (Ref. Ohio, affirmed by D. C.); obiter, In re United Button Co., 15 A. B. R. 392, 140 Fed. 495 (D. C. Del.).

142. In re Rouse, 1 A. B. R. 394 (Ref. Ohio); In re United Button Co., 15 A. B. R. 390, 140 Fed. 495 (D. C. Del.).

143. In re Rouse, 1 A. B. R. 394 (Ref. Ohio).

144. In re Remington Automobile & Motor Co., 9 A. B. R. 533, 119 Fed. 441 (D. C. N. Y.).

145. Obiter, In re Rouse, 1 A. B. R. 393 (Ref. Ohio).

allegations and even may not have been verified.¹⁴⁶ Thus, the claim of a mechanic's lienholder to a lien upon a special fund paid into the bankruptcy court, made by way of petition, may, after expiration of the year, be amended to conform to the regular proof of claim as prescribed by the Supreme Court's forms and be then, for the first time, verified.¹⁴⁷ And it has been held, that where a wife succeeds in an action against her husband, and his trustee in bankruptcy commenced, within the year after the adjudication, to enforce a resulting trust in certain land about to be sold as part of the bankrupt estate, her claim is "proven" within the limitation of §§ 57 and 57 (n).¹⁴⁸

§ 716. Whether, after Trustee's Recovery of Preference, etc., in Independent Suit after Expiration of Year, Defeated Party's Pleadings to Be Considered Proofs Filed within Year, or Litigation "a Liquidation."—Although the number and dignity of the authorities seem to be to the contrary, yet the weight of reason seems to the author to be in support of the proposition that a preferred creditor from whom a preference has been recovered after the expiration of one year from the date of the adjudication, in a suit filed by the trustee within the year, and who now seeks to prove his claim for the debt, is not a creditor who was seeking liquidation of his claim by liquidation and that he presents his claim too late.¹⁴⁹ Likewise, where an attaching creditor, under advice of counsel, failed to file his claim but litigated the matter up to the Supreme Court, on his final defeat, after the expiration of the year his claim may not be filed.¹⁵⁰ But a proof, duly filed within the year, may be amended after the year, by striking out a credit which was a preference and which the trustee had meanwhile recovered by litigation.¹⁵¹

§ 717. If Liquidated by Litigation within 30 Days before or after Expiration of Year; Then 60 Days Longer Granted.—Where the claim is liquidated by outside litigation and the final judgment in the litigation is rendered within 30 days before or after the expiration of the year, then the claimant has 60 days from the date of the final judgment to file his claim.¹⁵² And "litigation" here undoubtedly means litigation

146. Compare, to similar effect, *In re Mertens*, 16 A. B. R. 825 (C. C. A. N. Y.). But compare, *In re Dunn Hdw. Co.*, 13 A. B. R. 147, 132 Fed. 719 (D. C. N. Car.), where the court held a claim set up by way of a pleading was "fatally" defective. This decision states the law too extremely. The claim was certainly amendable if, as stated, it contained allegations sufficient for a good pleading.

147. *In re Roeber*, 11 A. B. R. 464, 127 Fed. 122 (C. C. A. N. Y.).

148. *Buckingham v. Estes*, 12 A. B. R. 182 (C. C. A. Tenn.).

149. *In re Damon*, 14 A. B. R. 809 (Ref. N. Y.); contra, *In re Fagan*, 15 A. B. R. 522, 140 Fed. 758 (D. C. S. Car.); contra, *In re Noel*, 18 A. B. R. 11, 150 Fed. 89 (C. C. A. N. H.).

150. *In re Baird*, 18 A. B. R. 228 (D. C. Pa.).

151. Contra, *In re Kemper*, 15 A. B. R. 675, 142 Fed. 210 (D. C. Iowa). This case denies that the claim was the same, yet, on the facts it was the same claim. Merely a credit was cut out.

152. Bankr. Act, § 57 (n).

outside of the bankruptcy proceedings themselves, for if an unliquidated claim be duly filed within the year, the delay in its liquidation by means other than outside litigation is within the control of the court, hence the reason for the limitation disappears.¹⁵³ But this litigation must have been directed by the court;¹⁵⁴ and must have been directed to the liquidation of the creditor's claim itself and not concern, exclusively, collateral matters, the amount of the claim itself being undisputed.

In *re Thompson's Sons*, 10 A. B. R. 581, 123 Fed. 174 (D. C. Pa.): "I see no escape from the positive declaration of this clause. It cannot be successfully contended that the claim was in process of liquidation in the sense borne by that word in the foregoing paragraph. If the litigation there referred to means litigation between the claimants and the bankrupt, no such dispute existed; and, assuming it to include litigation between the claimants and third parties, by which the bankrupt estate may be affected, although it is not represented therein, the object of the contest between the owner and the claimants was not to liquidate a claim. The amount was not in dispute. The sole question was whether E. O. Thompson's estate was liable, and it was not 'liquidation' to determine that controversy."

It is a possible and perhaps reasonable construction of the statute that a claim may be liquidated at any time the court may direct, whether before or after the expiration of the year, so long as the claim is filed within the year (or in cases of pending litigation, within the sixty days mentioned in § 57 (n)).¹⁵⁵

In *re Mertens & Co.*, 16 A. B. R. 829, 147 Fed. 177 (C. C. A. N. Y.): "From these various sections we deduce the following propositions: That proof and allowance of claims are two separate and distinct steps; that a clear statement of a claim in writing duly verified and filed with the referee, if made within a year, is sufficient to take the claim out of the statutory limitations, even though it may be allowed, or liquidated and allowed, afterwards.

"We think that § 63b must be interpreted in the light of the other sections of the law and that to construe it as meaning that no proof of unliquidated claims can be filed until the precise amount due thereon is established will, in practical operation, make the allowance of such claims impossible, for the reason that a hostile trustee or creditor can easily delay the liquidation until after the expiration of the year. A more reasonable and sensible construction is that the filing of the proof, like the filing of a declaration at common law, if made within the time, takes the claim out of the statute of limitations, and that after such proof is made the claim is before the court to be dealt with as the interest of the bankrupt and the creditors may require. No hard and fast rule can be made for the guidance of the referee in such matters; much is left to his discretion; and if the best interests of the estate require, he may withhold action on the claim or postpone the dividend thereon until the status of the claim is fully determined. * * *

"It may be pertinent to inquire how a claim can be liquidated as the court shall direct, unless a statement of the claim is filed with or brought to the attention of the court."

¹⁵³. Inferentially, In *re Mertens & Co.*, 16 A. B. R. 829, 147 Fed. 137 (C. C. A. N. Y.).

¹⁵⁴. Bankr. Act, § 63 (b).

¹⁵⁵. In *re Noel*, 18 A. B. R. 10, 150 Fed. 89 (C. C. A. N. H.).

And a still more liberal construction is that, if the liquidation be not accomplished until after the thirty days preceding the expiration of the year, then it will be sufficient if proof of claim be filed within sixty days after the liquidation is accomplished by final judgment, no matter when such final judgment be rendered, whether within the zone of thirty days before or after the expiration of the year, or later.

In *re Noel*, 18 A. B. R. 11, 150 Fed. 89 (C. C. A. N. H.): "It has been suggested that, in order to bring a claim within the exception, final judgment in the litigation must be rendered within thirty days of the expiration of the year, either before or after. In *re Keyes*, 18 Am. B. R. —, 152 Fed. —, decided in the District Court of Massachusetts, November 8, 1906. If we depended altogether upon the grammatical construction of the sentence, and disregarded altogether the nature of the injustice against which the exception was intended to guard, this construction might not be unreasonable. But to limit to thirty or to sixty days the time during which litigation will suspend the operation of the statute of limitations, and to exclude from proof claims liquidated by litigation fourteen or fifteen months after adjudication, is to establish a serious distinction, with only a fantastic difference. That a creditor whose claim was in litigation might, by an unqualified statute of limitations, be deprived of his just share of the bankrupt's estate, was the 'mischief felt,' the 'occasion and necessity' of the exception. To save the rights of such a creditor was 'the object and the remedy in view,' and the intention of the legislature is to be ascertained accordingly. 1 Kent Com. 462; 1 Plow. 205; Potter's Dwaris, 194. We therefore interpret the exception as if it read:

" 'If the final judgment therein is rendered within thirty days before the expiration of such time, or at any time thereafter.' "

"We have to determine if the proceeding here had in the State Court was a liquidation by litigation of the creditor's claim, within the meaning of the Bankrupt Act.

"This is the creditor's contention. The trustee, on the other hand, contends that the exception in clause 'n' refers only to a suit brought under § 63b (30 Stat. 563, c. 541 [U. S. Comp. St. 1901, p. 3447]) to fix the face value of a claim due from the bankrupt's estate, which otherwise by reason of its indefinite amount would not be provable. Upon a consideration of the clause already quoted, as its meaning is illustrated by the whole Bankrupt Act, we agree with the contention of the creditor. In *re Keppel v. Tiffin Savings Bank*, 197 U. S. 356, 13 Am. B. R. 552, the Supreme Court decided that the enforced surrender of a preference by a creditor did not necessarily deprive him of his right to prove thereafter. In that case formal proof was offered within a year of the adjudication; but the court expressly repudiated that construction of the law which would hold that the creditor's 'right to prove (his) lawful claims against the bankrupt estate was forfeited simply because of the election to put the trustee to proof in a court of the existence of the facts made essential by the law to an invalidation of the preference.' On the contrary, it held that 'whenever the preference has been abandoned or yielded up and thereby the danger of inequality has been prevented, such creditor is entitled to stand on an equal footing with other creditors and prove his claims.' Pages 363, 364 of 197 U. S.; page 557 of 13 Am. B. R. The phrase 'liquidated by litigation' is general, and the object of the exception which is made to the statutory limit of time is plainly to allow the proof of a claim after the expiration of a year by a creditor who during that time was engaged in litigation with the bankrupt's estate concern-

ing its liability to him. In a sense, the debt evidenced by the promissory notes held by Powell had already been liquidated apart from bankruptcy proceedings, Powell could have sued Noel at law for their face value. It may be that, pending the litigation, he could have proved his claim in bankruptcy as a secured claim, leaving his proof to be amended, in case his mortgage was avoided. *Hutchinson v. Otis*, 8 Am. B. R. 382, 115 Fed. 937, 941; on appeal, 190 U. S. 552, 10 Am. B. R. 135. But to prove during litigation a claim which cannot be allowed unless the creditor fails in the litigation is but an empty formality. If the security is as large as the debt, it is a formality which can hardly be accomplished under the rules and with the forms which have been provided. Notice of the claim is given in effect by the litigation, and, if the preferred creditor is not to be deprived of his proof altogether, there seems no good reason why he should not offer it immediately after the litigation is ended. The substantial amount of Powell's claim, the amount for which he could seek allowance and upon which he could demand a dividend, here remained uncertain until the validity of the mortgage had been settled. To hold that Powell's claim was 'liquidated by litigation' in the proceeding which, for some purposes, determined the amount for which it should be allowed, is not, we think, a forced construction of the language of the Act. It is rather that 'honest and practical interpretation' which we declared should be applied to statutes in bankruptcy."

Concerning the ruling of *In re Noel*, these criticisms seem appropriate. First, it disregards the plain words of the statute. The statute does not say "If the final judgment therein is rendered within thirty days before the expiration of such time, or *at any time thereafter*." On the contrary the wording is absolutely unambiguous, "Or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment." We are not to disregard the plain wording of a statute. Second, such permission might defeat the very purpose of § 57 (n) limiting the proving of claims to one year. It is concededly the purpose of § 57 (n) to hasten the winding up of bankrupt estates. The long drawn out administrations possible under the old law of 1867 (some of which were still pending at the time the Act of 1898 was passed) were deprecated by the framers of the Act of 1898. Section 57 (n) is a new provision, appearing in no former act, and the mischiefs aimed at are real. Yet, under the ruling in *In re Noel*, if the claimant but hold an unliquidated claim he is placed on a higher footing than other claimants and may be as leisurely as he pleases in getting it liquidated, for the trustee has notice and must withhold sufficient dividends to cover the claim. Under such ruling the mere serving of notice by the holder of an unliquidated claim would suspend indefinitely the closing of the estate, for his "dividend" must be held until his claim is liquidated and there is *no statutory provision prescribing when he shall begin his liquidating litigation*.

Yet, on the other hand, it is true that such liquidation by litigation is not an absolute right of the creditor perhaps; but, may be within the option of the bankruptcy court in directing the manner of liquidation under

§ 63 (b); and that if the bankruptcy court directs liquidation to be accomplished by litigation it would be a hardship to make the claimant lose his rights because of such order of the court or by the slowness of the court wherein the litigation is pending. At any rate, if the rule in *In re Noel* is to be adopted as the final rule of law, the qualification of § 63 (b) should be kept in mind and the distribution of the estate not be delayed, unless the court shall have directed the litigation. In that event, the application of the claimant for the court's direction might amount, in effect, to an informal filing capable of later amendment into "due" proof. Thus, after a preference has been set aside or recovered by litigation, the defeated creditor will be in time if he files proof of his claim within sixty days after final judgment is rendered.¹⁵⁶

156. *In re Noel*, 18 A. B. R. 10, 150 Fed. 89 (C. C. A. N. H.).

CHAPTER XXII.

YEAR'S LIMITATION FOR FILING CLAIMS.

Synopsis of Chapter.

- § 718. Despatch in Administration.
- § 719. Year's Limitation for Filing Claims.
- § 720. "Proving" Means Filing Here.
- § 721. Claim "Allowed" after Expiration of Year, if Filed within Year.
- § 722. May Be "Liquidated" after Expiration of Year, if "Filed" within.
- § 723. Court's Power Absolutely Ceases.
- § 724. Claims Presented after, Stricken from Files.
- § 725. Limitation Applies Even Where Creditor Not Notified, etc.
- § 726. Applies Though Assets Not Distributed, or New Assets Discovered.
- § 727. Applies Though Litigation Pending.
- § 728. Applies Also to Secured Claims, as to Deficit.
- § 729. Filing with Trustee Sufficient.
- § 730. Limitation Not Applicable to United States Government nor to Taxes.
- § 731. Withholding of Dividend until Expiration of Year Not Required.
- § 732. Claims Capable of Liquidation but Not Liquidated, Nevertheless Discharged.
- § 733. Claims Not Proved within Year, Nevertheless Available as Offset.
- § 734. Amendment of Claim after Expiration of Year.
- § 735. But an Original Claim Must Exist, Filed within Year.
- § 736. And Power of Amendment Not to Be Distorted to Let in Dilatory Creditors Who Have Withdrawn Proofs.
- § 737. Nor to Let Dilatory Creditors Filing Claims against Firm to File Claims against Separate Partners.

§ 718. **Despatch in Administration.**—One of the complaints urged against the passage of any bankruptcy law at the time the bill for the present one was before Congress was that the bankruptcy courts were slow in winding up estates. Indeed, at the time the bill was under discussion, one member of the opposition brought the fact to the attention of Congress that there were several cases even then still undisposed of that had been begun under the old law, more than twenty years beforehand. This fact in the history of the legislation explains the appearance in different sections of the present law of repeated provisions intended to hasten the administration of bankrupt estates.¹ One of these provisions is the limitation of time for proving claims.

§ 719. **Year's Limitation for Filing Claims.**—Claims may not be filed in bankruptcy after the end of a year from the adjudication, except that unliquidated claims have a somewhat longer time.²

§ 720. **"Proving" Means Filing Here.**—The statute uses the word

1. In re Muskoka Lumber Co., 11 A. B. R. 761, 127 Fed. 886 (D. C. N. Y.).

2. Bankr. Act, § 57 (n): "Claims shall not be proved against a bankrupt subsequent to one year after the adjudication; or, if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of

"proved" in § 57 "n." In this section the word "proved" does not mean the written proof of claim itself, but the filing of such proof of claim.

In *re Ingalls Bros.*, 13 A. B. R. 513, 514, 137 Fed. 517 (C. C. A. N. Y., reversed on the ground that filing with the trustee is sufficient, sub nom. *Olcutt v. Green*, 17 A. B. R. 75, 204 U. S. 96): "Briefly stated, the argument for the first proposition is that § 57a defines a proof of claim as 'a statement under oath, in writing, signed by a creditor, setting forth the claim,' etc.; that subsec. e provides that 'claims after being proved may, for the purpose of allowance, be filed by the claimants—before the referee;' that subsec. d provides that 'claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court (referee), etc.;' that subsec. n provides that 'claims shall not be proved against a bankrupt estate subsequent to one year after adjudication;' that a 'proof' is a claim 'proved;' that the word 'proved' must be assumed to have been employed in but a single sense and with a single meaning in the same section, and was not designed and cannot be construed to have in subsec. n any larger meaning than in a, c or d; in short, that no logical or necessary construction of subsec. n imposes any limitation upon the time of filing, but the contrary; and, finally, applying the section to the facts on the case, that the three claims in issue, having been 'proved' within the year, may be filed at any time.

"As a matter of first impression the construction urged seems almost conclusively reasonable. Pursued further, however, the proposition is perhaps reduced to the absurd when it is seen that the prohibition against 'proving' in its literal effect would not prohibit—would simply forbid an act which per se would be not only utterly harmless but utterly foolish, unless logically related to some further act designed to render it effective. If 'proved' in subsec. n is the mere equivalent of 'proof' in subsec. a and 'proved' in subsec. c and d, there seems to be nothing better than some purely speculative reason for subsec. n, since practically the time of verification can make no possible difference to parties in interest, except as involved in the time of filing. 'Proof' under subsec. a involves nobody save the creditor himself; filing—'proved'—under subsec. n involves notice to all parties in interest. That the presumably logical and consistent use of language is opposed by the practically illogical and inconsistent consequences involved, seems to have been the decision or assumption of every court before which the interpretation of subsec. n has arisen, although most of the decisions are somewhat general, rather than specific, and none of them specifically appears to have been predicated upon the precise state of facts disclosed here, i. e., upon proofs verified within the year, but offered for filing thereafter, which squarely raises the question of construction. However, their purpose cannot be doubted, and being unbroken in point of their conclusion, they must be accepted as conclusive against the petitioners."

§ 721. Claim "Allowed" after Expiration of Year if Filed within Year.—And a claim may be "allowed" after the expiration of the year, if filed within the year.³

such judgment; provided that the rights of infants and insane persons without guardians, without notice of the proceedings, may continue six months longer."

See discussion of this provision in *In re Damon*, 14 A. B. R. 809 (Ref. N. Y.). Bankr. Act, § 57 (n) is a new provision appearing for the first time in the Act of 1898. *Norfolk & W. R. v. Graham*, 16 A. B. R. 613, 145 Fed. 809 (C. C. A. W. Va.).

³. In *re Mertens*, 16 A. B. R. 825, 147 Fed. 177 (C. C. A. N. Y.); In *re Pettingill & Co.*, 14 A. B. R. 766, 137 Fed. 143 (Ref. Mass.).

§ 722. **May Be "Liquidated" after Expiration of Year, if "Filed" within.**—And a claim may be "liquidated" after the expiration of the year, if "filed" within the year.⁴

§ 723. **Court's Power Absolutely Ceases.**—Section 57 (n) is an absolute termination of the court's power to allow claims that are presented after the expiration of one year.⁵

Bray v. Cobb, 3 A. B. R. 788, 100 Fed. 272 (reversed, on other grounds, in *Cobb v. Overman*, 6 A. B. R. 324, 109 Fed. 65): "The section is more than a limitation of the time within which claims may be proved. It is a prohibition. The language used was intended to limit the time absolutely, and the reasons for thus limiting the time may be seen from an examination of other sections. * * * The general purpose of the Act seems to be to settle the estate within a reasonable time."

In *re Paine*, 11 A. B. R. 351, 127 Fed. 246 (D. C. Ky.): "The language of the clause is plain and unequivocal. There is no ambiguity about it and it admits of no construction. The decisions are clear to the effect that no proof of debt can be made after the expiration of one year from the adjudication except in those instances" specially excepted.

In *re Muskoka Lumber Co.*, 11 A. B. R. 761, 127 Fed. 886 (D. C. N. Y.): "The entire theory of the Bankrupt Act as stated by the cases, would seem to be the settlement of the estate in bankruptcy within a reasonable time. Congress, in its wisdom, has said 'claims shall not be proved against the bankrupt estate subsequent to one year.' This provision must be strictly construed against the creditor, in order to carry out the liberal spirit shown by other provisions of the Act, toward the debtor."

In *re Prindle Pump Co.*, 10 A. B. R. 405 (Ref. N. Y.): "The provision is new under our bankruptcy system. Under former acts proofs could be made and filed at any time, even after many years. As all proofs, whenever made related back to the commencement of the bankruptcy proceedings, the bankrupt estate becoming thus impressed with a trust for the benefit of creditors, even the various statutes of limitation did not apply and any claim not barred at the time of the inception of the bankruptcy proceedings, could, if just and sustained by adequate proof, be proved, apparently without any limitation of time. The provision in the Act of 1898 was clearly intended, in conformity with the general purpose of the Act, to aid in compelling the prompt distribution of bankrupt estates among diligent creditors and prompt closing of the proceedings and there is no warrant for giving its mandatory language any other than its plain meaning."

4. In *re Mertens & Co.*, 16 A. B. R. 829, 147 Fed. 177 (C. C. A. N. Y.), quoted ante, § 717.

5. In *re Shaffer*, 4 A. B. R. 728, 104 Fed. 982 (D. C. N. Car.); In *re Hawk*, 8 A. B. R. 71, 114 Fed. 916 (C. C. A.); In *re Hilton*, 3 N. B. N. & R. 104, 104 Fed. 981, 4 A. B. R. 774 (D. C. N. Y.); In *re Damon*, 14 A. B. R. 809 (Ref. N. Y.); compare, In *re McCallem*, 11 A. B. R. 447 (D. C. Penn.); In *re Rhodes*, 5 A. B. R. 197, 105 Fed. 231 (D. C. Penn.); In *re Leibowitz*, 6 A. B. R. 268, 108 Fed. 617 (D. C. Tex.); In *re Moebius*, 8 A. B. R. 590, 116 Fed. 47 (D. C. Penn.); In *re Kemper*, 15 A. B. R. 675, 142 Fed. 210 (D. C. Iowa); to same effect in composition cases, see In *re Brown*, 10 A. B. R. 588, 123 Fed. 336 (D. C. Colo.); In *re Ingalls Bros.*, 13 A. B. R. 512, 137 Fed. 517 (C. C. A. N. Y.); In *re Baird & Co.*, 18 A. B. R. 288 (D. C. Pa.); In *re Pettingill & Co.*, 14 A. B. R. 763 (Ref. Mass.).

Contra, where the only estate for distribution was precisely the preferential transfer to the creditor whose claim it is being sought to prove: In *re Fagan*, 15 A. B. R. 522, 140 Fed. 758 (D. C. S. Car.). This point was not involved in *Keppel v. Tiffin Sav. Bk.*, cited in the opinion as precedent.

§ 724. **Claims Presented after, Stricken from Files.**—Claims thus presented should be stricken from the files by the court of its own motion.⁶ And where a claim has been rejected because not presented within the year, although an undisputedly just claim, it cannot be gotten in by afterwards bringing suit on it and taking judgment thereon. This is not the liquidating by litigation contemplated by § 57 (n).⁷

§ 725. **Limitation Applies Even Where Creditor Not Notified, etc.**—The limitation applies even as to claims where the creditor has not had the requisite notice, nor knowledge; and although the bankrupt is a corporation and not likely ever to have assets again.⁸

§ 726. **Applies Though Assets Not Distributed, or New Assets Discovered.**—This limitation applies, although assets still remain in the trustee's hands undistributed;⁹ and although the estate has been reopened on the discovery of new assets.¹⁰

§ 727. **Applies Though Litigation Pending.**—The limitation applies, although litigation is pending over the validity of a lien held for the claim;¹¹ thus, where pending over the validity of an attachment lien levied within the four months.¹²

§ 728. **Applies Also to Secured Claims, as to Deficit.**—The limitation applies to secured claims, as to the deficit, the same as to unsecured claims.¹³

§ 729. **Filing with Trustee Sufficient.**—Filing with the trustee will suffice, for it is to be inferred from Rule XXI (1), providing that "Proofs of debt received by any trustee shall be delivered to the referee to whom

6. In re Pettingill & Co., 14 A. B. R. 766 (Ref. Mass.).

7. In re Prindle Pump Co., 10 A. B. R. 405 (D. C. N. Y.).

8. In re Muskoka Lumber Co., 11 A. B. R. 761, 127 Fed. 886 (D. C. N. Y.). The only remedy of such a creditor is to sue the bankrupt, the debt not being discharged.

One case holds that the bankrupt may be estopped from making the objection where he intentionally and in bad faith failed to schedule property so as to induce creditors not to file claims. In re Towne, 10 A. B. R. 284, 122 Fed. 313 (D. C. Mass.). But this decision seems to overlook the fact that § 57 n, operates as an absolute termination of the court's power to act and is not dependent on objection being filed by any one; the court itself should refuse to act in such cases without waiting for any one to file objections. Moreover, was not the creditor himself guilty of neglect? This case was distinguished and explained in In re Pettingill & Co., 14 A. B. R. 775, and is rejected in In re Damon, 14 A. B. R. 809 (Ref. N. Y.).

Another case seeming to present a relaxation of the rule is In re Brinberg, 9 A. B. R. 601, criticised in In re Damon, 14 A. B. R. 809 (Ref. N. Y.).

9. In re Muskoka Lumber Co., 11 A. B. R. 761, 127 Fed. 886 (D. C. N. Y.); contra, In re Fagan, 15 A. B. R. 522, 140 Fed. 758 (D. C. S. Car.).

10. In re Shaffer, 4 A. B. R. 728, 104 Fed. 982.

11. But compare analogous propositions under subject of "Unliquidated Claims," § 716, et seq.

12. In re Baird & Co., 18 A. B. R. 228 (D. C. Pa.).

13. In re Baird & Co., 18 A. B. R. 228 (D. C. Pa.).

the cause is referred;" also from subsection "c" of § 57 providing that "claims after being proved may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending or before the referee, if the case has been referred," that the referee is not the sole officer of the court with whom a claim may be sufficiently filed to take it out of the limitations of § 57 (n).¹⁴

Orcutt v. Green, 17 A. B. R. 75, 204 U. S. 96 (reversing *In re Ingalls Bros.*, 13 A. B. R. 512, 137 Fed. 517, C. C. A. N. Y.): "We are of opinion, taking into consideration the various provisions of the fifty-seventh section of the Bankruptcy Act, in connection with No. 21 of the General Orders in Bankruptcy, adopted by this court, that the presentation and delivery of proofs of claim to the trustee in bankruptcy within the year after the adjudication is filing within the statute and the general order above mentioned.

"The General Orders of this court are provided for by § 30 of the Bankruptcy Act, which enacts that 'All necessary rules, forms, and orders as to procedure and for carrying this Act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States.' Under that section this court had the power to provide, as it has done in Order 21, that 'Proofs of debt received by any trustee shall be delivered to the referee to whom the cause is referred.' There is nothing in that provision inconsistent with, or opposed to, anything stated in the bankruptcy law upon the subject, and we must therefore take the statute and the order and read them together, the order being simply somewhat of an amplification of the law with respect to procedure, but nothing which can be construed as beyond the powers granted to the court by virtue of the law itself. The question is not whether any one but the court or referee can pass upon a claim and allow it or disallow it. That must be done by the court or referee, but it is simply whether a delivery of a claim, properly proved, to the trustee is a sufficient filing. The law provides, subsection c of § 57, that the claims, after being proved, may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending, or before the referee, if the case has been referred; but that does not prohibit their being filed somewhere else prior to their allowance, and the order in bankruptcy in substance provides that they may be filed after being proved, with the trustee. Such order is equivalent to saying that proofs of debt (or claim) may be received by the trustee. When they are so received by him they are in legal effect received by the court, whose officer the trustee is. Having been received by the trustee, under authority of law, the proofs of debt are thereby sufficiently filed so far as the creditors are concerned, and it is the duty of the trustee to deliver them to the referee. If the trustee inadvertently neglects to perform that duty it is the neglect of an officer of the court, and the creditors are in no way responsible therefor. The presentation and filing have been made within the time provided for and with one of the proper officers, and his failure to deliver to the referee can not be held to be a failure on the part of the creditor to properly file his proofs."

§ 730. Limitation Not Applicable to United States Government nor to Taxes.—The limitation of § 57 (n) does not apply to claims of

¹⁴. But a trustee may not escape the limitations of Bankr. Act, § 57 (n), by filing his own claim with himself. *Orcutt v. Green*, 17 A. B. R. 75, 204 U. S. 96

the United States government; thus, it does not apply in the bankruptcy of a contractor under contract to supply paper to the government.¹⁵

Nor does § 57 (n) apply to taxes.

In *re Cleanfast Hosiery Co.*, 4 A. B. R. 702 (Ref. N. Y.): "Assuming, however, for the purposes of the argument, that taxes are provable claims, § 64 of the act relates specifically to taxes, and provides a special method for their payment, to-wit, that the court shall order the trustee to pay them, and that the receipt of the proper officer shall entitle the trustee to a credit for the amount paid. A formal proof of claim, as in case of provable debts generally, is not specifically required; in fact, the latter provision as to a receipt by the proper officer would seem to imply that none is necessary, and no time limit is imposed. I think this section should in these respects control, rather than § 57, subdivision 'n,' above mentioned, prescribing the rule as to provable debts as a class, under the familiar rule of construction, that a statutory provision as to a general class must give way to a special provision relating to one of the class. The provisions as to the special case will be held an implied exception to the clause relating to the general class, and effect be thus given to both clauses."

§ 731. **Withholding of Dividend Until Expiration of Year Not Required.**—Section 57 (n) does not operate to enlarge a procrastinating creditor's rights so as to require the trustee to withhold until the close of the year the paying out of dividends, when ready, on proved and allowed claims; but is, on the contrary, a curtailment of the creditor's rights, so that, even if money be still in the estate after the expiration of the year, yet it can not be shared in by one who does not prove his claim until the expiration of the year.¹⁶

§ 732. **Claims Capable of Liquidation but Not Liquidated, Nevertheless Discharged.**—Claims that might have been liquidated but were not liquidated are nevertheless barred by the bankrupt's discharge.¹⁷

§ 733. **Claims Not Proved within Year, Nevertheless Available as Offsets.**—Where a claim is provable in its nature, but has not been proved within the year, it is nevertheless available as an offset in an independent suit brought by the trustee against the claimant, if otherwise a valid offset.¹⁸

§ 734. **Amendment of Claim after Expiration of Year.**—A proof of debt may be amended after the close of the year, for the amendment, like all amendments, reverts to the time of the original filing and takes effect from that time, and should in all respects be considered the same as if it had been already filed then.¹⁹

15. In *re Charles M. Stoeber*, 11 A. B. R. 345, 127 Fed. 394 (D. C. Penn.).

16. In *re Stein*, 1 A. B. R. 662, 94 Fed. 124 (D. C. Ind.); In *re Bell Piano Co.*, 18 A. B. R. 185 (D. C. N. Y.).

17. In *re Hilton*, 4 A. B. R. 774, 104 Fed. 981 (D. C. N. Y.).

18. *Norfolk & Western Ry. Co. v. Graham*, 16 A. B. R. 615 (C. C. A. W. Va.).

19. *Hutchinson v. Otis*, 10 A. B. R. 135, 190 U. S. 552, 555 (affirming 8 A. B. R. 382). In this case, the Supreme Court of the United States held, that where the proof of debt originally filed is defective, a substituted proof by consent of

§ 735. But an Original Claim Must Exist, Filed within Year.—Of course, there must have been an original proof duly filed within the year; otherwise there would be nothing by which to amend; and the power of amendment is not to be distorted to let in dilatory creditors who have filed no proof within the limited year.

In *re* *Pettingill & Co.*, 14 A. B. R. 763, 137 Fed. 143 (Ref. Mass.): "The word 'proved' in § 57n must be read to include filing the claim with the referee; consequently no claim can be allowed against a bankrupt estate unless it has not only been verified but also filed with the referee within one year after the date of the adjudication."

In *re* *McCallum & McCallum*, 11 A. B. R. 448 (D. C. Pa.): "With every disposition to be liberal in the allowance of amendments, there is, nevertheless a limit to the power of the court in this regard. If the year within which claims may be proved is unexpired, amendments are largely a matter of course, but after the expiration of the year a different situation is presented. The rights of creditors are then fixed by the act itself, and no new right can be introduced. If the proof of a right that had already been asserted in substance should thereafter be found to lack form or precision, ordinarily, I suppose such defect might still be remedied."

§ 736. And Power of Amendment Not to Be Distorted to Let in Dilatory Creditors Who Have Withdrawn Proofs.—Nor is the power of amendment to be distorted to let in dilatory creditors who have withdrawn their proofs.²⁰

§ 737. Nor to Let Dilatory Creditors Filing Claims against Firm to File Claims against Separate Partners.—Nor to enable creditors who hold firm notes with an individual partner's endorsement, and who have proved their claims solely against the partnership estate, to amend, after the expiration of the year, by adding proof against the individual partner's estate also.

In *re* *McCallum & McCallum*, 11 A. B. R. 447 (D. C. Penn.): "The contract entered into by the maker of a promissory note, and the contract entered into by the endorser, are entirely distinct and separate undertakings. It does not affect this conclusion that the contract of endorsement is made by a member of the firm that has previously made the other contract. The same man has made two contracts in different characters one as a partner and the other as an individual."

the trustee may be filed more than a year after adjudication and the clause (n) of § 57 forbidding proof of claims subsequent to one year after adjudication cannot be taken to exclude amendments. It had been held *contra*, In *re* *Moebins*, 8 A. B. R. 590, 116 Fed. 47 (D. C. Pa.). *Contra*, where, by amendment after the year a creditor from whom a preference has been recovered by litigation, seeks to add to his claim the value of the preference recovered, In *re* *Kemper*, 15 A. B. R. 677, 142 Fed. 210 (D. C. Iowa), although on the facts, this case seems to have been wrongly decided: the claim was not a new one nor a distinct one—it was the old claim with a former credit excluded.

20. In *re* *Thompson Sons*, 10 A. B. R. 581, 123 Fed. 174 (D. C. Penn.).

CHAPTER XXIII.

ASSIGNMENT OF CLAIMS.

Synopsis of Chapter.

§ 738. Assignment of Claims.

§ 739. Several Assigned to One Person—Claims Merge for Voting, etc.

§ 740. Assigned before Bankruptcy.

§ 741. Assigned after Bankruptcy, but before Filing Proof.

§ 742. Assigned after Filing.

§ 743. Ten Days Notice to Original Claimant.

§ 744. "Satisfactory Proof" of Assignment to Be Filed.

§ 738. **Assignment of Claims.**—Claims may be assigned before or after bankruptcy, and before or after the filing of the formal deposition for proof of debt.¹

§ 739. **Several Assigned to One Person—Claims Merge for Voting, etc.**—If several claims of different creditors are assigned to one person, such person becomes but a single creditor, although holding, to be sure, several claims;² even though assigned "in trust."³

§ 740. **Assigned before Bankruptcy.**—A claim assigned before the debtor's bankruptcy as already noted (ante, ch. XX, § 608, et seq.), may be proved in the name of the assignee, he being the "owner" of the claim. No special form of proof is requisite, of course. And all that is necessary to prove is such a state of facts as will estop the assignor from making the same claim.⁴

In re Miner, 9 A. B. R. 100 (D. C. Ore.): "The form of assignment of a claim is immaterial, and the proof of the claim need only be such as will estop the assignor from making the same claim."

§ 741. **Assigned after Bankruptcy, but before Filing Proof.**—Claims assigned after the bankruptcy of the debtor, but before the filing of formal proof, must be accompanied by an affidavit of the one who owned

1. Compare, general discussion, In re Finlay, 3 A. B. R. 738 (D. C. N. Y.).

Assignment of Claim Not Payment of It.—An arrangement with a corporation buying in all a bankrupt's assets and business, to pay to a claimant a quantity of goods "in liquidation" of the claimant's claim, the claim, however, to be presented against the estate, amounts to a purchase of the claim and not to a payment of it, and the claim is not extinguished although the words used were in the form of payment. Haas-Baruck Co. v. Portuondo, 15 A. B. R. 130, 138 Fed. 949 (D. C. Pa.).

2. In re Massengill, 7 A. B. R. 669, 113 Fed. 366 (D. C. N. Car.); Leighton v. Kennedy, 12 A. B. R. 229, 129 Fed. 737 (C. C. A. Mass.); In re Burlington Malt-Ing Co., 6 A. B. R. 369, 109 Fed. 777 (D. C. Wis.); (1867) In re Frank, Fed. Cases, No. 5,050.

3. In re E. T. Kenney Co., 14 A. B. R. 611, 136 Fed. 451 (D. C. Ind.).

4. In re Miner, 8 A. B. R. 248, 114 Fed. 998 (D. C. Ore.).

the claim at the time the bankruptcy petition was filed. This affidavit must state the true consideration of the debt, and that it is entirely unsecured, or, if secured, the security, as is required in proving secured claims.⁵

§ 742. **Assigned after Filing.**—Where claims are assigned after proof, ten days notice must be sent to the original claimant to give him time and opportunity to deny the assignment, at the expiration of which time, if no denial of the assignment be made, and satisfactory proof be made of the assignment, the assignee's name is formally substituted on the court's records for the original claimant's name, and thereafter the assignee stands in the place of the original claimant.⁶

§ 743. **Ten Days Notice to Original Claimant.**—Notice by mail must be immediately given the original claimant. Presumably it is a ten days notice, since such is the usual length of notice prescribed in bankruptcy and, moreover, ten days time by the General Order XXI (3) is allowed for filing objections to the claim of assignment. The notice may be given by mail. Undoubtedly, personal service of notice would be proper, and of course notice may be waived. Notice by mail can not be taken to be the exclusive manner of notice. The notice is to be given by the referee, or, at any rate, to run in his name.

§ 744. **"Satisfactory Proof" of Assignment to Be Filed.**—Satisfactory proof of the assignment is to be filed, as a prerequisite to entry of the order of substitution. Such "proof" refers here, naturally, to a sworn statement alleging the assignment. It certainly does not refer to the filing of any original papers themselves, constituting the assignment; for assignments of claims, it is conceivable, may be verbal and are not always in form for "filing," General Order XXI (5) further providing how "an assignment of claim after proof," may be "proved."

5. Gen. Ord., XXI (3). See ante, ch. XX, § 609.

6. Gen. Ord. XXI (3): "Upon the filing of satisfactory proof of the assignment of a claim proved and entered on the referee's docket, the referee shall immediately give notice by mail to the original claimant of the filing of such proof of assignment; and if no objection be entered within ten days, or within further time allowed by the referee, he shall make an order subrogating the assignee to the original claimant. If objection be made, he shall proceed to hear and determine the matter." See ante, ch. XX, § 610.

7. As to the effect of the assignment of a priority claim upon the priority, see post, § 2133, et seq., subject of "Distribution."

CHAPTER XXIV.

ALLOWABLE CLAIMS.

Synopsis of Chapter.

- § 745. Allowability Distinguished from Provability.
- § 746. Only "Provable" Claims "Allowable."
- § 747. Converse Not True—All "Provable" Claims Not Necessarily "Allowable."

DIVISION 1.

SUBDIVISION "A".

- § 748. Meaning of "Secured" Claim.
- § 749. Distinguished from "Provable" Claim.
- § 750. Distinguished from "Preferred" Claim.
- § 751. "Allowable" Only after Deduction of Securities.
- § 752. Thus Notes (Not Accommodation) of Third Parties, Endorsed by Bankrupt as Collateral, Deducted.
- § 753. No Double Proof on Original Note and on Endorsement of Collateral.
- § 754. Likewise, Orders on Third Parties by Bankrupt, Deducted.
- § 755. Securities on Exempt Property, Deducted.
- § 756. No Deduction Where Securities Not on Bankrupt's Property.
- § 757. No Deduction for Amounts Paid by Surety.
- § 758. No Deduction for Property of Principal Held as Security by Creditor Where Surety Bankrupt.
- § 759. Determination of Value of Securities.
- § 760. Creditor Entitled to Pursue Method Stipulated in Contract.
- § 761. Unless Oppressively or Unfairly Exercised.
- § 762. Which of Remaining Four Methods, Left to Court's Discretion.
- § 763. Preliminary Determination of Values for Voting Purposes.
- § 764. No Judgment in Bankruptcy Proceedings against Claimant for Excess of Security.
- § 765. Withdrawing Claims Filed as Unsecured and Refiling as Secured.
- § 766. Proof of Secured Debt as Unsecured, Waiver or Not.
- § 767. Security Surrendered, Claim Allowed without Deduction.

SUBDIVISION "B".

- § 768. Surrender of "Preferences" Prerequisite to Allowance.
- § 769. Preference Surrendered, Claim "Allowable."
- § 770. Not Voluntarily Surrendered but Only on Litigation, Yet Allowable.
- § 771. Allowable if Not Surrendered until Adverse Ruling by Referee When Presented for Allowance.
- § 772. If Disallowed in Bankruptcy Proceedings, Order to Fix Time for Surrender and Allowance.
- § 773. But Surrender Not Requisite to Validity of Different Lien on Marshaling Liens for Sale—Requisite Only When Allowance to Share in Dividends Sought.
- § 774. Surrender Where Not Void under Act but under General Equity Principles.
- § 775. Allowability of Claims of Fraudulent or Preferential Transferees after Setting Aside Transfers.

SUBDIVISION "C".

- § 776. Allowability Where Lien by Legal Proceedings within Four Months.
- § 777. Judgments, Whose Liens Null under § 67 "F", Nevertheless "Allowable."
- § 778. Judgment Remains and Is Res Judicata.
- § 779. Nevertheless, Lien to Be Surrendered before Claim Allowable.

DIVISION 2.

- § 780. Validity of Claims Determined, in General, by State Law.
- § 781. Judicial Notice of State Law.
- § 782. Trustee Entitled to All Objections Bankrupt Might Have Urged, but Not Limited to Such.
- § 783. Creditors and Trustee Bound by Bankrupt's Contracts and Acts.

SUBDIVISION "A".

- § 784. Statute of Limitations, as Defense to Allowance.
- § 785. Trustee's Duty to Interpose It.
- § 786. As to Creditor Interposing It.
- § 787. Scheduling Does Not Revive Outlawed Debts.
- § 788. What Statute of Limitations Governs.

SUBDIVISION "B".

- § 789. Res Adjudicata Binding.
- § 790. Adjudication Not Res Adjudicata as to Amount or Validity of Petitioning Creditors' Claim.
- § 791. Order of Allowance of Disallowance, Res Adjudicata.
- § 792. Trustee's Failure to Contest Allowance, Bar to Suit to Recover Preference.
- § 793. "Provisional" Allowance Improper.

SUBDIVISION "C".

- § 794. Negotiability Unimpaired by Bankruptcy.
- § 795. Nonnegotiable Paper Subject to Same Defenses as Elsewhere.
- § 796. Disregarding Note and Claiming on Original Consideration.

SUBDIVISION "D".

- § 797. Allowability of Claims of Relatives.
- § 798. Thus, Wife's Claims.
- § 799. Thus, Child's Claim and Parent's Claim.
- § 800. But Ordinary Rule of Close Scrutiny Prevails.

SUBDIVISION "E".

- § 801. In General.
- § 802. Thus, Claims Alleged to Be Ultra Vires.
- § 803. Thus, Claims Tainted with Illegality or Fraud.
- § 804. Thus, Claims by Customers against Bankrupt Stockbroker.
- § 805. Unpaid Stock Subscriptions.
- § 806. Also Claims of Public for Moneys Deposited with Bankrupt Banks.
- § 807. Claims for Commissions for Taking Orders.
- § 808. Claims by County for Hire of Convict Labor.
- § 809. Annual Subscription to Mercantile Agency Reports.
- § 810. Claims on Old Concern's Debts Where Business Taken Over.

§ 745. **"Allowability" Distinguished from "Provability."**—As we have seen, there is a difference between a claim that is allowable and one that is merely provable. Of course no claim that is not provable may be considered by the court; the court itself will cast out a claim that is not provable, for it has jurisdiction to allow or disallow only provable claims and claims that are "duly proved"—claims, that is to say, that are of correct nature and of essentially correct form. The question still remains, after it has been determined that a claim is in proper form (i. e., "duly proved") and belongs to some one of the classes of debts which in their nature are "provable," whether the particular debt is one that should be "allowed" to participate in the dividends; whether, in short, the claim is "allowable."

§ 746. **Only "Provable" Claims "Allowable."**—No claim, of course, is allowable unless it be provable.¹

§ 747. **Converse Not True—All "Provable" Claims Not Necessarily "Allowable."**—The converse of the proposition is not true, for all provable claims are not necessarily allowable claims. There may exist incorrectness, illegality, offsets, counterclaims, securities held, and a thousand and one other things that will, if brought to the Court's attention in legal way, bar the claim in whole or reduce it in part and to such extent render it incapable of sharing in dividends.

Thus we come to consider "secured" and "preferred" claims, as to their "allowability," likewise claims outlawed by the Statute of Limitations, and those subject to offset, counterclaim and the many other defences affecting the validity and amount of claims in general.

DIVISION 1.

ALLOWABILITY AS AFFECTED BY THE HOLDING OF SECURITIES, PREFERENCES AND LEGAL LIENS.

SUBDIVISION "A".

ALLOWABILITY OF SECURED CLAIMS.

§ 748. **Meaning of "Secured" Claim.**—A "secured" claim, within the meaning of bankruptcy law, is a claim against the bankrupt where the creditor owning it or a surety, indorser, or other person secondarily liable for the debt, holds security upon property of the bankrupt of a kind that would pass to the trustee in bankruptcy.²

1. As to the "allowability" of claims as affected by their "provability," see preceding chapter, and cases cited therein.

2. Definition of "secured" creditor, Bankr. Act, § 1 (23): "Secured creditor" shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this act or who owns such a debt for which some indorser, surety or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets."

§ 749. **Distinguishable from "Provable" Claim.**—A secured claim may, of course, be "provable" if the nature of the debt brings it within one of the classes of § 63; and it may be "proved." Forms Nos. 32 and 36 have been prescribed by the Supreme Court for proof of secured claims.³

§ 750. **Distinguished from "Preferred" Claim.**—A "secured" claim is to be distinguished from a "preferred" claim, in bankruptcy parlance.⁴

§ 751. **"Allowable" Only after Deduction of Securities.**—Secured claims, although valid and "provable," are not "allowable" to share in dividends, except to the extent of any deficit left after deduction of the value of the securities from the debt.⁵

Kohout v. Chaloupka, 11 A. B. R. 265 (Sup. Ct. Neb.): "But in this connection it is important to keep in mind that a secured creditor is not, under the Bankruptcy Law, forced to the alternative of either relying wholly on his security, or, abandoning that, prove his claim with other creditors. It is, we think, settled by a number of authoritative adjudications that a creditor who has security for his debt, if that security is insufficient, may prove his claim for the overplus, and does not abandon his security if he makes a full disclosure of it and the value thereof. Under such circumstances he may vote upon the choice of an assignee upon such overplus. In *re Bolton*, Fed. Cas. No. 1,614. So, where a creditor proves for the full amount of his claim, specifying the securities held by him for the debt, he may participate in the dividends to the extent that his claim is greater than the value of the security."

Indeed, a claim may be entirely "disallowed" where amply secured.⁶

§ 752. **Thus, Notes (Not Accommodation) of Third Parties, Endorsed by Bankrupt as Collateral, Deducted.**—Thus, notes of third persons payable to the bankrupt, not made for the bankrupt's accommodation, and by him endorsed as collateral to his own debt, are securities held on the property of the bankrupt and must be deducted.

3. See ante, ch. XXI, "Provable Debts," Div. 1, § 628, et seq.

4. Impliedly, In *re Busby*, 10 A. B. R. 650, 124 Fed. 469 (D. C. Pa.).

5. Bankr. Act, § 57 (e): "Claims of secured creditors and those who have priority may be allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities or priorities, but shall be allowed for such sums only as to the courts seem to be owing over and above the value of their securities or priorities."

Bankr. Act, § 57 (h): "The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance."

In *re Hines*, 16 A. B. R. 496, 144 Fed. 543 (D. C. Pa.); In *re Little*, 6 A. B. R. 681, 110 Fed. 62 (D. C. Iowa); instance, In *re Hurlbutt, Hatch & Co.*, 16 A. B. R. 198, 135 Fed. 504 (C. C. A. N. Y.).

6. In *re Kenney*, 10 A. B. R. 452 (Ref. Mass.).

§ 753. **No Double Proof on Original Note and on Indorsement of Collateral.**—There may be no double proof of the same debt, once on the original note and again on the indorsement of collateral.⁷

§ 754. **Likewise, Orders on Third Parties by Bankrupt, Deducted.**—Likewise, orders drawn by the bankrupt in favor of the creditor on third parties indebted to the bankrupt, are securities held on the bankrupt's property, and are to be deducted.⁸

§ 755. **Securities on Exempt Property, Deducted.**—Securities held on the bankrupt's exempt property are to be deducted.⁹

In *re Lantzenheimer*, 10 A. B. R. 720, 124 Fed. 716 (D. C. Iowa): "If the bankrupt proceedings had not been instituted in this case, the creditor would have had the full right to enforce her mortgage security upon the piano, without exhausting the nonexempt property of the debtor; and the exemption privileges secured to the bankrupt by the state statute are not restricted or lessened by holding that the creditor can prove up her claim, and receive a dividend only on the difference between the value of the security and the full amount of her claim.

"The rule contended for by the creditor would result, in the great majority of the cases, in giving to the creditor a greater share in the estate of the debtor, without really benefiting the bankrupt; and I can see no good reason why the court should interpolate into clause 'h' of § 57 an exception not named therein

7. *First Nat'l Bk. v. Eason*, 17 A. B. R. 593 (C. C. A. Tex.).

Also, see post, "Rights of Creditors against Third Parties Jointly or Secondly Liable;" "But Bankrupt Estate Not to Pay Two Dividends on Same Claim," § 1520.

8. In *re Hines*, 16 A. B. R. 496, 144 Fed. 142 (D. C. Pa.).

9. See *Finley v. Poor*, 10 A. B. R. 377, 121 Fed. 739 (C. C. A. Ky.).

Whether Holder of Waiver of Exemption Note a "Secured" Creditor?—It has been held, that the holder of a note containing a waiver of exemptions is a secured creditor, the value of whose security must be deducted before allowance of his claim. In *re Meredith*, 16 A. B. R. 331, 144 Fed. 230 (D. C. Ga.).

Suggestion, obiter, *Lockwood v. Exch. Bk.*, 10 A. B. R. 107, 190 U. S. 291: "As in the case at bar, the entire property which the bankrupt owned is within the exemption of the State law, it becomes unnecessary to consider what, if any, remedy might be available in the court of bankruptcy for the benefit of general creditors, in order to prevent the creditor holding the waiver as to exempt property from taking a dividend on his whole claim from the general assets, and thereafter availing himself of the right resulting from the waiver to proceed against exempt property."

Obiter, *Bell v. Dawson Grocery Co.*, 12 A. B. R. 159, 120 Ga. 130: "The waiver becomes in the nature of a security in that the debt may be made out of any property owned by the debtor, without regard to any exemption rights which the debtor would have had but for the waiver."

Obiter (1867), In *re Bass*, 3 Woods 382, Fed. Cas. 1,091: "What equities might arise if there were several creditors, and some of them had a lien or claim against the homestead property, and others not, it is not necessary to decide. Those who have no such claim might, perhaps, properly object to those having such a claim being allowed to come in for a dividend against the general assets until they had first exhausted their remedy against the exempted property, on the principle of marshaling assets. This would depend on the question whether the equity of the general creditors is superior to that of the bankrupt and his family in reference to the right of homestead and exemption. In some cases, at least, the equities might perhaps be equal, in which case the court would not require the assets to be marshaled."

to-wit, that if the security held by the creditor is upon exempt property, the creditor can prove his claim for the whole amount due. * * * The institution of the proceedings in bankruptcy did not change the rights of the mortgagor and mortgagee in this particular. The latter still retained the right to enforce the mortgage against the property, and in requiring the mortgagee to credit upon her claim the value of the mortgage security, as provided for in § 57 of the Bankrupt Act, no burden was cast upon the exempt property other or different in its results than would have been the case had the proceedings in bankruptcy not been brought. The effect upon the exemptions of the bankrupt, whatever it may be, of enforcing the mortgage lien is the result, not of any special provisions of the act, but of the act of the debtor in creating a special lien upon the exempt property; and there is nothing in the act which requires the ruling that greater protection must be extended to exempt property in the administration of estates in bankruptcy than would be afforded under the provisions of the State law in case the debtor had not been adjudged a bankrupt."

In *re Little*, 6 A. B. R. 681, 110 Fed. 621 (D. C. Iowa): "From the facts shown on the record, it appears that Coonley held security upon the horses for the unpaid portion of the purchase price, and therefore, under the provisions of clause 'h' of § 57 of the Bankrupt Act, he is only entitled to a dividend upon the amount of his claim after deducting the value of his security, to be ascertained as provided for in such clause. The fact that the bankrupt and the creditor agreed to a different disposition of the matter cannot defeat the right of other creditors to insist that the claims, being secured, can be proved only as provided for in § 57; and the fact that the property was set aside as exempt does not release it from the special lien existing against it."

§ 756. No Deduction Where Securities Not on Bankrupt's Property.—Where the property held as security is not the property of the bankrupt, the claim should be allowed without deduction for the value of the securities.

In *re Mertens*, 15 A. B. R. 362, 142 Fed. 445 (C. C. A. N. Y., reversing on other grounds, 14 A. B. R. 226, and itself affirmed sub nom. *Hiscock v. Varick*, 18 A. B. R. 9): "If the securities were not the property of the partnership when they were pledged to the bank as collateral for the payment of the indebtedness, the bank was entitled to have its claim against the partnership allowed, and allowed at its face without any reduction. If they were not part of the partnership assets, they were not part of the joint estate in bankruptcy, and as to that estate the bank was under no obligation to apply or realize their value in reduction of its claim. If they were the property of Jacob M. Mertens individually, and were pledged by him, the bank would have been at liberty upon selling them to apply the proceeds to the payment of his individual debt; and no application having been made at the time, the settled rule of equity and of the courts of bankruptcy required the application of the proceeds in exoneration of the individual estate. * * *

"Many other authorities might be cited to the same effect, but the doctrine is so well established that it would be superfluous to refer to them. The provisions of the present Bankrupt Act requiring secured creditors to surrender preferences, and when the security is not preferential to have its value determined as a condition precedent to the allowance of the claim, have no application to cases in which the security was not the property of the bankrupt."

In re Noyes Bros., 11 A. B. R. 506, 127 Fed. 286 (C. C. A. Mass.): "It is too late to go to the reason of the rule which permits a creditor whose claim is secured or partly paid by an accommodation endorser to prove his claim to its full amount and exclude from the bankrupt estate the avails of such security or part payment, because the authorities in this country and England establishing that rule are such that we feel we ought to be governed by them."

To same effect, *Swarts v. Fourth Nat. Bk. of St. Louis*, 8 A. B. R. 673, 117 Fed. 1 (C. C. A. Mo.): "A creditor who holds the obligations of a bankrupt which have been partly paid by an accommodation maker, an indorser, or a surety, may prove and have his claim allowed, against the estate of the bankrupt, for the full amount owing by the bankrupt on the obligations. If the dividends on those obligations, plus the amount previously paid by the surety, amount to more than the obligations, the creditor will hold the surplus in trust for the surety."

Thus, property of individual members of partnership held as security for a firm debt need not be deducted in the allowance of the claim against the partnership estate.¹⁰

[1867] *Ex parte Whiting*, 14 N. B. Reg. 307: "When one partner has pledged his shares for the debts of the firm, proof may be made in full against the assets of the firm, because it is only when the proof is against the same estate which furnished security, that a sale and application of the security is required by the Bankrupt Law."

In re Plummer, 1 Phillips 56: "In administration under bankruptcy, the joint estates and separate estates are considered as distinct estates, and accordingly it has been held that a joint creditor having a security upon the separate estate is entitled to prove against the joint estate without giving up his security, upon the ground that it is a different estate."

10. In re Coe, Powers & Co., 1 A. B. R. 275 (Ref. Ohio, affirmed by D. C.). In this case it was held, that the value of the individual accommodation endorsements of the members of a bankrupt partnership should not be deducted from the amount due on the partnership note, the endorsements not being the property of the firm. In re Mertens, 15 A. B. R. 364 (C. C. A. N. Y., reversing, on other grounds, 14 A. B. R. 226); *Hiscock v. Varick Bank*, 18 A. B. R. 6, 206 U. S. 28 (affirming In re Mertens, 15 A. B. R. 364, C. C. A. N. Y.).

But notes appearing on their face to be pledged by the bankrupt partnership will be assumed, until the presumption is rebutted, to belong to the bankrupt firm. Inferentially, In re Mertens, 14 A. B. R. 226 (D. C. N. Y.).

Creditor's Secret Renewal of Security in His Own Name without Bankrupt's Knowledge, Security Still "Bankrupt's Property."—But where a creditor who was holding the bankrupt's lease as security, procured secretly a renewal of it in his own name, the lease is still to be regarded as security on the bankrupt's property.

Fitch v. Richardson, 16 A. B. R. 836, 147 Fed. 196 (C. C. A. Mass.): "On fundamental principles of equity, there can be no question that the renewal by the creditor of the lease of the stall inured to the benefit of the debtor, subject to a liquidation of his debt, and that the new lease was held by the creditor merely as security for the claim offered in proof. Also according to settled rules of courts of equity, the fact that his debtor apparently acquiesced in a claim that the creditor had renewed the lease for his own sole benefit is of no effect. Especially is that true in the present case, where the creditor admits that he obtained the renewal behind the back of the debtor, and without consulting him. Even if he had consulted him, equity looks at the relative positions of creditor and debtor, and holds that, in view of the fact that the debtor is, at least theoretically, more or less under compulsion, all dealings by a creditor with securities which he has received are regarded as involuntary on the part of the debtor, and as subject to the original relation in which they stood, unless a new and adequate consideration passes between the parties."

Wilder v. Keeler, 3 Paige 167: "A creditor of a joint estate is always entitled to whatever he may obtain out of the fund in the hands of the surviving partner, without relinquishing his security against the separate estate of the deceased partner." *In re Howard Cole & Co.* (Under law of 1867), 4 N. B. Reg. 571.

§ 757. **No Deduction for Amounts Paid by Surety.**—There should be no deduction for the amounts paid in on the debt by the surety. The creditor should prove for the entire debt as if no part thereof had been paid by the surety.¹¹ And if the dividend plus the payments made by the surety exceed the total amount due, then the creditor holds the excess in trust for the surety.¹²

§ 758. **No Deduction for Property of Principal Held as Security by Creditor Where Surety Bankrupt.**—Collateral belonging to the principal debtor need not be deducted from the claim sought to be proved against the bankrupt surety or endorser; it is not security on the property of the bankrupt.¹³

Gorman v. Wright, 14 A. B. R. 135, 136 Fed. 164 (C. C. A. N. Car., reversing *In re Matthews*, 13 A. B. R. 91): "That the claim of P. H. Gorman was properly proven as an 'unsecured' claim against the estate of the bankrupt Matthews is entirely clear. The security held by said Gorman was the property of the maker of the note, in which the bankrupt had no interest, and, therefore, under subsection 23 of § 1 of the Bankruptcy Act, the claim was properly allowed against the estate of the bankrupt indorser for the full amount due, regardless of said security."

Obiter, *In re Headley*, 3 A. B. R. 272, 97 Fed. 765 (D. C. Mo.): "That the N. Y. judgment creditors also held judgments against W. W. Coover, as co-defendant, under which there had been a levy upon the stock of said Coover. * * * such fact does not make the judgment creditors secured creditors within the meaning of the Act."

§ 759. **Determination of Value of Securities.**—The value of securities for deduction may be determined; 1st, by converting them into money according to the terms of the agreement pursuant to which such securities were delivered to the creditor; or 2nd, by agreement between the creditor and the trustee; or 3rd, by arbitration; or 4th, by compromise; or 5th, by litigation.¹⁴

11. *Swarts v. Fourth Nat'l Bk. of St. Louis*, 8 A. B. R. 673, 117 Fed. 1 (C. C. A. Mo.); *In re Noyes Bros.*, 11 A. B. R. 506, 127 Fed. 286 (C. C. A. Mass.).

12. *Swarts v. Fourth Nat'l Bk. of St. Louis*, 8 A. B. R. 673, 117 Fed. 1 (C. C. A. Mo.).

13. To same effect under law of 1867, *In re Anderson*, 12 N. B. Reg. 502, Fed. Cas. 350; and *In re Dunkerson*, Fed. Cas. 4,157. Apparently contra, obiter, analogously, *In re McCoy*, 17 A. B. R. 760 (C. C. A. Ind.).

14. Bankr. Act, § 57 (h): "Value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance."

Hiscock v. Varick Bk., 18 A. B. R. 8, 206 U. S. 28 (affirming *In re Mertens*, 15 A. B. R. 362, and reversing 14 A. B. R. 226).

§ 760. Creditor Entitled to Pursue Method Stipulated in Contract.

—If the agreement under which the securities were delivered provides the method for converting them into money, the creditor holding the securities has the right to have the securities converted into money according to such method, provided he follow such method.¹⁵

Hiscock v. Varick Bk., 18 A. B. R. 9, 206 U. S. 28 (affirming *In re Mertens*, 15 A. B. R. 362): "It is only when the securities have not been disposed of by the creditor in accordance with his contract that the court may direct what shall be done in the premises."

In re Mertens, 15 A. B. R. 362, 142 Fed. 445 (C. C. A. N. Y. reversing 14 A. B. R. 226, and itself affirmed sub nom. *Hiscock v. Varick Bk.*, 18 A. B. R. 9): "The decision of the court below proceeded not only upon the ground that the sale was unwarranted by the terms of the pledge, but also upon the ground that having been after the filing of the petition in bankruptcy it was inoperative and subject to the supervision and control of the court, because the act suspends the exercise of the pledgee's remedy pending the adjudication of bankruptcy."

"By the present Act, the title of the trustee is vested in the estate of the bankrupt 'as of the date he was adjudged a bankrupt.' We are of opinion that until the date of the adjudication a lienor or pledgee is at liberty to perfect any title which the nature of the lien permits. Under the Act of 1867, no lien could be acquired after the filing of the petition in bankruptcy, because the title of the assignee vested as of the commencement of the proceeding in bankruptcy. Now the trustee takes the property of the bankrupt in the condition in which he finds it at the date of the adjudication, unless it has been encumbered fraudulently or in contravention of some of the provisions of the Act. Under the former Act there are many decisions that a lien previously acquired could not be enforced subsequent to the commencement of the proceeding, except with the permission of the bankruptcy court. The Supreme Court, however, refused to sanction these decisions, and held that the lienor was entitled to perfect his title and enforce his rights as though no proceeding had been commenced. *Eyster v. Gaff*, 91 U. S. 521; *Jerome v. McCarter*, 94 U. S. 734. The change in the present Act, by which the trustee's title is that only which exists at the date of the adjudication, removes any uncertainty which arose under the Act of 1867. It was intended, we think, to permit all legitimate business transactions between a debtor and those dealing with him to be carried out and consummated as freely until he has been adjudicated a bankrupt as though no proceeding were pending. In many cases the proceeding against an alleged bankrupt is unfounded, and for this and other reasons never culminates in an adjudication. While the filing of a petition in bankruptcy is a caveat to all the world, the notice ought not to have the effect of paralyzing all business dealings with the debtor, or to prevent lienors or pledgees from enforcing their contracts. This is its practical effect if the rights and remedies of all concerned are in suspense until it can be ascertained whether an adjudication is or is not to follow the commencement of the proceeding. That Congress did not intend that lienors or pledgees should be prejudiced in enforcing their rights by the commencement of the proceedings in bankruptcy is indicated by the change made in the present Act with respect to the proof of claims by secured creditors. By the former Act, it was provided that a secured creditor should be admitted

¹⁵. Inferentially, obiter, *In re Castle Braid Co.* 17 A. B. R. 149, 145 Fed. 224 (D. C. N. Y.).

as a creditor only for the balance of his debt after deducting the value of the pledged property ascertained by an agreement between him and the assignee in bankruptcy, or by a sale under the direction of the court. Under that provision, if a pledgee sold the pledged property prior to the appointment of the assignee, or without the permission of the court, he was precluded from proving his claim or obtaining any share of the bankrupt's estate to which he would otherwise have been entitled. The present Act provides that the value of his security may be determined, among other methods, by converting it into money, pursuant to his contract rights, and thus if he has enforced it as the contract with the debtor allowed, he is permitted to prove the unsatisfied balance of his claim. Section 57, subdivision h, prescribes several modes of valuation, and the one referred to is exclusive of the others and is superfluous and useless unless it is intended to authorize the creditor without interference by the trustee or the court to value his own security, provided he turns it into money, 'according to the terms of the agreement pursuant to which' it was delivered to him.

"We conclude that the claim against the individual estate should have been allowed for the balance claimed."

At any rate, in the absence of oppression or fraud.¹⁶

In *re Brown*, 5 A. B. R. 220 (D. C. Penn.): "I do not pass upon the question, whether the court may interfere to prevent a fraudulent or oppressive exercise of such a right. No such exercise is threatened in the present case. It is agreed that the creditors intend to deal fairly with the property pledged, and will make an honest effort to sell for the best prices that can be obtained. This being so, I am of opinion that the Bankrupt Act gives the court no authority to intervene between these creditors and their exercise of the right to sell given by the collateral notes. Each of these creditors has a lien, which I must assume, in the absence of evidence to the contrary, was given and accepted in good faith for a present consideration, and not in contemplation of, or in fraud upon, the statute; and such liens are declared by clause 'd' of § 67 to be unaffected by the act. The phrase 'unaffected by the act' may perhaps be too broad. Other sections do affect such liens in some respects not now material, but the general meaning of the phrase is clear. Such liens are left as the act finds them, and (passing the question whether the court may interfere in the case of a fraudulent or oppressive enforcement) they may be proceeded upon according to their terms.

"It was argued that clause 'h' of § 57 gives the necessary power to restrain and regulate the creditors' right to sell. * * *

"Assuming that this clause intends to do something more than provide for a method of determining the value of securities held by secured creditors, if such creditors desire to ascertain and to prove a possibly unsecured balance of their claims, I cannot avoid the conclusion that the court is only permitted to intervene when the agreement between the bankrupt and the creditor fails to provide a method by which the value of the securities may be ascertained—again reserving the question of the court's power in the case of a fraudulent or oppressive conversion. This clause seems to me to be explicit. The value of such securities is to be ascertained 'by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors.' If there be no such agreement, the clause then

16. *Hiscock v. Varick Bk.*, 18 A. B. R. 8, 206 U. S. 28 (affirming *In re Mertens*, 15 A. B. R. 362, and reversing 14 A. B. R. 226).

goes on to say that the value is to be ascertained 'by such creditors and the trustee, by agreement, arbitration, compromise or litigation, as the court may direct. The supervision of the court is thus confined to the ascertainment of value where the bankrupt and his creditor have themselves failed to deal with this subject. In such an event the court may direct how the value is to be ascertained, and may choose among the methods of 'agreement, arbitration, compromise, or litigation,' supervising and controlling either form of proceeding.

"Clause 7 of § 2, giving the court power to 'cause the assets of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided,' and clause 15 of the same section, giving power to 'make such orders, issue such process and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this act,' must, of course, be read in connection with the rest of the statute, and are necessarily qualified by such provisions as are to be found in clause 'd' § 67, concerning liens, and by clause 'h' of § 57, concerning the method of ascertaining the value of securities held by creditor."

And the court will not enjoin the exercise of the right to sell.¹⁷

§ 761. Unless Oppressively or Unfairly Exercised.—But the court will interfere with or declare void any oppressive, unfair, or fraudulent exercise of the power given by the terms of the agreement.¹⁸

Obiter, *Hiscock v. Varick Bk.*, 18 A. B. R. 9, 206 U. S. 28: "Of course where there is fraud or a proceeding contrary to the contract the interposition of the court might properly be invoked."

Obiter, *In re Mertens*, 15 A. B. R. 368 (C. C. A. N. Y., affirmed sub nom. *Hiscock v. Varick Bk.*, 18 A. B. R. 9, 206 U. S. 28): "Doubtless the pledgee cannot avail himself of his authority, however unlimited, to sacrifice the property wantonly, or to purchase it himself at a valuation so inadequate as to suggest a fraudulent purpose."

But the burden of proving the unfairness or oppression rests on the trustee.¹⁹

Impliedly, *Hiscock v. Varick Bk.*, 18 A. B. R. 9, 206 U. S. 28: "The trustee did not offer to prove that others were prepared to purchase and might have done so but for want of information, or that the policies had a greater value than was realized at the sale, or that he was prepared to redeem the pledge for the benefit of the estate, nor did he offer to do so. There was nothing in the evidence tending to show a wanton sacrifice or an intention to buy in at so inadequate a price as to justify the inference of a fraudulent purpose. * * * Clearly there is nothing on the face of the record to justify a charge of fraud on account of inadequacy."

And sales, unfairly or oppressively made thereunder, even if made before adjudication (perhaps if after the petition is filed), may be declared

17. *In re Brown*, 5 A. B. R. 220 (D. C. Pa.). But compare, contra, *In re Cobb*, 3 A. B. R. 129, 96 Fed. 281 (D. C. N. Car.).

18. *In re Mertens*, 14 A. B. R. 226 (D. C. N. Y., reversed, on the facts, in 15 A. B. R. 362); compare, *In re Jersey Island Packing Co.*, 14 A. B. R. 689, 138 Fed. 625 (C. C. A. Calif.).

19. *In re Mertens*, 15 A. B. R. 368, 142 Fed. 445 (C. C. A. N. Y., affirmed sub nom. *Hiscock v. Varick Bk.*, 18 A. B. R. 9, 206 U. S. 28).

ineffectual for determining the value of securities, when the creditor later presents his claim for allowance.²⁰

And the State law is to determine the propriety of the stipulated method.

Hiscock v. Varick Bk., 18 A. B. R. 6, 206 U. S. 28: "The questions of the extent and validity of the pledge were local questions, and the decisions of the courts of New York are to be followed by this court. * * * Here there was an absolute power of sale, coupled with an interest. The bank had had both title and possession of the policies for a period of more than two years before the filing of the petition. It had a valid debt against both the copartnership and individual estates, which is not questioned. It could, therefore, make a sale under the power granted, and transfer title in its own name. Numerous decisions of the Court of Appeals of the State of New York sustain contracts of pledge waiving the right of the pledgor to exact strict performance of the common-law duties of a pledgee. In the absence of fraud, the pledgee may buy at his own sale held without notice, or demand, or advertisement, when power so to do is expressly granted by the pledgor."

§ 762. Which of Remaining Four Methods, Left to Court's Discretion.—Which one of the four remaining methods should be adopted is left to the discretion of the court.²¹

§ 763. Preliminary Determination of Values for Voting Purposes.—For the purpose of permitting the creditor to participate in creditors' meetings held prior to the determination of the values of their securities in the above manner, the claims of secured creditors may be allowed—temporarily, so to speak—in such amounts as the court may estimate to be the deficit.²² This is an exception to the rule that any "provisional" allowance of a claim is ineffective in bankruptcy.

§ 764. No Judgment in Bankruptcy Proceedings against Claimant for Excess of Security.—Where the value of the security is determined to be greater than the amount of the debt secured, no judgment for the excess may be entered in the bankruptcy proceedings in favor of the estate against the claimant: he is an adverse claimant in possession who may be reached only by plenary action.²³

§ 765. Withdrawing Claims Filed as Unsecured and Refiling as Secured.—A creditor may withdraw the proof of his claim as unsecured and may substitute one as secured;²⁴ but leave so to do may, in proper cases, be refused.²⁵

20. *In re Mertens*, 14 A. B. R. 226 (D. C. N. Y., reversed, on the facts, in 15 A. B. R. 362).

21. Bankr. Act, § 57 (h).

22. Bankr. Act, § 57 (e).

23. *Fitch v. Richardson*, 16 A. B. R. 835 (C. C. A. Mass.); see post, "Conflict of Jurisdiction, Adverse Claimants," § 1679. Compare, post, § 1694; compare, also, §§ 1187, 1188.

24. *In re Friedman*, 1 A. B. R. 510 (Ref., since, D. C. N. Y.). See ante, ch. XX, "Proof of Claims," "Withdrawal of Claims," § 623.

25. *In re Wilder*, 3 A. B. R. 761, 101 Fed. 104 (D. C. N. Y.), in note. See ante, ch. XX, "Proof of Claims," § 621.

§ 766. Proof of Secured Debt as Unsecured, Waiver or Not.

—Proof of a secured debt as unsecured may, but does not necessarily, amount to a waiver of the security.²⁶

Kohout v. Chaloupka, 11 A. B. R. 267 (Neb. Sup. Ct.): "The rule invoked by plaintiff in error to sustain his position is, of course, well settled, namely, that a creditor of a bankrupt may either directly or indirectly waive his security, and prove his claim as unsecured; as where a creditor, by judgment execution, attachment, or creditor's suit, proves his claim without disclosing his lien, in which event he will not subsequently be permitted to enforce it, but will be deemed to have waived it."

It is a waiver of the security if made with knowledge of the facts; but even an express relinquishment of securities made in ignorance of facts may not be a waiver.²⁷ And where no one has been caused to change his position thereby the claim may be withdrawn and one proving the debt as secured be substituted.²⁸ And the creditor may be re-instated in the security so relinquished, where the estate will be left no worse off than if the security had not been originally relinquished. And a relinquishment made in ignorance or mistake of law also is not necessarily a waiver;²⁹ thus, the relinquishment of a seat on the stock exchange, where it was relinquished under misapprehension of law as to such property passing.³⁰

§ 767. Security Surrendered, Claim Allowed without Deduction.

—If the security is surrendered, the claim may be allowed without deduction.³¹

²⁶. In re Friedman, 1 A. B. R. 510 (Ref., since, D. C. N. Y.); instance, held waiver, obiter, In re Downing, 15 A. B. R. 425 (D. C. Ky.).

²⁷. *Hutchinson v. Otis*, 8 A. B. R. 382, 115 Fed. 937 (C. C. A. Mass., affirmed in 10 A. B. R. 135): Where, within four months before the filing of a bankruptcy petition, a nonresident creditor brought two garnishee suits against the bankrupt in other States; and collected his judgments; but afterwards had to return them to the trustee, the creditor meanwhile voluntarily relinquishing his garnishment security under misapprehension as to bankruptcy.

²⁸. In re Friedman, 1 A. B. R. 510 (Ref., since, D. C. N. Y.).

²⁹. In re Swift, 7 A. B. R. 117, 111 Fed. 507 (D. C. Mass.); obiter, *Hutchinson v. Otis*, 8 A. B. R. 382, 115 Fed. 937 (C. C. A. Mass., affirmed in 10 A. B. R. 135).

³⁰. In re Swift, 7 A. B. R. 117, 111 Fed. 503 (D. C. Mass.).

³¹. In re Eagles & Crisp, 3 A. B. R. 735, 99 Fed. 695 (D. C. N. Car.); In re Hurlbutt, Hatch & Co., 16 A. B. R. 198 (C. C. A. N. Y.).

Proving Debt as Secured but Allowance Made without Deduction, No Waiver of Security in Subsequent Sale and Marshaling of Liens.—Where a creditor has duly proved his claim as secured, but the order of allowance allows it at its face without deduction for the value of securities it will not effect a waiver of the security in the subsequent marshaling of the assets and their sale. It will be presumed the referee recognized the existence of the security but determined its value, for the purpose of participation in creditors' meetings, to be nothing.

Bassett v. Thackara, 16 A. B. R. 787, 72 N. J. L. 81, 60 Atl. 39. This decision should have referred to Bankr. Act, § 57 (e), rather than § 57 (h). The sale was itself a compliance with § 57 (h).

SUBDIVISION "B."

ALLOWABILITY OF CLAIMS OF CREDITORS HOLDING VOIDABLE PREFERENCES.

§ 768. **Surrender of "Preferences" Prerequisite to Allowance.**—Claims of creditors holding voidable preferences are not "allowable" unless the preferences are surrendered.³²

One of the most important features of bankruptcy law is its treatment of creditors who have received preferences. The questions relating to this subject are so complex, varied and withal so very important that their consideration will be postponed until consideration of the general subject of preferences is reached.³³

It is sufficient now to state that if a creditor or his agent has received a preference within four months preceding the bankruptcy and has received it when he has had reasonable cause for believing that the debtor intended thereby to give a preference, such creditor's claim shall not be allowed until the preference has been surrendered.

§ 769. **Preference Surrendered, Claim "Allowable."**—Such claim may be allowed if the preference is surrendered.³⁴

§ 770. **Not Voluntarily Surrendered but Only on Litigation, Yet Allowable.**—If the preference is not voluntarily surrendered but only after litigation has ended by recovery of the preference, yet it may then be "allowed."³⁵

Keppel v. Tiffin Sav. Bk., 13 A. B. R. 552, 197 U. S. 356: "On the one hand, it is insisted that a creditor who has not surrendered a preference until compelled to do so by the decree of a court cannot be allowed to prove any claim against the estate. On the other hand, it is urged that no such penalty is imposed by the Bankrupt Act, and hence the creditor, on an extinguishment of a preference, by whatever means, may prove his claims. These contentions must be determined by the text, originally considered, of § 57g of the Bankrupt Act, providing that 'the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences.' We say by the text in question, because there is nowhere any prohibition against

32. Bankr. Act, § 57 (g): "The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences."

In re *Columbia Iron Wks.*, 14 A. B. R. 527, 142 Fed. 234 (D. C. Mich.); In re *Eagles & Crisp*, 3 A. B. R. 735, 99 Fed. 605 (D. C. N. Car.); In re *Malino*, 8 A. B. R. 205, 118 Fed. 368 (D. C. N. Y.); In re *Conhaim*, 3 A. B. R. 249, 97 Fed. 924 (D. C. Wash.).

33. Post, § 1271, et seq. Such claims may be "provable" although not "allowable," ante, § 632. And demand upon the creditor to surrender the preference is not essential. *Obiter*, *Eau Claire Nat'l Bk. v. Jackman*, 17 A. B. R. 682, — U. S. —.

34. Bankr. Act, § 57 (g). In re *Chaplin*, 8 A. B. R. 121, 115 Fed. 162 (D. C. Mass.). In this case there occurs an instance of the confusion of terms "proved" and "allowed."

35. *Eau Claire Bk. v. Jackman*, 17 A. B. R. 683, 204 U. S. 522; In re *Oppenheimer*, 15 A. B. R. 267, 140 Fed. 51 (D. C. Iowa).

the proof of a claim by a creditor who has had a preference, where the preference has disappeared as the result of a decree adjudging the preferences to be void, unless that result arises from the provision in question. We say also from the text as originally considered, because, although there are some decisions, under the Act of 1898, of lower Federal Courts, which are referred to in the margin, denying the right of a creditor to prove his claim, after the surrender of a preference by the compulsion of a decree or judgment, such decisions rest not upon an analysis of the text of the Act of 1898 alone considered, but upon what were deemed to have been analogous provisions of the Act of 1867 and decisions thereunder. We omit, therefore, further reference to these decisions, as we shall hereafter come to consider the text of the present act by the light thrown upon it by the Act of 1867 and the judicial interpretation which was given to that Act. * * *

"We think it clear that the fundamental purpose of the provision in question was to secure an equality of distribution of the assets of a bankrupt estate. This must be the case, since, if a creditor having a preference retained the preference, and at the same time proved his debt and participated in the distribution of the estate, and advantage would be secured, not contemplated, by the law. Equality of distribution being the purpose intended to be affected by the provision, to interpret it as forbidding a creditor from proving his claim after a surrender of his preference, because such surrender was not voluntary, would frustrate the object of the provision, since it would give the bankrupt estate the benefit of the surrender or cancellation of the preference, and yet deprive the creditor of any right to participate, thus creating an inequality. But it is said, although this be true, as the statute is plain, its terms can not be disregarded by allowing that to be done which it expressly forbids. This rests upon the assumption that the word 'surrender' necessarily implies only voluntary action, and here excludes the right to prove where the surrender is the result of a recovery compelled by judgment or decree.

"The word 'surrender,' however, does not exclude compelled action, but, to the contrary, generally implies such action. That this is the primary and commonly accepted meaning of the word is shown by the dictionaries. Thus, the Standard dictionary defines its meaning as follows:

"1. To yield possession of to another upon compulsion or demand, or under pressure of a superior force, give up, especially to an enemy in warfare; as, to surrender an army or a fort.'

"And in Webster's International Dictionary the word is primarily defined in the same way. The word, of course, also sometimes denotes voluntary action. In the statute, however, it is unqualified, and generic, and hence embraces both meanings. The construction which would exclude the primary meaning, so as to cause the word only to embrace voluntary action, would read into the statute a qualification, and this in order to cause the provision to be in conflict with the purpose which it was intended to accomplish—equality among creditors. But the construction would do more. It would exclude the natural meaning of the word used in the statute, in order to create a penalty, although nowhere expressly or even by clear implication found in the statute. This would disregard the elementary rule that a penalty is not to be readily implied, and, on the contrary, that a person or corporation is not to be subjected to a penalty unless the words of the statute plainly impose it. Tiffany v. National Bank, 18 Wall. 409, 410, 21 L. Ed. 862, 863. If it had been contemplated that the word 'surrender' should entail upon every creditor the loss of power to prove his claims if he submitted his right to retain an asserted preference to the courts for decision, such purpose could have found ready expression by

qualifying the word 'surrender' so as to plainly convey such meaning. Indeed, the construction which would read in the qualification would not only create a penalty alone by judicial action, but would necessitate judicial legislation in order to define what character and degree of compulsion was essential to prevent the surrender in fact from being a surrender within the meaning of the section.

"It is argued, however, that courts of bankruptcy are guided by equitable considerations, and should not permit a creditor who has retained a fraudulent preference until compelled by a court to surrender it, to prove his debt, and thus suffer no other loss than the cost of litigation. The fallacy lies in assuming that courts have power to inflict penalties, although the law has not imposed them. Moreover, if the statute be interpreted as it is insisted it should be, there would be no distinction between honest and fraudulent creditors, and therefore every creditor who in good faith had acquired an advantage which the law did not permit him to retain would be subjected to the forfeiture simply because he had presumed to submit his legal rights to a court for determination. And this accentuates the error in the construction, since the elementary principle is that courts are created to pass upon the rights of parties, and that it is the privilege of the citizen to submit his claims to the judicial tribunals—especially in the absence of malice and when—acting with probable cause—without subjecting himself to penalties of an extraordinary character. The violation of this rule, which would arise from the construction, is well illustrated by this case. Here, as we have seen, it is found that the bank acted in good faith, without knowledge of the insolvency of its debtor and of wrongful intent on his part, and yet it is asserted that the right to prove its lawful claims against the bankrupt estate was forfeited simply because of the election to put the trustee to proof, in a court, of the existence of the facts made essential by the law to an invalidation of the preference.

"We are of opinion that, originally considered, the surrender clause of the statute was intended simply to prevent a creditor from creating inequality in the distribution of the assets of the estate by retaining a preference, and at the same time collecting dividends from the estate by the proof of his claim against it, and consequently that whenever the preference has been abandoned or yielded up, and thereby the danger of inequality has been prevented, such creditor is entitled to stand on an equal footing with other creditors and prove his claims."

§ 771. Allowable if Not Surrendered until Adverse Ruling by Referee When Presented for Allowance.—The rule is the same whether the compulsory surrender be accomplished by independent action outside of the bankruptcy proceedings or by orders made in the bankruptcy proceedings themselves by the referee disallowing the claim.

In re Oppenheimer, 15 A. B. R. 267, 140 Fed. 51 (D. C. Iowa): "A creditor does not lose the right to prove his claim by submitting to the judgment of the court the question of the validity of alleged preferential payments."

§ 772. If Disallowed in Bankruptcy Proceedings Order to Fix Time for Surrender and Allowance.—If the claim is disallowed in the bankruptcy proceedings themselves on the ground of a preference received, the order of disallowance should fix a time within which the creditor might

surrender his preference and have his claim allowed; and it is error to fail to give the creditor an opportunity to surrender the preference.

In *re Oppenheimer*, 15 A. B. R. 267, 140 Fed. 51 (D. C. Iowa): "The referee, on finding that the payments were in fact voidable preferences, because made within the four months immediately preceding the filing of the petition in bankruptcy, should have fixed a reasonable time within which the petitioners might surrender the preferences and have their claims allowed, and, if the preferences were not so surrendered, then reject the claims, as provided by Bankruptcy Act. It was error, therefore, to reject the claims without giving the petitioners an opportunity to surrender the preferences, if in fact the payments are such."

§ 773. But Surrender Not Requisite to Validity of Different Lien on Marshaling Liens for Sale—Requisite Only When Allowance to Share in Dividends Sought.—But the requirement of surrender of preferences as a pre-requisite applies simply when allowance to share in dividends is sought; and liens, themselves not preferences, will not be denied validity in the marshaling of assets or distribution of proceeds of sale because of the fact that the lienholder may have received, on a distinct transaction, a preference which he does not surrender.³⁶

§ 774. Surrender Where Not Void under Act but under General Equity Principles.—The rule has been announced in one case where a creditor received a secret preference in a composition agreement made with creditors before bankruptcy that, on ordinary principles of equity and not by virtue of any express provision of the Bankruptcy Act, such preference must be surrendered before allowance of the claim.³⁷

§ 775. Allowability of Claims of Fraudulent or Preferential Transferees after Setting Aside Transfers.—After a transfer has been set aside in the State court at the suit of the trustee as preferential or fraudulent, the claim of the transferee for reimbursement of consideration is allowable against the transferor's bankrupt estate, if he be not guilty of actual fraud but only of constructive fraud.³⁸

SUBDIVISION "C".

ALLOWABILITY OF CLAIMS WHERE CREDITOR HOLDS LIEN BY LEGAL PROCEEDINGS.

§ 776. Allowability Where Lien by Legal Proceedings within Four Months.—Claims of creditors for which a lien has been obtained on the bankrupt's property by legal proceedings within four months of the bank-

36. In *re Franklin*, 18 A. B. R. 218 (D. C. N. Car.).

37. In *re Chaplin*, 8 A. B. R. 121, 115 Fed. 162 (D. C. Mass.).

38. *Barber v. Coit*, 16 A. B. R. 419, 144 Fed. 381 (C. C. A. Ohio).

ruptcy and while the debtor was insolvent may be, nevertheless, allowed upon surrender of the lien.³⁹

In *re Richard*, 2 A. B. R. 512, 513, 94 Fed. 633 (D. C. N. Car.): "There is no denial of respondents' 'debt,' as defined in § 1 (11), nor allegation that there was any actual fraud in obtaining the judgments—only such fraud of the Bankrupt Law as vitiates any lien acquired. The debts are due. Respondents have received and can receive no preference, lien, or advantage by reason of or under the judgments of the magistrate's court. They are nullities in this court to this extent, but they establish the debt. * * * The respondents must pay the cost in the State court, and refund what has been collected under these proceedings. They are still creditors of the bankrupt, after a fruitless fight. They have gained no advantage and acquired no lien, but are still creditors unsecured. Should they be punished by a loss of their debts because they were vigilant? The law does not so provide. * * * They are creditors, and, on a surrender of the amount collected of the bankrupt estate, are entitled to prove their claims as other unsecured creditors."

Such claims may be "provable."⁴⁰

The subject of the rights of parties where liens have been obtained upon the property of the bankrupt, by legal proceedings within four months of the bankruptcy, and while the bankrupt was insolvent, is one of the most important subjects in bankruptcy.⁴¹ Suffice it to say here, such claims are provable, if in their nature they belong to any of the classes of debts mentioned in § 63. They are also "allowable," because it is the lien that is rendered null and void by the bankruptcy, and the claim itself is not barred from allowance.

§ 777. Judgments, Whose Liens Null under § 67 "f," Nevertheless "Allowable."—Thus, judgments, whose liens are rendered null and void under § 67 (f) as operating to create such liens, are nevertheless themselves allowable, it being the judgment lien and not the judgment itself that is affected.⁴²

§ 778. Judgment Remains and Is Res Judicata.—Indeed, the judgment remains *res judicata*, so far as it determines the validity of the claim, although its lien is dissolved by the bankruptcy adjudication.⁴³

Impliedly, *Pepperdine v. Bk. of Seymour*, 10 A. B. R. 575 (Mo. Ct. App.): "A proper construction of the Bankrupt Act makes it evident that the preferential lien of a judgment, where a lien is obtained as the effect of a judgment, was intended to be destroyed by the adjudication in bankruptcy, but the purpose of the law was not to render void the judgment itself as such."

39. In *re Scully*, 5 A. B. R. 716, 108 Fed. 372 (D. C. Pa.). In this case, surrender of the lien was not adverted to as a prerequisite.

40. See ante, ch. XXI, "Provable Claims," Div. 1, § 632. Also, ante, part II, ch. II, "Parties and Petition in Involuntary Bankruptcy," Div. 1, "Proper Parties," § 234.

41. It will be later more fully discussed, see post, "Liens by Legal Proceedings Nullified by Bankruptcy," § 1429, et seq.

42. In *re Richard*, 2 A. B. R. 512, 94 Fed. 633 (D. C. N. Car.); impliedly, *Pepperdine v. Bk. of Seymour*, 10 A. B. R. 575 (Mo. Ct. App.).

43. In *re Richard*, 2 A. B. R. 512, 94 Fed. 633 (D. C. N. Car.).

§ 779. **Nevertheless, Lien to Be Surrendered before Claim Allowable.**—It seems, furthermore, that the creditor should formally relinquish his lien obtained by the legal proceedings before his claim should be allowed.⁴⁴

DIVISION 2.

ALLOWABILITY OF CLAIMS AS AFFECTED BY THEIR VALIDITY.

§ 780. **Validity of Claims Determined, in General, by State Law.**—Unless repugnant to the peculiar provisions of the Bankrupt Act, the validity of claims is to be determined by the law of the State.⁴⁵

In re Worth, 12 A. B. R. 570, 130 Fed. 927 (D. C. Iowa): "The notes * * * being Iowa contracts, and payable in Iowa, are to be governed by the laws of that state relating to usury."

In re Talbott, 7 A. B. R. 29, 110 Fed. 924 (D. C. Mass.): "The provability of a wife's claim must depend upon its enforceability, either at law or in equity in the courts of the State."

As interpreted by its highest tribunal.⁴⁶

In re Worth, 12 A. B. R. 572 (D. C. Iowa): "The construction of a local statute by the highest court of the State is, under the familiar rule, controlling upon the federal courts in such State."

Except upon matter of general law the state decisions will be followed. But upon questions of common law and not of statute, the state decisions may not be followed.⁴⁷

§ 781. **Judicial Notice of State Law.**—And the bankruptcy court will take judicial notice of the State law.⁴⁸

§ 782. **Trustee Entitled to All Objections Bankrupt Might Have Urged, but Not Limited to Such.**—The trustee is entitled to urge all the objections the bankrupt might have urged. But the right of one creditor to object to another's claim is not limited to objections which the bankrupt might himself have raised, but includes those where the transaction contravenes the peculiar provisions of the bankruptcy act relative to preferences and void legal liens obtained within the four months of bankruptcy, and where the transaction would be void against creditors had there been

44. In re Richard, 2 A. B. R. 512, 94 Fed. 633 (D. C. N. Car.); inferentially (as to such creditors' right to maintain involuntary petition without offer to surrender), see "Parties and Petition in Involuntary Bankruptcy," § 234.

45. First Nat'l Bk. v. Altman, Miller & Co., 12 A. B. R. 12 (Ref. Ohio); In re Tucker, 12 A. B. R. 594, 131 Fed. 64 (D. C. Mass.); In re Trombly, 16 A. B. R. 599 (Ref. Vt.). But compare, contra, as to wife's claims in Massachusetts, James v. Gray, 12 A. B. R. 573, 131 Fed. 401 (C. C. A. Mass.), refusing to follow In re Talbott, 7 A. B. R. 29, 110 Fed. 924 (D. C. Mass.).

46. But compare, James v. Gray, 12 A. B. R. 573, 131 Fed. 401 (C. C. A. Mass.).

47. In re Hess, 14 A. B. R. 559, 134 Fed. 109 (Ref. Pa., affirmed by D. C.).

48. In re Trombly, 16 A. B. R. 599 (Ref. Vt.).

no bankruptcy proceedings. Otherwise, however, the creditor is restricted to objections which the bankrupt himself might have raised.⁴⁹

§ 783. Creditors and Trustee Bound by Bankrupt's Contracts and Acts.—The trustee is bound by the bankrupt's contracts and acts.⁵⁰ Except where fraud exists or special rights are given by the provisions of the Bankruptcy Act to the trustee.

SUBDIVISION "A".

ALLOWABILITY AS AFFECTED BY STATUTE OF LIMITATIONS.

§ 784. Statute of Limitations as Defense to Allowance.—The statute of limitations may be interposed against the allowance of a claim.⁵¹

§ 785. Trustee's Duty to Interpose It.—It is the trustee's duty to interpose it.⁵²

§ 786. As to Creditor Interposing It.—Any creditor, it has been held, may also plead it: it is not such a personal defense of the debtor that a creditor in bankruptcy is not also entitled to make it.⁵³ A claim barred by the statute of limitations is nevertheless "provable" in bankruptcy,⁵⁴ although such a claim when proved may be expunged or disallowed.⁵⁵

§ 787. Scheduling Does Not Revive Outlawed Debts.—The fact that the bankrupt has put in his list of claims, in Schedule A, a debt that is barred by the statute of limitations will not operate to revive the debt as against the other creditors. It is not such a written acknowledgment as will take away the bar of the statute, at least as to the trustee or the other creditors.⁵⁶

49. In re Arnold & Co., 13 A. B. R. 320, 133 Fed. 789 (D. C. Mo.), in which the rule is stated too broadly.

50. In re Edson, 9 A. B. R. 505 (D. C. Vt.). Instance, commissions of agent paid by seller as part of seller's claim where bankrupt repudiated contract of sale effected by agent, In re Saxton Furn. Co., 15 A. B. R. 445, 142 Fed. 293 (D. C. Pa.). See post, subject of "Title to Assets," § 1144, et seq.

51. In re Wooten, 9 A. B. R. 247, 118 Fed. 670 (D. C. N. Car.); In re Lipman, 2 A. B. R. 46, 94 Fed. 353 (D. C. N. Y.), and notes; In re Hargardine-McKittrick Co. v. Hudson, 10 A. B. R. 225, 122 Fed. 232 (C. C. A. Mo., affirming 6 A. B. R. 637); instance, In re Watkinson, 16 A. B. R. 245, 143 Fed. 602 (D. C. Pa.); instance, dormant judgment, In re Rebman, 17 A. B. R. 767 (C. C. A. Calif.). As to dormant judgments, see In re Rebman, 17 A. B. R. 767 (C. C. A. Calif.).

52. In re Wooten, 9 A. B. R. 247, 118 Fed. 670 (D. C. N. Car.).

53. See In re Lafferty & Bro., 10 A. B. R. 290, 122 Fed. 558 (D. C. Pa.); compare, In re Lipman, 2 A. B. R. 46, 94 Fed. 353 (D. C. N. Y.).

54. In re Hargardine-McKittrick Co. v. Hudson, 10 A. B. R. 225, 122 Fed. 232 (C. C. A. Mo.). Compare, ante, § 747.

55. In re Hargardine-McKittrick Co. v. Hudson, 10 A. B. R. 225, 122 Fed. 232 (C. C. A. Mo.); In re Lipman, 2 A. B. R. 46, 94 Fed. 353 (D. C. N. Y.).

56. In re Wooten, 9 A. B. R. 247, 118 Fed. 670 (D. C. N. Car.); In re Lipman, 2 A. B. R. 46, 94 Fed. 353 (D. C. N. Y.); In re Resler, 2 A. B. R. 166, 95 Fed. 804 (Ref. Minn., affirmed by In re Resler, 2 A. B. R. 602); [1867] In re Doty, 16

§ 788. **What Statute of Limitations Governs.**—The Statute of Limitations that governs federal courts in the particular district where the bankruptcy proceedings are pending, governs in the allowance of claims. It is the law of the forum that governs.⁵⁷ It is the statute of the State where the proceedings are pending.⁵⁸ It is the statute of the State where an action could be brought on the claim.⁵⁹

SUBDIVISION "B".

ALLOWABILITY AS AFFECTED BY RES ADJUDICATA.

§ 789. **Res Adjudicata Binding.**—Res judicata is binding in bankruptcy, as elsewhere.

Where the judgment itself is not void it is binding in bankruptcy.⁶⁰ The adjudication in bankruptcy is conclusive upon at least all parties to the bankruptcy proceedings of the facts necessarily proved.⁶¹ Thus it is conclusive as to the insolvency of the bankrupt at the date of the commission of the act of bankruptcy on which the adjudication was based, where insolvency was necessarily involved. In involuntary petitions the adjudication of bankruptcy is not at any rate conclusive of insolvency at any time prior to the adjudication.⁶²

§ 790. **Adjudication Not Res Adjudicata as to Amount or Validity of Petitioning Creditor's Claim.**—But the decree of adjudication in involuntary bankruptcy is not res adjudicata as to the amount nor validity of one of the petitioning creditors' claims, when subsequently presented for allowance to share in dividends.⁶³

§ 791. **Order of Allowance or Disallowance, Res Adjudicata.**—An order of allowance or of disallowance of a claim, not appealed from,

N. B. Reg. 202, Fed. Cases, No. 4,017. But see, *In re Gibson*, 69 South Western 974.

Each item of an account for money loaned is severable so that some may be barred by the statute and others not. *In re Wooten*, 9 A. B. R. 247, 118 Fed. 670 (D. C. N. Car.).

57. *In re Resler*, 2 A. B. R. 116, 95 Fed. 804 (Ref. Minn., affirmed by *In re Resler*, 2 A. B. R. 602).

58. *Hargardine-McKittrick Dry Goods Co. v. Hudson*, 10 A. B. R. 225, 122 Fed. 232 (C. C. A. Mo., affirming 6 A. B. R. 657); inferentially, *In re Farmer*, 9 A. B. R. 19, 116 Fed. 763 (D. C. N. Car.).

59. *In re Lipman*, 2 A. B. R. 46, 94 Fed. 353 (D. C. N. Y.). Compare, *In re Dunavant*, 3 A. B. R. 41, 96 Fed. 542 (D. C. N. Car.).

60. *In re Chase*, 13 A. B. R. 294, 133 Fed. 79 (D. C. Mass.).

61. *Ayers v. Cone*, 14 A. B. R. 739, 138 Fed. 778 (C. C. A. S. Dak.). But compare, *In re Continental Corp'n*, 14 A. B. R. 538 (Ref. Ohio). Also, compare, *Whitney v. Wenman*, 14 A. B. R. 591 (D. C. N. Y.).

62. Inferentially, *In re Linton*, 7 A. B. R. 676 (Ref. Penn.).

63. *In re Continental Corp'n*, 14 A. B. R. 538 (Ref. Ohio); compare, also, the Court's reasoning in *Whitney v. Wenman*, 14 A. B. R. 591 (D. C. N. Y.). See dissenting opinion in *Ayres v. Cone*, 14 A. B. R. 739, 138 Fed. 778 (C. C. A. S. Dak.); contra, *Ayres v. Cone*, 14 A. B. R. 739 (C. C. A. S. Dak.). See, also, "Effect of Adjudication or Rights of Parties," § 447.

nor reversed, is a bar, as *res judicata*, to a suit on the same cause of action in another jurisdiction;⁶⁴ also in subsequent proceedings in the bankruptcy proceedings themselves.⁶⁵

§ 792. **Trustee's Failure to Contest Allowance, Bar to Suit to Recover Preference.**—The trustee's failure to contest a claim, otherwise valid, because of voidable preferences received thereon, is a bar to his subsequent suit to recover the preferences.⁶⁶

§ 793. **"Provisional" Allowance Improper.**—A claim may not be allowed "provisionally" to enable a creditor to participate in creditors' meetings. The "provisional" qualification is void and the claim is *res adjudicata* in subsequent litigation.⁶⁷

SUBDIVISION "C".

ALLOWABILITY OF COMMERCIAL PAPER.

§ 794. **Negotiability Unimpaired by Bankruptcy.**—The attributes of negotiability are unimpaired by bankruptcy; and the rights and immunities of bona fide holders, granted by the law merchant, are protected in bankruptcy.⁶⁸

In *re Wyly*, 8 A. B. R. 604, 116 Fed. 38 (D. C. Tex.): "The rights of a purchaser or holder of a negotiable instrument who has taken it bona fide, for a valuable consideration, in the ordinary course of business, before due, without notice are not affected by the equities existing between the antecedent parties. This proposition is too well settled to need the citation of authorities for its support. The Bankruptcy Act does not by its term alter the rights for its indorsee of negotiable instruments, and so they exist just as before its enactment."

Thus, as to accommodation paper. Accommodation paper of a corporation, although *ultra vires*, may be proved against it in bankruptcy by an innocent holder for value who took it, before maturity, in the usual course of business.⁶⁹

64. *Hargardine-McKittrick Dry Goods Co. v. Hudson*, 10 A. B. R. 225, 123 Fed. 232 (C. C. A. Mo.); *obiter*, In *re Heinsfurter*, 3 A. B. R. 109, 97 Fed. 193 (D. C. Iowa); *Clendening v. Nat'l Bk.*, 11 A. B. R. 245 (Sup. Ct. N. Dak.).

65. Compare, In *re Drumgoole*, 15 A. B. R. 261 (D. C. Pa.).

66. *Clendening v. Nat'l Bk.*, 11 A. B. R. 245 (Sup. Ct. N. Dak.); *contra*, *Buder v. Columbia Distilling Co.*, 9 A. B. R. 331, 70 S. W. 508 (St. Louis Ct. App.).

67. *Clendening v. Nat'l Bk.*, 11 A. B. R. 245 (Sup. Ct. N. Dak.); compare, In *re Malino*, 8 A. B. R. 205, 118 Fed. 368 (D. C. N. Y.).

68. Impliedly, In *re Levi*, 9 A. B. R. 176, 121 Fed. 198 (D. C. N. Y., *rev'g* 8 A. B. R. 244); *instance*, In *re Car Wheel Wks.*, 14 A. B. R. 595, 139 Fed. 421 (D. C. N. Y.), a case wherein corporate paper was affected with bad faith but held by an innocent endorser.

The bankrupt corporation for whose benefit the *ultra vires* accommodating was done by the other corporation is estopped from urging the *ultra vires* of the accommodation and the *ultra vires* is not available defense to the trustee. *Farmers & Merchants' Bk. v. Akron Mach. Co.*, 12 A. B. R. 6 (Ref. Ohio); compare, *Wollerstein v. Ervin*, 7 A. B. R. 256 (C. C. A. Penna.).

69. In *re Akron Twine & Cordage Co.*, 11 A. B. R. 321 (Ref. Ohio).

But where the endorsee and holder had knowledge that it was accommodation paper, it is not an allowable claim if *ultra vires*.⁷⁰

Thus, as to whether an endorsement is as a guaranty for one's own benefit or is for accommodation, where one corporation owns another corporation's stock and endorses latter's notes.⁷¹ Likewise the accommodation paper of a partnership although the partner who signed the firm name was acting beyond the scope of his actual authority, will bind the firm in the hands of a *bona fide* purchaser.⁷²

Thus, as to claims of sureties for the bankrupt;⁷³ and as to stipulations for attorney's collection fees in notes;⁷⁴ and as to rights of parties where the maker endorses his own notes.⁷⁵

Thus, the ordinary rules of commercial paper apply in bankruptcy as to showing the true relation, where a surety signs first and his principal second.⁷⁶

§ 795. **Nonnegotiable Paper Subject to Same Defenses as Elsewhere.**—Likewise, nonnegotiable paper is subject to the same defenses in bankruptcy as elsewhere.⁷⁷

§ 796. **Disregarding Note and Claiming on Original Consideration.**—Claim may be made upon the original obligation and a note given therefor be disregarded under the same circumstances and with the same qualifications available had there been no bankruptcy.⁷⁸

SUBDIVISION "D".

ALLOWABILITY OF CLAIMS OF RELATIVES.

§ 797. **Allowability of Claims of Relatives.**—Claims of relatives are allowable in bankruptcy if valid by state law and not in contravention of the provisions of the bankruptcy act.

70. In re Prospect Worsted Mills, 11 A. B. R. 502 (D. C. Mass.). The syllabus of this case sets forth the propositions decided, as follows: "One manufacturing corporation cannot pledge its credit for the price of goods sold to another corporation. The guaranty of the debt of one manufacturing corporation by the unanimous consent of the stockholders of another is subject to the claims of the creditors of the latter. Consent of wife and daughter of president of corporation where president and his sons manage the whole corporation cannot be presumed to accommodation endorsement merely from fact that the president and his sons were managing the corporation."

71. In re Car Wheels Wks., 15 A. B. R. 571 (D. C. N. Y.).

72. Union Nat'l Bk. v. Neill, 17 A. B. R. 848, 149 Fed. 720 (C. C. A. Tex.).

73. See ante, ch. XXI, "Provable Claims," div. 3; "Contingent Claims," § 642, et seq. Also, see post, under the general subject of "Preferences."

74. See ante, ch. XXI, "Provable Debts," div. 5; "Claims Not Owing at Time of Bankruptcy," § 671.

75. In re Edison, 9 A. B. R. 505 (D. C. Vt.).

76. In re Carter, 15 A. B. R. 126, 138 Fed. 846 (D. C. Ark.).

77. In re Goodman Shoe Co., 3 A. B. R. 200, 96 Fed. 949 (D. C. Pa.).

78. Instance, *Du Vivier v. Gallice*, 17 A. B. R. 557, 149 Fed. 118 (C. C. A. N. Y.).

§ 798. **Thus, Wife's Claims.**—A wife's claim against her bankrupt husband's estate is allowable, if valid by state law.

In *re Novak*, 4 A. B. R. 311, 101 Fed. 800 (D. C. Iowa): "Under the provisions of the Code of Iowa, a wife may become the creditor of the husband. * * * This being the settled rule in Iowa, I can see no ground for holding that the wife, being an actual creditor in good faith, may not exercise the right conferred by the Bankrupt Act upon creditors to initiate proceedings in bankruptcy when cause therefor exists."

Thus, as to her claims for services to husband rendered outside of domestic duties, they are allowable in bankruptcy in States where she may make contracts directly with her husband;⁷⁹ but are not allowed in New York;⁸⁰ nor in Wisconsin, for her services as book-keeper;⁸¹ nor in Vermont, for clerking in her husband's restaurant and store.⁸²

And her claims may be allowable notwithstanding the state statute forbids a wife suing her husband except for divorce or recovery of her separate estate.⁸³ And she is competent to testify in support of her own claim although the statute forbids husband and wife testifying "against each other;" for her suit is not "against" him.⁸⁴

A wife's claim for an annuity against her husband, based upon an alimony judgment later converted into an annuity secured by deed of trust, is allowable, even though they subsequently re-marry.⁸⁵

So, also, obligations arising not by direct contract between husband and wife but by implication of law, as, for instance, subrogation, are allowable in Massachusetts, although in that State husband and wife may not contract with each other.⁸⁶ A wife's claim not registered as her separate property in accordance with state law has been held nevertheless allowable in Oregon.⁸⁷

A wife who has gone on her bankrupt husband's note and given a mortgage on her separate property to secure his debt has been held to be a surety and not the principal, although she signs first; and she has been held entitled to prove the claim in the creditor's name.⁸⁸ She would, on payment, be subrogated to the mortgagee's lien.⁸⁹ But a wife's claim upon a loan of corporate stock to her husband has been held not a provable [allowable] debt in Mass.⁹⁰

79. In *re Domenig*, 11 A. B. R. 552, 128 Fed. 146 (D. C. Penn.).

80. In *re Kaufman*, 5 A. B. R. 104 (D. C. N. Y.).

81. In *re Winkels*, 12 A. B. R. 696 (D. C. Wis.).

82. In *re Trombly*, 16 A. B. R. 599 (Ref. Vt.).

83. In *re Domenig*, 11 A. B. R. 552, 128 Fed. 146 (D. C. Penn.).

84. In *re Domenig*, 11 A. B. R. 552, 128 Fed. 146 (D. C. Penn.).

85. *Savage v. Savage*, 15 A. B. R. 599 (C. C. A. Va.).

86. In *re Nickerson*, 8 A. B. R. 707, 116 Fed. 1003 (D. C. Mass.).

87. In *re Miner*, 9 A. B. R. 100, 117 Fed. 953 (D. C. Ore.).

88. In *re Carter*, 15 A. B. R. 126, 138 Fed. 846 (D. C. Ark.).

89. In *re Carter*, 15 A. B. R. 126, 138 Fed. 846 (D. C. Ark.).

90. In *re Tucker*, 12 A. B. R. 594, 131 Fed. 647 (D. C. Mass.). But, compare her right to recover proceeds of sale thereof, *Tucker v. Curtin*, 17 A. B. R. 354 (C. C. A. Mass.).

Yet, on the other hand, the wife's claim for money loaned her husband out of her separate estate, although under State law not enforceable in Massachusetts, has been held nevertheless allowable in bankruptcy;⁹¹ and, in Wisconsin, to be enforceable, and her claim therefor to be a provable debt against her husband's estate;⁹² likewise in Maine.⁹³ And a wife's claim has been held invalid in Illinois, where it was based on an unconsolidated gift.⁹⁴

§ 799. **Child's Claim and Parent's Claim.**—A child's claim against a bankrupt parent's estate, as also a parent's claim against a bankrupt child's estate, is allowable where valid by State law.⁹⁵

§ 800. **But Ordinary Rule of Close Scrutiny Prevails.**—But the ordinary rule that the claims of relatives against an insolvent estate should be closely scrutinized before allowance, prevails in bankruptcy.⁹⁶

In *re Rider*, 3 A. B. R. 192 (D. C. N. Y.): "In the present instance the principal accusation against the claim is based upon the relationship of father and son existing between the bankrupt and the creditor. This fact demanded closer scrutiny than is required in the case of ordinary claims, and such an examination appears to have been given by the referee."

In *re Wooten*, 9 A. B. R. 249 (D. C. N. Car.): "Being the claim of a son against his father, aside from other circumstances, the rule governing the dealings between near relations applies. This rule is familiar learning—well settled—and need not be here discussed or any of the abundant authorities cited."

Obiter, In *re Grandy & Son*, 17 A. B. R. 214 (D. C. S. C.): "All transactions between a wife and a husband, who afterwards proves to be in failing circumstances, ought to be subject to the closest scrutiny by the courts, and no claim by her upon his estate, unless sustained by abundant testimony, ought to be allowed; but in this case there is no question of the absolute good faith of the transaction."

91. *James v. Gray*, 12 A. B. R. 573, 131 Fed. 401 (C. C. A. Mass.); *contra*, In *re Talbott*, 7 A. B. R. 29, 110 Fed. 924 (D. C. Mass.).

92. In *re Neiman*, 6 A. B. R. 329, 109 Fed. 113 (D. C. Wis.). But see, inferentially *contra*, In *re Winkels*, 12 A. B. R. 696 (D. C. Wis.), where the court refused to allow a wife's claim for services as husband's bookkeeper in his store.

93. In *re Foss*, 17 A. B. R. 439 (D. C. Me.).

94. In *re Chapman*, 5 A. B. R. 570, 105 Fed. 901 (D. C. Ills.).

95. In *re Rider*, 3 A. B. R. 192, 96 Fed. 811 (D. C. N. Y.); In *re Wooten*, 9 A. B. R. 247, 118 Fed. 670 (D. C. N. Car.); In *re Brewster*, 7 A. B. R. 486 (Ref. N. Y.). In *re Upson*, 10 A. B. R. 602, 123 Fed. 807 (D. C. N. Y.), in which case the bankrupt held money in trust for daughter, but loaned it to his own business giving to himself as guardian, a note for the amount, the court holding the note provable and allowable. In *re Miller*, 13 A. B. R. 87, 132 Fed. 414 (D. C. Vt.).

96. In *re Brewster*, 7 A. B. R. 486 (Ref. N. Y.). Compare, to same effect, analogously, *Horner-Gaylord Co. v. Miller & Bennett*, 17 A. B. R. 267 (D. C. W. Va.).

SUBDIVISION "E".

ALLOWABILITY OF MISCELLANEOUS CLAIMS—CLAIMS AFFECTED BY ULTRA VIRES—ILLEGALITY—USURY—FRAUD—CLAIMS FOR MONEY LOST IN GAMBLING—CLAIMS AGAINST BANKRUPT STOCKBROKER—CLAIMS FOR UNPAID STOCK SUBSCRIPTION—CLAIMS FOR COMMISSIONS—CLAIMS ON ANNUAL SUBSCRIPTION, ETC.

§ 801. **In General.**—In general, claims are allowable in bankruptcy if they be provable, and if they be by state law valid.⁹⁷

§ 802. **Thus, Claims Alleged to Be Ultra Vires.**—Claims upon alleged ultra vires contracts are allowable in bankruptcy if valid by State law, and are not allowable if invalid by State law. Thus, as to that of a corporation which has attempted to be partner of a firm.⁹⁸ Likewise, as to accommodation ultra vires negotiable paper.⁹⁹

Farmers & Merch. Bk. v. Akron Mach. Co., 12 A. B. R. 6 (Ref. Ohio): "Where accommodation paper is made by one corporation for the benefit of another corporation which negotiates the same and uses the proceeds thereof and the former is compelled to pay the same at maturity and the latter corpora-

97. Various Defenses to Allowance of Claims Passed on in Bankruptcy Reports.—1. **Secret partner against firm.** Rush v. Lake, 10 A. B. R. 455, 122 Fed. 561 (C. C. A.), reversing 7 A. B. R. 96.

2. **Firm note claimed to be for individual partner's debt.** Rush v. Lake, 10 A. B. R. 445, 122 Fed. 561 (C. C. A.), reversing 7 A. B. R. 96.

3. **Stipulation for Attorney's Fee in Note.**—See ante, §§ 671-794.

4. **Corporate note in the hand of the payee given for a purchase of its own stock** that rendered the company insolvent, is not an allowable claim. In re Smith Lumber Co., 13 A. B. R. 123, 132 Fed. 618 (D. C. Tex.).

5. **Original debts revived on failure to pay composition notes.** In re Carton, 17 A. B. R. 343, 148 Fed. 63 (D. C. N. Y.).

6. **Claims of president of bankrupt corporation** who, shortly before bankruptcy, overstated assets, to the loss of a creditor relying thereon, should not be allowed until he has satisfactorily accounted for the discrepancy: he should be held to the truth of his statement. In re Royce Dry Goods Co., 13 A. B. R. 257, 133 Fed. 100 (D. C. Mo.).

7. **Notes given to officer of corporation by corporation.** In re Castle Braid Co., 17 A. B. R. 143, 145 Fed. 224 (D. C. N. Y.).

8. **Compensation of officer of corporation** is not allowable unless prior to the services the compensation was fixed by by-law or by formal resolution of the board of directors duly entered on the minutes, so as to contain the elements of a contract. In re Grubbs-Wiley Grocery Co., 2 A. B. R. 442 (D. C. Mo.). But unquestionably such services may be ratified and compensation allowed therefor after rendition, by formal resolution.

9. **Salary of Business Manager.** Mason v. St. Arbans Furniture Co., 17 A. B. R. 868, 149 Fed. 898 (D. C. Vt.).

10. **Release of Debt.** In re Howard, 4 A. B. R. 69, 100 Fed. 630 (D. C. Calif.).

11. **Statute of Frauds.** In re Pettingill & Co., 14 A. B. R. 728, 135 Fed. 213 (D. C. Mass.).

12. **Rebate upon Creditor's Claim.** In re Douglass & Sons Co., 8 A. B. R. 113, 114 Fed. 772 (D. C. Conn.).

13. **Proof of claim not filed until after bankrupt's death** although claimant present at bankruptcy proceeding before, no evidence of the debt appearing on the bankrupt's books; claim rejected. In re Shaw, 7 A. B. R. 458 (D. C. Penn.).

98. Wallerstein v. Ervin, 7 A. B. R. 256, 112 Fed. 124 (C. C. A. Penn.).

99. In re Akron Twine & Cordage Co., 11 A. B. R. 321 (Ref. Ohio).

tion becomes bankrupt, the corporation which has so accommodated the bankrupt company may prove its claim against the bankrupt and participate in dividends."

And as to the claim where a corporation has bought in its own stock to settle dissensions among stockholders.¹⁰⁰

And bonds of a corporation issued not for money, labor or property actually received for lawful use as required by New York statute, are not allowable;¹⁰¹ although such corporate bonds issued as security for credit are valid.¹⁰²

The endorsement by one corporation of the notes of another corporation whose stock is largely owned by the first corporation has been held to create a guaranty and not an accommodation and to be not *ultra vires*.¹⁰³

§ 803. Claims Tainted with Illegality or Fraud.—Claims are not allowable in bankruptcy that are invalid under State law because of illegality or fraud. Thus, as to claims tainted with usury.¹⁰⁴

In *re Worth*, 12 A. B. R. 566, 130 Fed. 927 (D. C. Iowa): "Under the Iowa statute, however, the usurious contract is not void, but voidable only to the extent of the interest in excess of the legal rate, and as construed by the Supreme Court of that State, the right to interpose such a defense is the privilege of the borrower only, and if he does not avail himself of the privilege so granted the statute is no longer applicable. *Carmichael v. Bodfish*, 32 Iowa, 418. The construction of the local statute by the highest court of the State is, under the familiar rule, controlling upon the federal courts in such State. The objecting creditors in the present case are in no manner parties or privies to the alleged usurious contract of the Sheldon State Bank, in no manner connected therewith, and cannot therefore be heard to interpose the objection of usury thereto."

Thus, as to claims where a secret advantage has been given to the claimant in a former composition arrangement made before bankruptcy.¹⁰⁵

100. In *re Castle Braid Co.*, 17 A. B. R. 143, 145 Fed. 224 (D. C. N. Y.).

101. In *re Waterloo Organ Co.*, 13 A. B. R. 466, 134 Fed. 341 (C. C. A. N. Y.).

102. In *re Waterloo Organ Co.*, 13 A. B. R. 477, 134 Fed. 345 (C. C. A. N. Y., distinguishing 13 A. B. R. 466).

103. In *re Car Wheel Wks.*, 15 A. B. R. 571, 141 Fed. 430 (D. C. N. Y.).

104. Instance, In *re Robinson*, 14 A. B. R. 626, 136 Fed. 430 (D. C. Mass.): In this case amendment was allowed to avoid the illegality. The reasoning of the court, however, seems somewhat sophistical. The court says as long as the claim is based upon implied contract the express contract will prevail over any implied contract and so the charge of usury will remain: so the court suggests that the claim be changed to one for obtaining money by fraud and then that the tort be waived and claim be made again upon the implied contract for money had and received. This seems like juggling with names. If the claim can be proved at all it can only be proved in the form of a contract, express or implied, for tort claims, as such, are not provable in bankruptcy, of course: then if proved as a contract the express and usurious contract will prevail over any implied contract.

105. Instance, *Batchelder & Lincoln Co. v. Whitmore*, 10 A. B. R. 641, 122 Fed. 355 (C. C. A. Mass.): instance, In *re Chaplin*, 8 A. B. R. 121, 115 Fed. 162 (D. C. Mass.).

Thus, as to the claim of a customer where there has been gambling on margins.¹⁰⁶ Likewise, as to a fraudulent claim where money was paid to the bankrupt on a pretended sale.¹⁰⁷ Claims against the bankrupt for money lost in a gambling scheme are allowable although the money is knowingly used for gambling purposes, if fraudulent misrepresentations exist, making the parties not in *pari delicto*.¹⁰⁸

§ 804. Claims by Customers against Bankrupt Stockbroker.—Claims by customers against a bankrupt stockbroker buying and selling stock on margins, are provable and the relation is not fiduciary but is held in some cases to be that of debtor and creditor, and to be on implied contract;¹⁰⁹ and in other cases to be that of pledgor and pledgee.¹¹⁰

§ 805. Unpaid Stock Subscriptions.—Claims against a bankrupt stockholder for unpaid stock subscription are valid in bankruptcy.¹¹¹

§ 806. Also Claims for Money Deposited with Bankrupt Banks.—Also claims of the public for moneys deposited with the bankrupt.¹¹²

§ 807. Claims for Commissions for Taking Orders.—The claims of agents for commissions for taking orders, are allowable in bankruptcy, if valid by the State law.¹¹³

106. *Cleage v. Laidley*, 17 A. B. R. 598, 149 Fed. 346 (C. C. A. Mo.).

107. *In re Lanshaw*, 9 A. B. R. 167, 118 Fed. 365 (D. C. Mo.).

108. *In re Arnold & Co.*, 13 A. B. R. 320, 133 Fed. 789 (D. C. Mo.).

109. *In re Gaylord*, 7 A. B. R. 577, 113 Fed. 131 (D. C. Mo.).

And preferences must be surrendered, as in case of other creditors. *In re Gaylord*, 7 A. B. R. 577, 113 Fed. 131 (D. C. Mo.); impliedly, but obiter, *In re Topliff*, 8 A. B. R. 141, 114 Fed. 323 (D. C. Mass.); contra, *Richardson v. Shaw*, 16 A. B. R. 842, 147 Fed. 659 (C. C. A. N. Y.).

And the right of set-off also exists. *In re Topliff*, 8 A. B. R. 141, 114 Fed. 323 (D. C. Mass.).

And the contract may be broken by the bankruptcy of the broker. *In re Pettingill & Co.*, 14 A. B. R. 729, 137 Fed. 143 (D. C. Mass.); *In re Swift*, 7 A. B. R. 374, 112 Fed. 315 (C. C. A. Mass., affirming 5 A. B. R. 335), the court saying "where a man has disabled himself from performing his contract, it is unnecessary to make any request or demand for performance."

And the date of the filing of the bankruptcy petition fixes the amount of damages. *In re Pettingill & Co.*, 14 A. B. R. 729, 131 Fed. 143 (D. C. Mass.); *In re Swift*, 7 A. B. R. 374, 112 Fed. 315 (C. C. A. Mass., affirming 5 A. B. R. 335); *In re Graff*, 8 A. B. R. 745, 117 Fed. 343 (D. C. N. Y.).

110. *In re Bolling*, 17 A. B. R. 399 (D. C. Va.); *Richardson v. Shaw*, 16 A. B. R. 842, 147 Fed. 659 (C. C. A. N. Y.); *In re Berry & Co.*, 17 A. B. R. 467, 143 Fed. 176 (C. C. A. N. Y.).

Conversion of Shares of Stock by Broker.—*In re Graff*, 8 A. B. R. 744, 117 Fed. 343 (D. C. N. Y.); *In re Floyd, Crawford & Co.*, 15 A. B. R. 277 (Ref. N. Y.); *In re Swift*, 9 A. B. R. 385, 118 Fed. 348 (D. C. Mass.); *In re Bolling*, 17 A. B. R. 399 (D. C. Va.); *In re Berry & Co.*, 17 A. B. R. 467, 149 Fed. 176 (C. C. A. N. Y.).

111. *Hays v. Wagner*, 18 A. B. R. 163 (C. C. A. Ohio).

112. *In re Salmon & Salmon*, 16 A. B. R. 626 (D. C. Mo.); *In re Smart*, 14 A. B. R. 672, 136 Fed. 974 (D. C. Ohio).

113. *In re Ladue Tate Mfg. Co.*, 14 A. B. R. 235, 135 Fed. 910 (D. C. N. Y.).

§ 808. **Claims by County for Hire of Convict Labor.**—Claims by the county for the hire of convict labor are allowable against the estate of a bankrupt contractor.¹¹⁴

§ 809. **Annual Subscription to Mercantile Agency Reports.**—Annual subscriptions to mercantile agencies' reports are allowable claims even though a large portion of the unexpired year still remains.¹¹⁵

§ 810. **Claims on Old Concern's Debts Where Business Taken Over.**—A corporation organized for the purpose of taking over the assets of a partnership, and carrying on its business at the same place and composed of the same persons, to whom all its stock is issued, is liable for the debts of the partnership, even though they were not expressly assumed by the writings transferring the assets to it.¹¹⁶

114. In re Wright, 2 A. B. R. 592, 95 Fed. 807 (D. C. Mass., affirmed in 4 A. B. R. 496).

115. In re Buffalo Mirror & Beveling Co., 15 A. B. R. 122 (Ref. N. Y.).

116. Du Vivier v. Gallice, 17 A. B. R. 557, 149 Fed. 118 (C. C. A. N. Y.).

CHAPTER XXV.

ALLOWANCE, DISALLOWANCE AND RE-EXAMINATION OF CLAIMS.

Synopsis of Chapter.

DIVISION 1.

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- § 812. No "Provisional" Allowance, for Voting, etc.
- § 813. Procedure Where Claim "Duly Proved" and Not Objected to.
- § 814. Where Claim Not "Duly Proved."
- § 815. To Be "Allowed" on Presentation or Receipt—No Motion nor Pleading Requisite.
- § 816. Court on Own Motion, Postponing Allowance.
- § 817. Reconsideration of Claims.
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- § 819. Before Election of Trustee, Either Bankrupt or Creditor Proper Party.
- § 820. Others May Not Object.
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- § 822. Creditors' Motive in Objecting Immaterial.
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- § 846. Claimant Must Present Himself for Examination.
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- § 851. Trustee's Attorney Not to Act as Claimant's Attorney.
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- § 854. Dealings between Near Relatives to Be Closely Scrutinized.
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- § 856. Schemes to Charge Partnership Assets with Individual Liabilities.
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- § 858. Vacating of Allowance after Expiration of Current Term.
- § 859. Rehearing Where Mere Pretence to Revive Right of Appeal.
- § 860. Review of Referee's Order Refusing to Reopen Hearing.
- § 861. Claims Not Re-Examined after Closing of Estate.

DIVISION 1.

JURISDICTION AND PARTIES.

§ 811. **Allowance, Disallowance and Reconsideration of Claims.**—Claims may be allowed, disallowed and reconsidered.¹

§ 812. **No "Provisional" Allowance, for Voting, etc.**—Claims may not be allowed "provisionally" to permit creditors to vote. They must either be allowed or disallowed absolutely. The annexing of the term "provisionally" is without legal effect.

Clendenen v. Nat'l Bk., 11 A. B. R. 245 (Sup. Ct. N. Dak.): "The contention that the allowance was temporary, and merely to enable the defendant to vote at the creditors' meetings, likewise contradicts the legal effect of the order of allowance."

To same effect, *In re Malino*, 8 A. B. R. 205, 118 Fed. 368 (D. C. N. Y.): "The referee overruled the objections, offering to consider them later, and accepted the proofs of claims objected to as presented and a trustee was elected thereupon. I think the proceedings were erroneous. The right of creditors to select a trustee is a substantial one, and it does not rest in the discretion of the referee to allow claims as voting bases when objections are made, which are apparently genuine. While the selection of a trustee can not be tied up indefinitely by obstructive tactics, which are obviously for the purpose of delay, and in proper cases provisional allowances or disallowances may be made in order that a trustee may be expeditiously selected; nevertheless, the proceeding should not be so summary as to exclude the consideration of all objections. Objecting creditors, and the bankrupt are entitled to a hearing upon the objections for

1. Bankr. Act, § 2 (2): "That the courts of bankruptcy * * * are hereby invested * * * with such jurisdiction * * * to * * * (2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt-estate."

the purpose of determining, at least, whether they are honestly made and there is reasonable ground for their consideration. These facts being established, the claims should not be allowed for the purpose of voting."

§ 813. Procedure Where Claim "Duly Proved" and Not Objected to.—If the claim is "provable," that is, belongs to one of the classes mentioned in § 63, of the Act, as being "provable" claims, and is also "duly proved," that is, correct in form, the court (in practice, the referee) must, upon its presentation or receipt, "allow" the claim, that is, enter an order, permitting it to share in dividends, unless it is objected to by proper parties or unless, for good cause, the referee of his own motion postpones the allowance.²

§ 814. Where Claim Not "Duly Proved."—If the claim is not "duly proved," that is to say, if the affidavit for proof of debt be not correct in form, or if the claim on its face is not a provable claim, that is to say, if it be not one of those mentioned in § 63, the referee should not "allow" the claim, even though no party in interest objects. On the contrary the court should disallow the claim, without prejudice to a refileing when "duly proved," or the proof may be withdrawn by the claimant.

In re Sumner, 4 A. B. R. 124, 101 Fed. 224 (D. C. N. Y.): "The meaning of this subdivision is that, if objection be interposed, or the court be not satisfied with the prima facie case thus made, the claim shall not be accepted as proven, until disposition shall have been made of such objection, or, if the court continue the consideration, until the court shall be convinced of its validity."

§ 815. To Be "Allowed" on Presentation or Receipt—No Motion nor Pleading Requisite.—The claim, if on its face provable and duly proved, and if it be not objected to by parties nor be postponed by the court, must be "allowed" upon "presentation" or "receipt," and no further motion nor pleading is requisite than the mere presentation or receipt of the deposition for proof of debt, the deposition being itself both the pleading and the evidence, and other pleading being unauthorized.³

In re Sumner, 4 A. B. R. 124, 101 Fed. 224 (D. C. N. Y.): "This section provides both the method of presenting the claim and the evidence necessary, in the first instance, to sustain it. The 'statement under oath,' if it contain the matter pointed out, is at once the claimant's pleading and his evidence, and makes for him a prima facie case."

2. Bankr. Act, § 57 (d): "Claims which are duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion."

Cf course, in cases of secured claims the court will first determine the value of the securities held, see ante, § 759, et seq.

3. In re Carter, 15 A. B. R. 126, 138 Fed. 846 (D. C. Ark.); In re Shaw, 6 A. B. R. 499, 109 Fed. 780 (D. C. Pa.).

§ 816. **Court on Own Motion, Postponing Allowance.**—The court (referee) may, however, even though no party objects and the claim be “duly proved,” postpone the allowance, “for cause.”⁴ What will constitute “cause” under this section is not defined.

§ 817. **Reconsideration of Claims.**—Claims which have been allowed may be reconsidered, for cause, and reallowed or rejected, in whole or in part.⁵

§ 818. **Objection and Disallowance.**—Claims may be objected to by parties in interest and be disallowed.⁶

In *re Sully & Co.*, 18 A. B. R. 124 (C. C. A. N. Y.): “It is true that the trustee in bankruptcy was about to bring an action against them to recover a considerable sum of money, and it is argued that their defense will be seriously prejudiced by the adjudication in the bankruptcy proceeding, fixing the amount of the claims of the Cotton Exchange creditors. However this may be, they are not parties in interest in the proceeding itself in any legal sense, or within the meaning of the Bankruptcy Act. It is not enough that their rights may be incidentally affected by the proceeding. The term ‘parties in interest’ applies to those who have an interest in the res which is to be administered and distributed in the proceeding and does not include those who are merely debtors or alleged debtors of the bankrupt.”

§ 819. **Before Election of Trustee, Either Bankrupt or Creditor Proper Party.**—Before the election of a trustee, either the bankrupt or any creditor may object to a claim, or petition for its re-examination.⁷

Thus, any creditor may object;⁸ or the bankrupt may object.

In *re Ankeny*, 4 A. B. R. 72, 100 Fed. 614 (D. C. Iowa): “I concur in the ruling of the referee that the bankrupt may move to set aside and expunge the allowance of an alleged claim. In the absence of any enactment in the statute, it might well be held that it was the duty of the bankrupt to object to the allowance of unjust or fictitious claims against his estate, which, if allowed, would decrease the dividend coming to the creditors. The theory of the act is that the bankrupt entitled himself to a discharge by yielding up his non-exempt property to be divided among his creditors, but a bankrupt would not be acting in good faith, nor would he be carrying out the true spirit of the act, if he knowingly permitted false or unjust claims to be allowed, to the injury of

4. Bankr. Act, § 57 (d).

5. Bankr. Act, § 57 (k): “Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed.”

Bankr. Act, § 57 (k) and Gen. Order No. XXI (6) have reference to claims against the bankrupt that were in existence when the petition was filed and not to claims against the estate for expenses of administration, such as a receiver’s account. Such expenses, if objectionable, should be promptly objected to and exception filed when the question is raised before the referee. In *re Reliance Storage & Warehouse Co.*, 4 A. B. R. 49, 100 Fed. 619 (D. C. Penna.).

6. Bankr. Act, § 57 (d).

7. Bankr. Act, § 57 (d) and (k).

8. Impliedly, In *re Lafferty*, 10 A. B. R. 290, 122 Fed. 558 (D. C. Pa.).

his actual creditors. By clause 7 of § 7 of the act, it is declared to be the duty of the bankrupt, in case any person proves a false claim against his estate, to disclose the fact immediately to his trustee. In the present case no trustee has been appointed. This fact precludes giving notice to the trustee, but it does not justify the allowance of the false claim, nor prevent the bankrupt from objecting to the proof thereof."

§ 820. Others May Not Object.—Parties who are not creditors may not be heard on the hearing of contested claims against the estate;⁹ and, in general, a creditor, before his standing as such has been established by the allowance of his own claim, may not object to the allowance of others.¹⁰ This rule does not exclude the bankrupt, for it is one of the bankrupt's duties to object to erroneous claims.¹¹

§ 821. Thus, Neither Receiver nor Debtor of Bankrupt.—The rule enunciated in the preceding paragraph would exclude the receiver. And would also exclude debtors of the bankrupt.¹²

§ 822. Creditors' Motive in Objecting Immaterial.—But simply that a creditor is making the objection in reality for the benefit of a debtor, or other person, not himself entitled to make the objection, is immaterial. The creditor has a clear legal right and his motive is of no consequence.¹³

In *re Sully & Co.*, 18 A. B. R. 125 (C. C. A. N. Y.): "The petitioners are creditors to the amount of over \$3,700, and their interest in the result of a re-examination is clear. It is doubtless true that they would not have intervened merely in order to protect themselves, and that they were mainly, and perhaps solely, influenced by a desire to assist Hawley and Ray. But if they had reasonable grounds for asserting the right secured to them by the Bankrupt Act, whether they chose to do so for their own advantage or for that of third persons is quite immaterial. The element of motive cannot prejudice the assertion of a clear legal right or statutory privilege. They have been deprived of the right reserved to them by § 57, merely because they would have been willing to forego it, or would not have asserted it, if they had not been moved by friendly consideration for Hawley and Ray. This was a matter which concerned only themselves. There was nothing censurable in the motive which induced them to proceed. Indeed, if they believed that unfounded or exagger-

9. *Dressel v. North State Lumber Co.*, 9 A. B. R. 541, 119 Fed. 531 (D. C. N. Car.).

10. *Dressel v. North State Lumber Co.*, 9 A. B. R. 541, 119 Fed. 531 (D. C. N. Car.).

11. In *re Ankeny*, 4 A. B. R. 72, 100 Fed. 614 (D. C. Iowa); compare, analogously, *Griffin v. Mutual Life Ins. Co.*, 11 A. B. R. 622, 119 Ga. 664 (Sup. Ct. Ga.); contra, in *re Levy*, 7 A. B. R. 56 (Ref. N. Y.).

12. In *re Sully*, 15 A. B. R. 304, 142 Fed. 895 (D. C. N. Y., reversed on the facts in 18 A. B. R. 123).

13. Before the election of a trustee it has been held creditors may not raise the defense of usury, for such defense is purely personal to the bankrupt: the trustee, however, may make the defense, for he succeeds to all the bankrupt's rights. In *re Worth*, 12 A. B. R. 566, 130 Fed. 927 (D. C. Iowa). But this is doubtful law, for the trustee's title reverts to the adjudication.

ated claims of certain other creditors were to be used by the trustee and those creditors to the harm of Hawley and Ray, they were commendable in lending the latter their assistance. As their application was a legitimate one, we see no reason why it should be denied upon a consideration of motive."

§ 823. **Expense of Contesting Claims to Control Election of Trustee, Not Chargeable against Estate.**—The costs of the contest of a claim made in the effort to control the election of a trustee are not chargeable against the estate.¹⁴

§ 824. **After Trustee Elected, All Objections, etc., to Be by Him or in His Name.**—After the election and qualification of the trustee, all objections and applications for re-examination of claims should be taken by the trustee or in the trustee's name.¹⁵

In *re Lewensohn*, 9 A. B. R. 368, 121 Fed. 538 (C. C. A.): " * * * The act is silent as to the party by whom a re-examination may be moved.

"The trustee represents every creditor. The orderly conduct of the administration requires that a proceeding for the re-examination of the claim should be taken in the interests of all the creditors, and not be permitted at the instance of any one creditor unless demanded by the interests of all. If the trustee should without sufficient reason refuse to proceed, the court by its order could compel him to do so, or remove him for disobedience. It has been held under the present act that a creditor cannot prosecute an appeal from the judgment of a court of bankruptcy allowing the claim of another creditor, and that the trustee is the only party who can do so. *Chatfield v. O'Dwyer*, 4 Am. B. R. 313, 101 Fed. 797; *Foreman v. Burleigh*, 6 Am. B. R. 230, 109 Fed. 313. The provision allowing such appeals does not designate the party by whom they may be prosecuted, and these decisions proceeded upon the ground that the trustee is the proper party and the only proper party, because he represents the interests of all creditors in the estate. There is such a close analogy between the two proceedings of a re-examination and a review that these decisions are apposite.

"The court below was of the opinion that the proceeding was authorized by

14. In *re Worth*, 12 A. B. R. 566, 130 Fed. 927 (D. C. Ia.); compare, to same effect, In *re Fletcher*, 10 A. B. R. 398 (D. C. N. Y.); inferentially, In *re Mercantile Co.*, 2 A. B. R. 419, 95 Fed. 123 (D. C. Mo.).

15. See dissenting opinion in *Ayres v. Cone*, 14 A. B. R. 739, 138 Fed. 783 (C. C. A. S. Dak.), the dissenting opinion undoubtedly stating the correct rule. See analogously, as to summary order on bankrupt, In *re Rothschild*, 5 A. B. R. 587 (Ref. Ga.); apparently contra, obiter, In *re Carter*, 15 A. B. R. 126, 138 Fed. 846 (D. C. Ark.); impliedly, In *re Sully & Co.*, 18 A. B. R. 123 (C. C. A. N. Y.); In *re Koenig & Van Hoogenhuyze*, 11 A. B. R. 619, 127 Fed. 891 (D. C. Tex.); obiter, In *re Carton & Co.*, 17 A. B. R. 349 (D. C. N. Y.); analogously (plenary suit to recover property), In *re Bailey*, 18 A. B. R. 226 (D. C. Pa.); inferentially, *Chatfield v. O'Dwyer*, 4 A. B. R. 313, 101 Fed. 797 (C. C. A. Ark.); compare, In *re Little River Lumber Co.*, 3 A. B. R. 682, 101 Fed. 558 (D. C. Ark.); compare, In *re McCallum & McCallum*, 11 A. B. R. 447, 127 Fed. 768 (D. C. Pa.); compare facts in In *re Stover*, 5 A. B. R. 250, 105 Fed. 355 (D. C. Pa.), and in In *re Linton*, 7 A. B. R. 676 (Ref. Penn.). Here, however, it does not appear whether a trustee had been elected or not nor (in the case, In *re Linton*, at any rate) whether the applications were for re-examination of claims already allowed or objections thereto before allowance. Contra, inferentially, *McDaniel v. Stroud*, 5 A. B. R. 689, 106 Fed. 486 (C. C. A. S. Car.).

General Order 21, clause 6. That part of Order 21, which is pertinent, reads as follows:

"When the trustee or any other creditor shall desire the re-examination of any claim filed against the bankrupt's estate, he may apply by petition to the referee to whom the case is referred for an order for the re-examination, and thereupon the referee shall make an order fixing a time for hearing the petition, of which due notice shall be given by mail addressed to the creditor."

"This regulates the procedure for re-examination without regard to the party by whom or the time when it may be pursued, and does not purport to confer any right or privilege beyond these expressly or impliedly given by the act. The court below seems to have construed the language as though it were intended to permit the trustee or any creditor to apply by petition 'whenever he may desire to do so.' Thus read it would permit a re-examination after the estate had been closed, and this clearly could not have been intended because it is forbidden by clause k of § 8. It may be given due effect by reading it as authorizing a petition by a creditor at the appropriate stage of the proceeding when it may be desirable for the creditor to intervene. The word 'desire' is used in the sense of 'intend.' It may become desirable and necessary to re-examine a proved claim prior to the qualification of the trustee, as delays frequently ensue in the election and qualification of this officer, and it might be that evidence would be lost in the meantime. This probably was within the contemplation of the General Order, but we cannot believe it was within its intention to permit the trustee and creditors concurrently to pursue a re-examination of a claim, or to permit a creditor to do so when the trustee for sufficient reasons does not approve, or when in the interests of all it is desirable that the trustee should conduct the proceeding."

In *re Sully & Co.*, 15 A. B. R. 321, 142 Fed. 895 (D. C. N. Y.): "The trustee alone is authorized to institute proceedings for the re-examination and expunging of claims."

Contra, inferentially, In *re Roche*, 4 A. B. R. 369, 101 Fed. 956 (C. C. A. Tex.): "Under this statute (1867) there was strong reason for contending that an appeal from a judgment allowing a claim could only be made by an assignee dissatisfied therewith. The Act of 1898 is silent as to the party who may take an appeal on the allowance or disallowance of the claim. The omission of the provision above quoted from the act of 1867 is significant, and we are of opinion that the intention of the lawmakers was, not to restrict the right of appeal, but to leave in force the general rule that, where an appeal lies from any judgment or decree, the same may be taken by any party or person injured or affected by the decree or judgment. The record in this case shows that the appellant, as a creditor of the bankrupt, is directly interested in the judgment complained of, not only as a general creditor of the bankrupt, but as having a special lien on the sum in the hands of the trustee."

§ 825. Creditor May Not Have Re-Examination of His Own Claim on Disallowance, Though Rehearing Not Forbidden.—And a creditor probably is not permitted to apply for a re-examination of his own claim upon disallowance; his proper practice is to petition for review of the order of disallowance.¹⁶ But of course the court has the discretion to grant him a rehearing, under the usual rules.

16. Obiter, In *re Chambers*, *Calder & Co.*, 6 A. B. R. 707 (Ref. R. I.).

§ 826. **On Trustee's Refusal, He May Be Ordered, etc., or Creditor or Bankrupt May Proceed.**—On refusal of the trustee for insufficient reasons to proceed, he may be ordered to do so.¹⁷ And the trustee may be removed for noncompliance with the order.¹⁸

In *re Stern*, 16 A. B. R. 513, 144 Fed. 956 (C. C. A. Iowa): “* * * if he refuses to oppose a claim or to move for its reconsideration when he ought to do so, he may be compelled to act or to permit the objecting creditors to act in his name.”

Or the creditor may himself proceed;¹⁹ or the bankrupt may proceed;²⁰ in which events it is proper that the reasonable expense of a successful resistance should be paid out of the estate.²¹

And the court may require the creditor to indemnify the trustee against costs and expenses.²²

But compare, *In re Baird*, 7 A. B. R. 448, 112 Fed. 960 (D. C. Pa.): “It is certainly not the duty of a trustee to litigate every question that may be called to his notice by the creditors, however frivolous or apparently lacking in support it may be. On the other hand, he should not be permitted, by requiring indemnity in every instance against the costs and expenses of a suit to cast the risk of controversy upon the particular creditor who may request to undertake it.”

Or to pay the costs if unsuccessful.²³

§ 827. **If Creditor Proceeds, Should Use Trustee's Name.**—In such cases, however, the proper practice would be for the creditor to use the trustee's name, by leave of court;²⁴ although he has been held entitled to reimbursement in a case where it appears he did not use the trustee's name but proceeded in his own name.²⁵ And a creditor and the trustee may, by

17. *McDaniel v. Stroud*, 5 A. B. R. 685, 106 Fed. 486 (C. C. A. S. Cal.); *Chatfield v. O'Dwyer*, 4 A. B. R. 313, 101 Fed. 797 (C. C. A. Ark.); analogously, *In re Lewensohn*, 9 A. B. R. 368, 121 Fed. 538 (C. C. A.); obiter, *In re Carton & Co.*, 17 A. B. R. 349 (D. C. N. Y.); analogously, *In re Bailey*, 18 A. B. R. 226 (D. C. Pa.).

For an instance where the court refused to entertain a motion made by the bankrupt for an order upon the trustee to institute such proceedings, see, *In re Levy*, 7 A. B. R. 56 (Ref. N. Y.). But compare, inferentially, contra, *Griffin v. Mut. Life Ins. Co.*, 11 A. B. R. 622, 119 Ga. 664 (Sup. Ct. Ga.).

18. *In re Lewensohn*, 9 A. B. R. 368, 121 Fed. 538 (C. C. A.).

19. *In re Sully & Co.*, 18 A. B. R. 120 (C. C. A. N. Y.); *In re Little River Lumber Co.*, 3 A. B. R. 682 (D. C. Ark.); *McDaniel v. Stroud*, 5 A. B. R. 685, 106 Fed. 486 (C. C. A. S. Cal.); analogously, *In re Bailey*, 18 A. B. R. 226 (D. C. Pa.).

20. Obiter, *In re Carton & Co.*, 17 A. B. R. 349 (D. C. N. Y.).

21. *In re Little River Lumber Co.*, 3 A. B. R. 682, 101 Fed. 558 (D. C. Ark.).

22. *In re Bailey*, 18 A. B. R. 226, 151 Fed. 953 (D. C. Pa.).

23. *In re Sully & Co.*, 18 A. B. R. 126 (C. C. A. N. Y.); *Chatfield v. O'Dwyer*, 4 A. B. R. 313, 101 Fed. 797 (C. C. A. Ark.).

24. *McDaniel v. Stroud*, 5 A. B. R. 685, 106 Fed. 486 (C. C. A. S. Cal.); *In re Sully & Co.*, 18 A. B. R. 126 (C. C. A. N. Y.); *In re Bailey*, 18 A. B. R. 226 (D. C. Pa.).

25. *In re Little River Lumber Co.*, 3 A. B. R. 682, 101 Fed. 558 (D. C. Ark.).

formal entry, adopt the objections filed by the bankrupt before the election of a trustee and need not file new objections.²⁶

§ 828. Though but One Creditor in Position to Object, Yet Trustee May Object.—Where only one or less than all of the creditors is in a position to object to the claim, nevertheless the trustee succeeds to such creditor's defense and may urge it, even if the creditor himself does not urge it.

Instance, *In re Royce Dry Goods Co.*, 13 A. B. R. 267, 133 Fed. 100 (D. C. Mo.): "When this claim was presented for allowance, the wronged creditors unquestionably had the right to object thereto on the ground that the claimant was estopped to deny the truth of his representations. If so why may not the trustee for them?"

But it hardly seems correct to hold that where a claim is good as against all the other creditors and is bad only as to the one, yet that it may be thrown out altogether. A better rule it would seem would be to make it the subject of a special order in the distribution, and adjust the priorities in the dividends in accordance with the respective equities;²⁷ and postpone such claimant's dividend, or subject it to such creditor's claim.²⁸

§ 829. Creditor Holding Special Defense, Yet May Not Object in Own Name.—It is doubtful whether the creditor holding the special defense may object to the allowance of the claim, but at any rate he may, on distribution, have the dividend on such claim subjected to his own claim.²⁹

DIVISION 2.

PLEADINGS AND PROCEDURE ON OBJECTIONS TO CLAIMS AND ON RE-EXAMINATION OF ALLOWED CLAIMS.

§ 830. Objections for Lack of Form or "Provability," Not Necessarily in Writing.—Objections to claims on the ground that they are not

^{26.} *Contra*, *Ayres v. Cone*, 14 A. B. R. 739, 138 Fed. 778 (C. C. A. S. Dak.), but the able and dissenting opinion of Sanborn, J., in this case undoubtedly states the true rule.

It has been held, that a trustee and also a creditor might institute a joint proceeding, upon a joint petition against several creditors. As to trustee, see *In re Lyon*, 7 A. B. R. 61 (D. C. N. Y.); as to creditor, *In re Linton*, 7 A. B. R. 676 (Ref. Penn.).

This practice is improper and leads to confusion, since different defenses are involved and creditors are entitled to separate hearings. It does not save a "multiplicity of suits" but provokes a multiplicity of objections for the consideration of a court of review. The rule laid down by Chancellor Kent is clearly distinguishable. Different preferences received by different creditors at different times and different places and in different amounts are not "connected" within the meaning of Chancellor Kent. The only connection is the uniformity of legal principles involved and the necessity of proving the bankrupt's insolvency in each case. These do not constitute a connected series of acts.

^{27.} See post, § 2133, et seq., subject of "Marshaling of Priorities in Dividends."

^{28.} *Obiter*, *In re Royce Dry Goods Co.*, 13 A. B. R. 627, 133 Fed. 100 (D. C. Mo.).

^{29.} But compare, *In re Royce Dry Goods Co.*, 13 A. B. R. 267, 133 Fed. 100 (D. C. Mo.).

provable as being not among the enumerated classes of provable debts or that they are not duly "proved," as being defective in the form of affidavit, need not be made in writing, if the proof of claim shows the fault on its face. An oral intimation to the court is sufficient and the court may and should act without any motion.³⁰

§ 831. Objections for Substance Properly in Writing.—Objections to claims for matters of substance ought, by the better practice, to be in writing, although there is no statutory requirement to that effect, nor any rule nor form of the Supreme Court requiring it.³¹

In *re Royce Dry Goods Co.*, 13 A. B. R. 257, 133 Fed. 100 (D. C. Mo.): "There is nothing in the Act or rules in bankruptcy directing the form of such objections. They should be in writing."

Compare, to same effect, In *re Linton*, 7 A. B. R. 676 (Ref. Penn.): "Objections to proofs of claims should be set forth in the form of a petition for review."

Compare, In *re Cannon*, 14 A. B. R. 114, 133 Fed. 837 (D. C. Penna.): "A preliminary question is raised by the refusal of the referee to sustain the objection of the claimants' counsel to the examination of the witnesses, 'because no formal exception to the claim has been filed by the trustee.' This position is based upon the assumption that the trustee must put his objections in writing before the claim can be attacked by testimony or other evidence. No doubt it is desirable that the trustee's objections shall be clearly and distinctly stated in advance of the investigation, so far as this may be possible, in order that the claimant may know what he is called upon to meet. But this information may be communicated to him in several ways; the trustee's objections may be noted by the stenographer, as was the case in *In re Shaw*, 6 Am. B. R. 499, 109 Fed. 780; or they may be stated orally, as was done in the instance now under consideration, if the referee permits this course to be pursued; or they may be filed in writing, this being the method which the claimants insist upon as the exclusive method. Undoubtedly, the last-named practice has obvious advantages, and should be followed as a rule, wherever practicable, but the Bankrupt Act does not require objections to be always in writing, § 57d directing the allowance of claims that have been duly proved, 'unless objection to their allowance should be made by parties in interest, or their consideration be continued for cause by the court upon its own motion.' The manner of making such objection is thus left open, and should, I think, be largely committed to the discretion of the referee. It is conceivable, that while a trustee might have enough information to justify him in entering objection to a particular claim upon a ground which he might be able to state in general terms, he might not have information sufficiently precise to permit him to file specific objections in advance of the hearing; and I think it would be going too far to require him to make an attempt that could only result in failure. Whatever will give sufficient preliminary information to the claimant concerning the character of the trustee's objection, is, I think, all that can fairly be required, especially when this is afterwards supplemented, as in the present case, by specific objections in writing."

³⁰. Inferentially, In *re Cannon*, 14 A. B. R. 114, 133 Fed. 837 (D. C. Pa.).

³¹. See, inferentially, In *re Wooten*, 9 A. B. R. 247, 118 Fed. 670 (D. C. N. Car.).

But need not be under oath;³² and in the discretion of the court need not be in writing, but may be stated orally.³³

§ 832. Each Claim, Properly, to Be Separately Objected to.—It is undoubtedly the better practice not to join in one pleading objections to different claims. The same objections may not be applicable; the same evidence may not be requisite; and on review the record would be inconveniently voluminous.

Yet it has been held that objections to different claims may be set forth in one pleading.

In *re Linton*, 7 A. B. R. 676 (Ref. Penn.): "Any number of creditors can properly be named in the same petition, but each should be served with a copy of the petition, and a copy of the order made to appear and show cause why their claims should not be reduced in amount or expunged." This may have been a case of re-examination of claims already allowed rather than objection thereto before allowance.

§ 833. Objections to Be Specific.—The objections should be specific;³⁴ and undoubtedly should follow the usual rules of pleading—pleading and denying allegations of fact, and not being indefinite.

§ 834. Amendment of Objections Permissible.—Amendment of objections may be permitted.³⁵

§ 835. Overruling Trustee's Motion to Dismiss Claim for Failure to Make Prima Facie Case.—On overruling the trustee's motion, made at the close of the claimant's case, to disallow the claim on the claimant's own proof, it is error to proceed as if the case had been entirely submitted and to allow the claim. Opportunity should then be given to the trustee to support his objections with evidence;³⁶ nor should the reviewing court allow the claim upon reversal of the referee's order of disallowance made at the close of the claimant's case, but should remand with instructions to hear trustee's evidence in support of the objections.

In *re Livingston Co.*, 16 A. B. R. 385, 144 Fed. 971 (C. C. A. N. Y.): "We think this was error, because by such disposition of the cause the claim was allowed without any opportunity to the trustee to put in what proof he might be able to produce tending to controvert the case made by the claimant."

32. In *re Wooten*, 9 A. B. R. 247, 118 Fed. 670 (D. C. N. C.).

33. In *re Cannon*, 14 A. B. R. 114, 133 Fed. 837 (D. C. Penna.).

34. In *re Royce Dry Goods Co.*, 13 A. B. R. 257, 133 Fed. 100 (D. C. Mo.): "Should be sufficiently explicit to indicate to the claimant the nature and character thereof."

35. In *re Royce Dry Goods Co.*, 13 A. B. R. 257, 133 Fed. 100 (D. C. Mo.). Here to conform the objections to the proof.

36. Inferentially, In *re Livingston Co.*, 16 A. B. R. 385, 144 Fed. 971 (C. C. A. N. Y.).

§ 836. **Petition for Re-Examination.**—Where the re-examination of a claim once allowed is desired, a petition for an order expunging the claim should be filed.³⁷

§ 837. **To Be Specific, and Sufficiency Tested in Usual Way.**—The petition for re-examination should be specific. The sufficiency or insufficiency of the allegations may be tested in the usual manner of procedure. Thus, a motion for a more specific statement is proper to cure indefiniteness in the pleading.³⁸

§ 838. **Good Cause to Be Shown.**—Good cause must be shown, however, for setting aside an order of allowance before the court will reconsider the claim.³⁹

Compare, inferentially, to same effect, *In re Smith*, 2 A. B. R. 648 (Ref. N. Y.): "The better practice, when application is made to increase or decrease the sum at which a claim has previously been allowed, is to vacate the former order of allowance, and allow the claim at the new amount as if then moved for the first time."

What is necessary to constitute good cause in such cases is not clear. At any rate facts sufficient to obtain a rehearing in accordance with the Federal Equity rules would, of course, be sufficient here.

In re George Watkinson Co., 12 A. B. R. 370 (D. C. Pa.): "Neither the terms of the act, nor the general orders, require the petitioner to aver facts which, if proved, would defeat the claim. It is only necessary, in my judgment, to aver facts which, if true, are a sufficient cause for the re-examination of the claim."

In other words, the petition for re-examination need not be the final statement of the complete case, although of course probability of the existence of facts sufficient to defeat it must be shown in order to show "good cause."

37. Rule XXI (6) of the Supreme Court's General Orders in Bankruptcy: "When the trustee or any creditor shall desire the re-examination of any claim filed against the bankrupt's estate, he may apply by petition to the referee to whom the case is referred for an order for such re-examination, and thereupon the referee shall make an order fixing a time for hearing the petition, of which due notice shall be given by mail addressed to the creditor. At the time appointed the referee shall take the examination of the creditor, and of any witness that may be called by either party, and if it shall appear from such examination that the claim ought to be expunged or diminished, the referee may order accordingly."

Compare, to same effect, *In re Linton*, 7 A. B. R. 676 (Ref. Penn.); inferentially, and obiter, *In re Docker-Foster Co.*, 10 A. B. R. 584, 123 Fed. 190 (D. C. Pa.).

38. *In re Ankeny*, 4 A. B. R. 72, 100 Fed. 614 (D. C. Iowa).

39. Bankr. Act, § 57 (k): "* * * may be reconsidered for cause." *In re Doty*, 5 A. B. R. 58 (Ref. N. Y.).

But Perhaps Petition Should Set Up Facts Sufficient to Defeat Claim as Well as Merely to Show Good Cause.—The petition for re-examination, perhaps, should set up facts which, if proved, would defeat the claim; otherwise the re-examination would be vain.

§ 839. **Creditor to Be Given Due Notice.**—The creditor whose claim is attacked should be given due notice of the petition.⁴⁰

§ 840. **Notice by Referee, and May Be by Mail.**—The notice is to be given by the referee, not by the creditor nor trustee (unless otherwise ordered by the judge).⁴¹ The notice may be by mail and notice by mail would be "due notice."⁴²

§ 841. **Creditor to File Answer.**—The creditor should file an answer thereto, else the claim may be expunged pro confesso.

In re Docker-Foster Co., 10 A. B. R. 584, 123 Fed. 190 (D. C. Penn.): "Under the provisions of General Order No. 37, which extends the equity rules of the Supreme Court to proceedings in equity instituted for the purpose of carrying into effect the provisions of the Bankrupt Act, or for enforcing the rights and remedies given by it, failure to file an answer to a petition seeking to expunge a claim justifies a decree pro confesso under Rule 18, carrying the ordinary incidents and consequences of such a decree."

§ 842. **Reconsideration Refused for Trustee's Laches.**—Reconsideration of an allowed claim will be refused where the trustee is guilty of laches.⁴³

§ 843. **Burden of Proof—Original Order of Allowance, Prima Facie Case.**—The burden of proof rests on the party desiring the reconsideration of an order of allowance, for the original order of allowance establishes a prima facie case.⁴⁴ Before allowance the proof of debt makes a prima facie case for the creditor.⁴⁵

§ 844. **Deposition for Proof of Debt Prima Facie Case for Claimant.**—The mere presentation of the duly verified and filed deposition for proof of debt makes a prima facie case, even when objected to, and must stand until the objector adduces evidence which authorizes the referee to expunge or reduce it.⁴⁶

40. In re Linton, 7 A. B. R. 676 (Ref. Penn.). Compare practice, as described in In re Doty, 5 A. B. R. 58 (Ref. N. Y.).

41. In re Stoeve, 5 A. B. R. 250, 105 Fed. 355 (D. C. Pa.).

42. Rule XXI (6).

43. See In re Hinckel Brew Co., 10 A. B. R. 484, 123 Fed. 942 (D. C. N. Y.). In re Hamilton Furn. Co., 8 A. B. R. 588, 116 Fed. 115 (D. C. Pa.). In this case claims had been allowed and dividends paid thereon. Compare facts, In re Geo. Watkinson, 12 A. B. R. 370 (D. C. Pa.).

44. In re Howard, 4 A. B. R. 69, 100 Fed. 630 (D. C. Calif.); In re Doty, 5 A. B. R. 58 (Ref. N. Y.).

45. Obiter, In re Doty, 5 A. B. R. 58 (Ref. N. Y.).

46. In re Doty, 5 A. B. R. 58 (Ref. N. Y.); In re Cannon, 14 A. B. R. 114, 133 Fed. 837 (D. C. Pa.); compare, In re Shaw, 6 A. B. R. 499, 109 Fed. 780 (D. C. Pa.); compare, inferentially, In re Wooten, 9 A. B. R. 247, 118 Fed. 670 (D. C. N. Car.); In re Creasinger, 17 A. B. R. 546, 145 Fed. 224 (Ref. Calif.); obiter, In re Jones, 18 A. B. R. 208 (D. C. Mich.); (1867) In re Saunders, 2 Lowell 444, 446, Fed. Cases 12,371; (1867) In re Felter, 7 Fed. 906.

Some cases seem to indicate that the ordinary rules as to the introduction and

Whitney *v.* Dresser, 15 A. B. R. 326, 200 U. S. 535: "The only question warranting the appeal is whether the sworn proof of claim is *prima facie* evidence of its allegations in case it is objected to. It is not a question of the burden of proof in a technical sense—a burden which does not change whatever the state of the evidence—but simply whether the sworn proof is evidence at all.

"The Circuit Court of Appeals observed that the proof of claim warrants the payment of a dividend in the absence of objection, and, therefore, must have some probative force. In reply it is argued that what is done in default of opposition is no test of what is evidence when opposition is made; that a judgment may be entered on a declaration for want of an answer, yet a declaration is not evidence; that it is contrary to analogy to give effect to an *ex parte* affidavit, and that on general principles it is the right of any party against whom a claim is made to have it proved, not only upon oath, but subject to cross-examination.

"Notwithstanding these forcible considerations we agree with the Circuit Court of Appeals. The prevailing opinion, not only in the Second Circuit, but elsewhere, seems to have been that way. * * * The alternative would be that the mere interposition of an objection by any party in interest, § 57d, would require the claimant to produce evidence. For if the formal proof is no evidence a denial of the claim must have that effect. If it does not, then the formal proof is some evidence even when there is testimony on the other side. The words of the statute suggest, if they do not distinctly import, that the objector is to go forward, and thus that the formal proof is evidence even when put in issue. The words are: 'Objections to claims shall be heard and determined as soon,' etc. Section 57f. It is the objection, not the claim, which is pointed out for hearing and determination. This indicates that the claim is regarded as having a certain standing already established by the oath. Some force also may be allowed to the word 'proof' as used in the Act. Convenience undoubtedly is on the side of this view. Bankruptcy proceedings are more summary than ordinary suits. Judges of practical experience have pointed out the expense, embarrassments and delay which would be caused if a formal objection necessarily should put a creditor to the production of evidence or require a continuance. Justice is secured by the power to continue the consideration of a claim whenever it appears there is good reason for it. We believe that the understanding of the profession, the words of the Act and convenient and just administration all are on the side of treating a sworn proof of claim as some evidence even when it is denied."

In *re Dresser*, 13 A. B. R. 747, 135 Fed. 495 (C. C. A. N. Y.): "We are dealing here with a statute, the primary object of which is to collect the property of the bankrupt speedily and divide it equally among his creditors. Analogies drawn from pleadings in actions at common law and in equity furnish little assistance in the interpretation of such a law. If the doctrine be once established that a proof of claim in bankruptcy is entitled to no greater weight than a complaint in an ordinary action at law the most serious results

weight of evidence and the conduct of trials prevail in the hearing of the objections to claims in bankruptcy. Thus it has been held that, in Pennsylvania, a claimant against the estate of a deceased bankrupt is not competent to testify in support of his claim although he is called by the trustee to testify concerning a transfer of property made to him by the bankrupt within four months preceding the adjudication. In *re Shaw*, 6 A. B. R. 499, 109 Fed. 780 (D. C. Penn.).

Thus it has been held that every creditor must establish his claim by a preponderance of the evidence if it is denied. In *re Wooten*, 9 A. B. R. 247, 118 Fed. 670 (D. C. N. C.); inferentially, In *re Ladue Tate Mfg. Co.*, 14 A. B. R. 235, 135 Fed. 910 (D. C. N. Y.).

will follow. Any vindictive or contumacious creditor can, by filing objections, compel creditors to come from distant states and even from foreign countries to testify in support of their claims before a word of testimony impeaching their validity has been adduced. No one disputes that in the absence of objection the proof of claim stands as sufficient warrant for the payment of a dividend based thereon. It is not then a mere pleading, confessedly it possesses some probative force. This being so it is not easy to approve the logic which deprives it of all weight, as evidence upon the mere filing of an objection. If the appellant's contention be sustained an efficient administration of the law might, as we have seen, be made difficult, if not impossible. We see no reason or necessity for such an interpretation of the law. On the other hand a construction which requires the objector to offer some proof before subjecting the creditor to the expense and annoyance of presenting sustaining evidence seems to be in accord with the intent and purpose of the act and to present a simple, efficient and perfectly fair rule of procedure. In a vast majority of instances the claims of creditors are susceptible of the most simple verification. The trustee has the bankrupt's books at his disposal and can at any time call upon the bankrupt for assistance. In cases where exaggerated or fraudulent claims are filed there is no difficulty in ascertaining and proving facts sufficient to establish the true character of the claim, thus putting the claimant upon his proof.

"The subject was carefully examined in *In re Sumner* (D. C.), 4 Am. B. R. 123, 101 Fed. 224, and the conclusion was reached that under § 57 'a,' 'b,' 'd' and 'f' of the Act the objector, though not required to disprove the claim, must produce evidence whose probative force shall be equal to, or greater than, the evidence offered in the first instance by the claimant.' This, we think, is a correct statement of the law and is in accord with General Order 21 (6), 89 Fed. x, which seems to indicate that the claim must stand until evidence has been adduced which authorizes the referee to expunge or reduce it. See, also, *In re Shaw* (D. C.), 6 A. B. R. 499, 109 Fed. 780; *In re Felter* (D. C.), 7 Fed. 904, affirmed sub nom. *Whitney v. Dresser*, 15 A. B. R. 326, 200 U. S. 535."

In *re Sumner*, 4 A. B. R. 123, 101 Fed. 224 (D. C. N. Y.): "It is apparent from subdivision 'f' that the statute contemplates that, after the claimant has presented his claim in the prescribed manner, objection may be made, and that thereafter the question of the objection shall be taken up and decided. This does not mean that the burden of proof is upon the objector to disprove the claim, but that he shall produce evidence whose probative force shall be equal to, or greater than, the evidence offered in the first instance, by the claimant. The burden of proof is always upon the claimant, but the statute points out how he may meet it for the purpose of making a *prima facie* case; and further provides that a creditor, or other person entitled, may, by interposing objection, so relate himself to the record as to be able to give evidence in opposition to the claim. Therefore, if the creditor shall have complied with § 57a, by filing with the referee a statement under oath, he shall be entitled to have his claim accepted, unless from some circumstance the referee demands further evidence from him, or unless an objection is interposed, and such objection is followed by evidence offered by the objector, which shall overthrow the presumptive case made by the claimant."

In *re Castle Braid Co.*, 17 A. B. R. 148 (D. C. N. Y.): "If they set forth all the necessary facts to establish the claim, and are not self-contradictory, *prima facie*, they establish the claim, even in the presence of objections, and the objector is then called upon to produce evidence and show facts tending to defeat the claim of probative force equal to that of the allegations of the

proof of claim. The burden of proof is always on the claimant, but, as probative force is given to the allegations of the proofs of claim, and no probative force is given to the objections, this must be met, overcome, or at least equalized, by the objecting party. In short, if the proofs of claim state facts sufficient to make a prima facie case, and it is stated that there is no security, the referee is bound to allow the claim, unless evidence controverting such facts is given by the objecting party, or an offset or counterclaim thereto is proved or established, or it appears that security is held for the claim."

In re Carter, 15 A. B. R. 126, 138 Fed. 846 (D. C. Ark.): "The presentation of a claim in proper form duly verified except as to particulars which the court treats as waived presents a prima facie case in favor of the claimant upon which he has a right to rest and the burden of proof is upon the objectors."

This rule in practical administration throws a great burden upon creditors and the trustee in bankruptcy, in objecting to claims. They are obliged thereby frequently to prove a negative—that goods, for instance, were never sold, or never delivered or never paid for; thus reversing the usual rules of evidence in the trial of cases and making bankruptcy procedure unnecessarily peculiar and perplexing.

Let the instance of the claim of a relative for money borrowed be taken. The claimant introduces his deposition into evidence and rests. Now, what must the trustee or objecting creditors do? Their oath to their written objections is not, apparently, as weighty as the claimant's oath to his deposition, for *they* must proceed further; they must "introduce evidence" "to overthrow the presumptive proof." Now, what facts does the deposition for proof of claim allege? For if *facts* are not deposed to in the claimant's proof, how will the trustee or creditors be able to know what *facts* they must, under the rule, "rebut?" No facts are deposed to; the proof of claim states simply legal conclusions. Of course, it would be different were the claimant bound to introduce all his evidence in the first instance—not only the deposition for proof of the claim but all his other evidence in chief. In that instance there would be no difficulty; for if he rested his case on the deposition, then, after the objecting creditor or trustee had introduced evidence, the case would be closed except for rebutting evidence from the claimant. But such a procedure is obviously not what the rule contemplates, for there would be no material change from the ordinary method of procedure thereby. If the rule contemplates that the claimant may, for the first time, introduce his witnesses to substantiate his case in chief, *after* his opponent has concluded his defense, the rule would work inequitably, for the objecting creditors or trustee would have to deny every conceivable adverse circumstance while the claimant might sit by and put in his own case in chief afterwards. The rule is peculiar, unnecessary and vexatious and is not practicable. It has generally been found that deviation from the time honored order of procedure is unwise. This instance is no exception. It would seem sufficient to give the deposition for proof of debt simply the effect of evidence *when no objections are filed to the claim*, or at any rate to require the claimant to put in all his proof along with it, except such as

is mere rebuttal. The Courts have introduced the rule for the protection of claimants against unfounded objections; but it would seem that the oath of the objectors ought to be sufficient guaranty of good faith, and that, in the effort to protect claimants from unfounded objections, bankruptcy practice should not be thrown into confusion and be made a new and strange procedure for lawyers to learn.

§ 845. But, at Any Rate, Prima Facie Case for Allowance as Priority Claim, Not So Established.—But, at any rate a prima facie case for the allowance of the claim as a priority claim is not established by the mere presentation of the deposition containing allegations which, if true, would establish such priority. The effect of the deposition as prima facie proof goes no further than merely to establish prima facie the provability and allowability of the claim, not the order of its priority in the distribution of the assets.

In *re Jones*, 18 A. B. R. 208 (D. C. Mich.): "It is contended by the petitioner that, as the petition was sworn to, the truth of the allegation in question is prima facie established upon the principle that the sworn proof of claim against the bankrupt is prima facie evidence of its allegations, even if objected to. This is undoubtedly the rule, as applied to the proof of the claim itself as a general claim, considered apart from the question of priority. * * * These decisions do not, to my mind, support the proposition that allegations relating to alleged priority are to be taken as prima facie true, for the purpose of establishing such priority, in the absence of evidence for or against the fact. The proof of claim, as such, is governed by § 57 of the Bankrupt Act (30 Stat. 560 [U. S. Comp. St. 1901, p. 3443]). The subject of priorities is governed by § 64. The question presented in the *Dresser Case* related entirely to the proof of claim as a general claim, under § 57 of the Bankrupt Act, and had nothing to do with the question of priority, under § 64 of the Act. * * * The reasons for the rule of prima facies applicable to proofs of claims do not apply to petitions for priority. In my opinion the allegations relating to priority were not prima facie evidence of their truth."

§ 846. Claimant Must Present Himself for Examination.—Opportunity should be given to examine the claimant where hearing is had upon a petition to re-examine a claim already allowed.⁴⁷

In *re Sumner*, 4 A. B. R. 123, 101 Fed. 224 (D. C. N. Y.): "An opportunity should be given to examine the claimant and other witnesses, if the attendance of the same can be procured seasonably and without embarrassing delay, and it may be that in suitable cases the referee should suspend a determination of

⁴⁷ Impliedly, Gen. Order 21 (6): "At the time appointed, the referee shall take the examination of the creditor, etc." *Obiter*, In *re Doty*, 5 A. B. R. 58 (Ref. N. Y.).

Nonresident Creditor Exempt from Service of Summons While So in Attendance.—And while he is so in attendance he is exempt from service of summons upon him in another action by the trustee, in case he be a nonresident.

Morrow v. Dudley & Co., 16 A. B. R. 459 (D. C. Pa.): "Of the right of a party to attend a judicial hearing away from the place of his residence, without being subjected to the service of process, there is, of course, no question, and hearings before the referee are no exception."

the matter until evidence can be taken by deposition. But a suspension of the proceedings for the purpose of obtaining the evidence of witnesses not within the jurisdiction of the court should only be exercised where the referee is convinced that there is not only formal objection to the claim interposed in good faith, but also that there is substantial reason for believing that such evidence is necessary for the just administration of the estate."

And the examination is in the nature of a cross-examination.⁴⁸

§ 847. **Place for His Examination.**—The place of the re-examination of a nonresident creditor on a reconsideration of his claim may be either in the district where the proceedings are pending or where he resides, as the referee may order.⁴⁹

§ 848. **Nonresident Claimant Entitled to Reimbursement.**—A nonresident creditor is entitled to reimbursement of reasonable traveling fees and hotel expenses, but not counsel fees, when ordered to appear on re-examination of his claim.⁵⁰

§ 849. **Jury Trials Not to Be Had.**—Jury trials can not be had before the referee. There is no machinery adequate therefor and, such proceedings being equitable in their nature, a jury could not be demanded as of right.

But compare, *In re Rude*, 4 A. B. R. 319, 101 Fed. 805 (D. C. Ky.): "Bankruptcy proceedings are equitable in their nature, and while the court and possibly the referee, might have had a jury to pass upon the amount of the attorney's fee (lien claimed by attorney on client's dividend) that was a matter of discretion and not of right. The court does not understand that in equitable proceedings parties have a right to have an issue tried out of chancery by a jury."

§ 850. **Variance between Claim and Proof.**—Material variance between the statement of the claim, in the formal deposition for proof of debt, and the evidence, is fatal, unless remedied in the usual manner.

In re Lansaw, 9 A. B. R. 167, 118 Fed. 365 (D. C. Mo.): "The rule of law obtains everywhere, under every system of pleading, that the party must establish 'by evidence the case made in his pleading; and he is not entitled to recover on evidence which shows a different right of recovery.' * * *

"The Bankrupt Law, which proceeds much upon principles of equity jurisprudence and practice, requires that the claimant, in presenting his claim to the referee for allowance against the bankrupt estate, must make a statement of what his claim is, and he must purge himself by presenting his claim under oath. He cannot present for allowance a claim for \$700, alleged to have been advanced by him to the bankrupt, and which was put into the business of the merchantile store of the bankrupt, and undertake to sustain it by proof that his mother requested the bankrupt to pay the claimant \$800 on a debt he owed her, and which was afterwards compromised at \$700. The claim should have been rejected by the referee on this ground, without more."

48. *In re Castle Braid Co.*, 17 A. B. R. 150, 145 Fed. 224 (D. C. N. Y.).

49. *In re Geo. Watkinson Co.*, 12 A. B. R. 370 (D. C. Pa.).

50. *In re Geo. Watkinson Co.*, 12 A. B. R. 370 (D. C. Pa.).

But an inconsequential variance between the allegations of a claimant as to when his debt against the bankrupt arose, and his testimony upon that point, does not require a reversal of the allowance of his claim by the referee.⁵¹

§ 851. **Trustee's Attorney Not to Act as Claimant's Attorney.**—A claimant should not be represented by the trustee's attorney; professional ethics would forbid the practice.⁵²

§ 852. **Untrustworthy, Though Uncontradicted, Testimony May Be Rejected.**—Oral admissions denied and uncorroborated may be not sufficient to support a claim.⁵³ And the bankrupt's uncorroborated testimony as to the precise time of his becoming insolvent should be received with caution.⁵⁴ Even uncontradicted testimony in support of a claim may be so unsatisfactory that it may be rejected and the claim be disallowed, although the objectors may have been under the burden of rebutting the *prima facie* case made by the deposition for proof of the claim.⁵⁵

§ 853. **But Uncontradicted Testimony, Not Incredible, to Be Given Weight, Notwithstanding Suspicious Circumstances.**—But uncontradicted testimony is to be given weight as proof of the facts testified to, although circumstances of suspicion may exist, so long as such circumstances fall short of making the testimony incredible.⁵⁶

§ 854. **Dealings between Near Relatives to Be Closely Scrutinized.**—The rules governing the dealings between near relatives apply to contests over the allowance of claims in bankruptcy; they are to be scrutinized with care.⁵⁷

§ 855. **Also, Written Obligations Given by Bankrupts on Eve of Bankruptcy.**—Likewise, written obligations and acknowledgments of indebtedness given by bankrupts, during the period of insolvency immediately preceding bankruptcy, are to be subjected to close scrutiny, and

51. *In re Stout*, 6 A. B. R. 505, 103 Fed. 618 (D. C. Mo.).

52. *In re Stern*, 16 A. B. R. 513, 144 Fed. 956 (C. C. A. Iowa). So, also, it has been held improper for the bankrupt's attorney to represent the claimant. *In re Wooten*, 9 A. B. R. 247. The reasoning of the court, however, in this case is not free from objections. The bankrupt could not make admissions to bind the estate anyway, no matter whether his attorney was the claimant's attorney or not.

53. *In re Kaldenberg*, 5 A. B. R. 6, 105 Fed. 232 (D. C. N. Y.).

54. *In re Linton*, 7 A. B. R. 676 (Ref. Tex.).

55. *In re Cannon*, 14 A. B. R. 114, 133 Fed. 837 (D. C. Pa.). To same effect, *In re Domenig*, 11 A. B. R. 555, 128 Fed. 146 (D. C. Pa.).

56. *Inferentially*, *Union Trust Co. v. Bulkeley*, 18 A. B. R. 42, 150 Fed. 510 (C. C. A. Mich.).

57. *In re Wooten*, 9 A. B. R. 247, 118 Fed. 670 (D. C. N. Car.); *In re Domenig*, 11 A. B. R. 555, 128 Fed. 146 (D. C. Pa.): *inferentially*, but *obiter*, *Union Trust Co. v. Bulkeley*, 18 A. B. R. 42, 150 Fed. 510 (C. C. A. Mich.).

should not be upheld where they are not supported by good and sufficient consideration.⁵⁸

§ 856. Schemes to Charge Partnership Assets with Individual Liabilities.—Any scheme or device resorted to by persons in contemplation of bankruptcy, for the purpose of charging partnership assets with the individual liabilities of the partners, is violative of the provisions of the Act.

In *re Jones & Cook*, 4 A. B. R. 141 (D. C. Mo.): "The physical and undisputed facts surrounding the case are also in my opinion, sufficient to stamp the transaction as fraudulent within the meaning of the Bankruptcy Act. The two endorsements were made at the time the firm was in an embarrassed financial condition. They were also made without any new consideration moving from the individual creditor to the firm, and they were made within four months prior to the time when the members of the firm petitioned voluntarily to be adjudicated bankrupts. The endorsements were also made in favor of relatives. Under this state of facts, it is impossible to believe that the parties intended anything less than to gain an unconscionable and unlawful advantage over partnership creditors in violation of the spirit and meaning of the Bankruptcy Act. If authority for the conclusion reached in this case were needed, it can be found in *In re Lane*, 10 N. B. R. 135, 14 Fed. 1070 (No. 8,044)."

§ 857. Agent's Admissions Not Binding unless within Scope.—The admissions of an agent are not binding on his principal unless within the scope of his authority. Thus, the husband's admissions of his wife's insolvency, while acting as manager of her business, have been held not competent.⁵⁹

§ 858. Vacating of Allowance after Expiration of Current Term.—Vacating of an order of allowance may be had after the expiration of the current term of the U. S. District Court, for there are no terms in bankruptcy proceedings.⁶⁰

⁵⁸. In *re Brewster*, 7 A. B. R. 436 (Ref. N. Y.).

⁵⁹. *Duncan v. Landis*, 5 A. B. R. 652, 106 Fed. 839 (C. C. A. Pa.).

⁶⁰. Bankr. Act, § 2; compare, inferentially, *In re Ives*, 7 A. B. R. 692, 113 Fed. 911 (C. C. A. Mich.); *In re Worcester Co.*, 4 A. B. R. 496, 102 Fed. 811 (C. C. A. Mass.).

No Terms of Court, in Bankruptcy.—That there are no terms of court in bankruptcy, see *In re First Nat'l Bk.*, of Belle Fourche, 18 A. B. R. 274 (C. C. A.): "A proceeding in bankruptcy is a continuous suit. There are no terms of the bankruptcy court. It is always open, and until the termination of the pending suit that court has the power to re-examine its orders therein upon a timely application in an appropriate form. *Sandusky v. National Bank*, 90 U. S. 289, 293, 23 L. Ed. 155; *Lockman v. Lang*, 132 Fed. 1, 4, 65 C. C. A. 621, 624."

In *re Henschel*, 8 A. B. R. 201, 114 Fed. 968 (D. C. N. Y.); In *re Lemmon & Gale Co.*, 7 A. B. R. 291, 112 Fed. 300 (C. C. A.); In *re Mercur*, 10 A. B. R. 505, 122 Fed. 384 (C. C. A., affirming 8 A. B. R. 275, 116 Fed. 655); *Sandusky v. Nat'l Bk.*, 23 Wall. 289; contra, *In re Hawk*, 8 A. B. R. 71, 114 Fed. 300 (C. C. A.); inferentially and obiter, *In re Riggs Restaurant Co.*, 11 A. B. R. 509 (C. C. A. N. Y.): "There can be no doubt that a court has power if reasonably exercised to resettle an order, imperfectly phrased, so as to conform its text to the decision it was intended to embody." In *re Kaufman*, 14 A. B. R. 387 (D. C. N. Y.).

Obiter, In re *Tucker*, 18 A. B. R. 386 (C. C. A. Mass.): "It must be regarded as well settled that the rule relating to the powers of ordinary judicial tribunals, limiting summary proceedings to the term at which judgment is entered, does not apply to proceedings in bankruptcy."

But will not modify its order where there has been laches.

In re *Hoyt & Mitchell*, 11 A. B. R. 784 (D. C. N. Car.): "An order made upon the affirmance of the report of a special master disallowing payments made by a trustee, in violation of the district rules, is final, and will not be set aside or modified, upon a motion made more than a year afterwards."

It might pertinently be inquired here, however, how it comes that the district judge was having a "special master" pass upon the trustee's reports, presumably at an additional expense to the estate, when there was a referee who was the duly constituted officer to pass upon trustee's reports, performing this duty as part of the duties of his office without additional expense to creditors.

The district court cannot modify or vacate its orders, or grant rehearings, in matters where an appeal is pending, for the matter is no longer before it and it has no further jurisdiction.

First Nat'l Bk. v. *State Bk.*, 12 A. B. R. 440 (C. C. A. Mont.): "The overwhelming weight of authority of the State courts is that an appeal, properly perfected, absolutely removes the case from the trial court, and places it in the appellate tribunal. The case must, of necessity, either be in the appellate or lower court. It cannot very well be in both courts at the same time. Such a course would lead to endless confusion. Under all the ordinary rules of practice, the appellate court alone would have the jurisdiction. After the cause leaves the lower court, it is deprived of taking any action upon any question involved in the appeal. Many of the authorities in the State courts upon this point are collected and cited in *Elliott's App. Proc.*, § 541. The Federal authorities are substantially to the same effect.

"The precise point here raised has not been discussed in the national courts, because the practice adopted by appellant in this case is virtually unknown; but it has been incidentally referred to in several decisions to the effect that the decree in the District or Circuit Courts, when an appeal has been taken therefrom, is suspended until the appeal is disposed of. This rule is frequently stated in admiralty and other causes."

But it retains jurisdiction where the review is by petition for review and not by appeal.⁶¹ On dismissal of an appeal, the district court may hear a petition for a rehearing, and its order will be appealable.⁶²

§ 859. Rehearing Where Mere Pretence to Revive Right of Appeal.—It has been held that rehearing will be denied where it is applied for upon the pretence of reconsidering the merits, but in reality for the purpose of reviving the petitioner's right of appeal, which had been lost by laches.⁶³

61. In re *Orman*, 3 A. B. R. 698 (C. C. A. Ala.).

62. *Obiter*, First Nat. Bk. v. *State Bk.*, 12 A. B. R. 443 (C. C. A. Mont.).

63. In re *Girard Glazed Kid Co.*, 12 A. B. R. 295, 129 Fed. 841 (D. C. Penna.); compare, In re *Chambers, Calder & Co.*, 6 A. B. R. 707 (Ref. R. I.).

But it would seem that the application for rehearing should be decided on its merits, and not on the motives of the applicant. If ground for rehearing exists, the motive should not interfere with the granting of the application. If ground does not exist, then the motive of the applicant is immaterial.

§ 860. Review of Referee's Order Refusing to Reopen Hearing.—Ordinarily, the judge will uphold a referee in refusing to reopen the case to allow creditors who have shown laches in presenting their claims to be heard, but where there is manifest error the judge will look into the record and correct the error.⁶⁴

§ 861. Claims Not Re-Examined after Closing of Estate.—Re-examination of an allowed claim cannot be had after the estate is closed.⁶⁵ Whether § 57 (k) of the Act is meant to prohibit the re-examination of a claim after a closed estate has been reopened is not certain. There appear to be no decisions directly on the point.

⁶⁴. *In re Wood*, 2 A. B. R. 695, 95 Fed. 946 (D. C. N. Car.).

⁶⁵. Bankr. Act, § 57 (k).

CHAPTER XXVI.

TRUSTEES.

Synopsis of Chapter.

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- § 862. Appointment of Trustee at First Meeting, etc.
- § 863. Election May Be Postponed.
- § 864. Allowance of Claims May Be Postponed.
- § 865. No "Provisional" Allowance for Voting Purposes.
- § 866. Only Partnership Creditors to Vote in Partnership Bankruptcies.
- § 867. Conversely, Individual Creditors to Vote in Individual Bankruptcies.
- § 868. Majority in Number and Amount, Present, Whose Claims Allowed, Requisite.
- § 869. No Such Majority, Court to Appoint.
- § 870. Court Also to Appoint Where Creditors Fail Altogether to Act,
- § 871. Dispensing with Trustee Where No Assets, and No Creditors Present.
- § 872. But if Assets Shown, Trustee to Be Appointed, Though No Creditor Appears.
- § 873. Trustee Elected, Not Compelled to Act.
- § 874. Either One Trustee or Three to Be Elected, Not Merely Two.
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- § 876. Concurrence of Two Requisite, Where Three Appointed.
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DIVISION 2.

- § 878. Approval and Disapproval of Creditors' Election.
- § 879. Statutory Qualifications of Trustee.
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- § 893. Question of Collusion to Be Definitely Disposed of before Approval.
- § 894. When Referee Disapproves, Order of Disapproval to Be Entered and Opportunity for Review Given.
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DIVISION 3.

- § 896. Occupies Dual Position—Official Custodian for All—Also Party Litigant.
- § 897. Occupies Fiduciary Relation.

- § 898. Trustee Not to Be Dictated to by Creditors.
- § 899. Approval of Court before Starting Litigation Not Necessary, Except Where Substituted in Pending Suit.
- § 900. Creditors Not to Elect "Supervising Committee."
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- § 905. Statutory Duties and Those Not Statutory.
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§ 948. Creditors to Elect New Trustee on Death, Removal, etc.

§ 949. Also on Reopening of Estate.

DIVISION 1.

ELECTION, APPOINTMENT AND QUALIFYING OF TRUSTEES.

§ 862. **Appointment of Trustee at First Meeting, etc.**—We have now, as the result of our following the usual course of a bankruptcy proceedings thus far, arrived at the subject of the appointment of a trustee.

The creditors at their first meeting after the adjudication or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, or if there is a vacancy in the office of trustee, appoint one trustee or three trustees. If the creditors do not appoint a trustee or trustees, the court appoints.¹

§ 863. **Election May Be Postponed.**—The election of a trustee may be postponed, for cause; thus, upon the bankrupt's announcement that he is going to offer terms of composition;² or upon unanimous request of creditors for an adjournment to compose their differences where there has been no choice on the first ballot; creditors not being restricted to one ballot.³ But the selection of a trustee may not be tied up indefinitely by obstructive tactics, obviously for the purpose of delay.⁴

§ 864. **Allowance of Claims May Be Postponed.**—If claims are objected to, their allowance may be postponed, if the result would not affect the election of the trustee, that is to say, if with or without the claim on either side the election would be the same. Whether a claim will be postponed or the objections to it heard without delay and before the election, are question resting in the sound discretion of the Court.⁵

§ 365. **No "Provisional" Allowance for Voting Purposes.**—Claims objected to may not be allowed for voting purposes and the consideration

1. Bankr. Act, § 44 (a). For general discussion, see *In re Eagles & Crisp*, 3 A. B. R. 734, 99 Fed. 696 (D. C. N. Car.); also, *In re Henschel*, 7 A. B. R. 662, 113 Fed. 443 (C. C. A.); also, *In re Lewensohn*, 3 A. B. R. 299, 98 Fed. 576 (D. C. N. Y.).

2. *In re Rung Bros.*, 2 A. B. R. 620 (Ref. N. Y.).

3. *In re Nice & Schreiber*, 10 A. B. R. 639 (D. C. Pa.).

4. *In re Malino*, 8 A. B. R. 205, 206, 118 Fed. 368 (D. C. N. Y.); *In re Sumner*, 4 A. B. R. 123, 101 Fed. 224 (D. C. N. Y.).

5. See *In re Eagles & Crisp*, 3 A. B. R. 733, 99 Fed. 696 (D. C. N. C.); *In re Columbia Iron Wks.*, 14 A. B. R. 527, 127 Fed. 99 (D. C. Mich.); *In re Malino*, 8 A. B. R. 205, 118 Fed. 368 (D. C. N. Y.).

of the objections thereto postponed. The creditors' right to vote and to exclude improper claims from being voted is a substantial right.⁵

In *re Malino*, 8 A. B. R. 205, 118 Fed. 368 (D. C. N. Y.): "The right of creditors to select a trustee is a substantial one (In *re Henschel*, 7 A. B. R. 662), and it does not rest in the discretion of the referee to allow claims as voting bases when objections are made which are apparently genuine." But in this case the Court modifies the rule and says provisional allowances are permissible in "proper cases." Evidently where the ground of objection is that the claimant has been preferred it is not a "proper case."

Contra, obiter, In *re Kelly Dry Goods Co.*, 4 A. B. R. 528, 102 Fed. 747 (D. C. Wis.): "Surely no construction is admissible which would permit other creditors, through the mere filing of objections to a claim, to exclude a bona fide claimant from voting on the election of a trustee."

There may, however, be a preliminary determination of the value of securities held by a secured creditor, for the purposes of voting.⁶

§ 866. Only Partnership Creditors to Vote in Partnership Bankruptcies.—In partnership bankruptcies, it is only the partnership creditors who may vote for trustee; and this is so, even where the individual partners are also adjudicated bankrupts as individuals in the same proceedings and their individual estates in process of administration therein.⁷

§ 867. Conversely, Individual Creditors to Vote in Individual Bankruptcies.—In individual bankruptcies, the individual creditors are entitled to vote for trustee, although all the assets belong to the partnership and there is but one joint creditor.⁸

§ 868. Majority in Number and Amount, Present, Whose Claims Allowed, Requisite.—The election of a trustee is to be accomplished in general in the same manner in which creditors take action in other matters at their meetings. Thus, a majority in number and amount must coincide in their choice.⁹

§ 869. No Such Majority, Court to Appoint.—Where there is no majority on the election by the creditors, the court, that is to say, in prac-

5. See ante, § 812.

6. See ante, § 763.

7. Bankr. Act, § 5 (b): "The creditors of the partnership shall appoint the trustee; in other respects so far as possible the estate shall be administered as herein provided for other estates."

Obiter, In *re Eagles & Crisp*, 3 A. B. R. 733, 99 Fed. 696 (D. C. N. Car.). But the provision that the "creditors of the partnership shall appoint, etc.," applies only in the case of a joint petition. In *re Beck*, 6 A. B. R. 554, 110 Fed. 140 (D. C. Mass.). As to what claims are provable against the partnership as distinguished from the individuals, see post, § 2230, et seq., "Distribution in Partnership Cases."

8. In *re Beck*, 6 A. B. R. 554, 110 Fed. 140 (D. C. Mass.).

9. See ante, "Creditors' Meetings," § 581, et seq. There cannot be any official trustee appointed by the court, nor any general trustee to act in classes of cases. See Supreme Court's General Order in Bankruptcy, No. XIV. See criticism of this provision, In *re Cobb*, 7 A. B. R. 202, 112 Fed. 655 (D. C. N. Car.).

tice, the referee, makes the appointment. This the statute prescribes in so many words.⁹ Neither the statute nor rules limit the creditors to one balloting. If there is no choice on the first vote, the request of the creditors for an adjournment for a reasonable time, to compose their differences should be granted.¹⁰ If at the first meeting all claims offered are in dispute, and it is impracticable at that time to settle the dispute, it is within the proper discretion of the referee to make the appointment.¹¹ When the Court (referee) makes the appointment, it is the better practice not to appoint either of the opposing candidates.¹²

§ 870. Court Also to Appoint Where Creditors Fail Altogether to Act.—When no creditors (with allowed claims) appear at all, the court, also, may appoint the trustee.¹³

But the Court has not authority to appoint a trustee unless the creditors have failed to act.¹⁴

In *re Newton*, 6 A. B. R. 52, 107 Fed. 439 (C. C. A. Mo.): "When they fail to do so, either at the first meeting, or afterwards in case of a reopening of the estate, and not till then, power is conferred upon the court to make such appointment."

§ 871. Dispensing with Trustee Where No Assets, and No Creditors Present.—Where no assets are shown by the schedules and no creditor appears at the first meeting, the court (referee) may by order setting forth the facts dispense with the appointment of a trustee altogether.¹⁵

In *re Levy*, 4 A. B. R. 108, 101 Fed. 247 (D. C. Wis.): "In the absence of substantial assets, either appearing from the schedules or discoverable, the appointment of a trustee is not indispensable."

Thereafter, the court, without notice to creditors, at almost any length of time, may appoint a trustee if deemed advisable, even though the referee has long since returned the files in the case to the clerk, for the estate is not technically closed and "reopening" is not necessary in order to authorize the appointment.¹⁶

9. Bankr. Act, § 44 (a). In *re Kuffler*, 3 A. B. R. 162, 97 Fed. 187 (D. C. N. Y.); In *re Brooks*, 4 A. B. R. 50, 100 Fed. 432 (D. C. Pa.); In *re Richards*, 4 A. B. R. 631, 103 Fed. 849 (D. C. N. Y.).

10. See In *re Nice & Schreiber*, 10 A. B. R. 639, 123 Fed. 987 (D. C. Penn.); inferentially, In *re Kuffler*, 3 A. B. R. 162, 97 Fed. 187 (D. C. N. Y.).

11. In *re Cohen*, 11 A. B. R. 439, 131 Fed. 391 (D. C. Mass.).

12. Instance, In *re Cohen*, 11 A. B. R. 441, 131 Fed. 391 (D. C. Mass.); instance, contra (noting the trouble resulting therefrom), In *re Richards*, 4 A. B. R. 631, 103 Fed. 849 (D. C. N. Y.).

13. Bankr. Act, § 44 (a): "If the creditors do not appoint a trustee or trustees as herein provided, the court shall do so."

14. *Obiter*, In *re Fisher & Co.*, 14 A. B. R. 366, 370, 135 Fed. 223 (D. C. N. Y.); *Fowler v. Jenks*, 11 A. B. R. 255, 90 Minn. 74 (Sup. Ct. Minn.).

15. General Order XV; impliedly, *Clark v. Pidcock*, 12 A. B. R. 315, 129 Fed. 745 (C. C. A. N. J.); *obiter*, In *re Eagles & Crisp*, 3 A. B. R. 734 (D. C. N. Car.).

16. *Clark v. Pidcock*, 12 A. B. R. 315 (C. C. A. N. J.): In this case it appeared that at the first meeting of creditors called by the referee on the 21st day of November, 1899, no creditors were present, and no trustee was appointed

§ 872. But if Assets Shown, Trustee to Be Appointed, Though No Creditor Appears.—But if any assets are shown, even if they be exempt, a trustee should be appointed; for no one but the trustee has the power to set apart exempt property to the bankrupt, and the scope of General Order No. 15 cannot be extended.¹⁷

And in any case, even where no assets are shown and no creditor appears, it is the better practice to appoint a trustee to make an investigation. The deposit of \$5.00 to cover the trustee's fee must not be returned to the bankrupt, because it belongs to his estate; so there is no economy in omitting to appoint a trustee. Moreover, if no trustee is appointed and the estate is closed, in whom is the title to property that the bankrupt has concealed? Title to property does not vest until the appointment and qualification of a trustee (see § 70); and concealment is not a ground for refusing a discharge unless it is concealment from the "trustee" [see § 29 (b) (1)]. For examples of such situations, see

In re Toothacker, 12 A. B. R. 100, 101, 128 Fed. 187 (D. C. Conn.): "There appearing to be no assets, a trustee was not appointed * * *. By omitting to place it in the schedules, he was enabled to escape a trustee from whom to conceal it."

Rand v. Iowa Central Ry. Co., 12 A. B. R. 164, 96 App. Div. (N. Y.) 413: "The plaintiff contends that the title and right to maintain the action remained in him until the appointment of a trustee in bankruptcy, and since one was not appointed his title and right have not been divested. This contention on the part of the plaintiff seems so extraordinary and fraught with consequences so disastrous to the rights of creditors that a court should hesitate to so declare the law unless there be no avenue of escape."¹⁸

§ 873. Trustee Elected, Not Compelled to Act.—There is no power to compel a person who has been elected trustee to accept the trust.

And it has been held, in one case, that if there be no substantial assets, he may demand compensation as a condition of acceptance and that if creditors insist upon his acceptance, they will have to furnish him his fees or otherwise arrange with him.¹⁹

and that but one creditor proved his debt, and that the schedule of the bankrupt disclosed no assets, and that it was ordered by the referee that "until further order of the court no trustee be appointed and no other meeting of the creditors be called." On the 28th day of January, 1902, the referee made the final report above recited, and that "the estate of the bankrupt has been fully administered and so far as referred to me it has been closed," the court held that after the lapse of more than a year, it had jurisdiction under § 44 and Gen. Order 15 to appoint a trustee, upon the petition of the assignee of the creditor alleging that the bankrupt had died leaving various properties which he had fraudulently disposed of with intent to defraud creditors. However, this decision is qualified by the fact that the only creditor whose claim was allowable was the one asking the appointment.

¹⁷. Compare, to same effect, In re Smith, 2 A. B. R. 190 (D. C. Tex.).

¹⁸. Rand v. Railway Co., 16 A. B. R. 692, 186 N. Y. 58 (reversing 12 A. B. R. 164, 96 App. Div. 413).

¹⁹. In re Levy, 4 A. B. R. 108, 101 Fed. 247 (D. C. Wis.).

But there is no power in the court to allow him any other or different compensation than that prescribed in the Act.²⁰

§ 874. Either One Trustee or Three to Be Elected, Not Merely Two.—Creditors may elect one trustee or three trustees.²⁰ They may not elect merely two trustees. There must be one or three; no other number will do.²¹

But there is no requirement that all three be elected at once, and an election and appointment of merely two trustees is not necessarily void, the inference arising that the third trustee will later be elected.

In *re Fisher & Co.*, 14 A. B. R. 369, 135 Fed. 223 (D. C. N. J.): "The point made by the objecting creditor is that, as the creditors at their first meeting elected two trustees and not one trustee or three trustees, the appointment was absolutely void. I am not willing so to hold, especially in view of what was done in this case."

And a petition for leave to sell assets filed by two trustees before a third trustee is elected is not void, the third trustee being elected before the sale was made and joining in the petition therefor.²²

Presumably the creditors themselves determine the question as to whether there shall be one trustee or three.

§ 875. Whether Number May Be Subsequently Increased.—Whether, after one trustee has been elected, the creditors may, at a subsequent meeting, vote to increase the number to three and thereupon elect two more trustees to act with the one already appointed, is not decided under the present law. Probably the wording of § 44 would imply that such change could not be made unless the existing trustee had been "removed" or the office had been "vacated;" in which events, of course, the creditors would be entirely free to determine whether he should be succeeded in the office by one or by three. Under the law of 1867, by petition to the court, an additional trustee could be appointed.²³

§ 876. Concurrence of Two Requisite, Where Three Appointed.—Of course where three trustees are appointed, it requires a concurrence of two of the trustees to act in any matter.²⁴

§ 877. Qualifying of Trustees.—Trustees are required to enter into bond for the faithful performance of duty before entering on the duties of their office.

20. Bankr. Act, § 44. Also, see *post*, § 2029.

21. Bankr. Act, § 47 (b); In *re Fisher & Co.*, 14 A. B. R. 366, 135 Fed. 223 (D. C. N. J.).

22. In *re Fisher & Co.*, 14 A. B. R. 366, 135 Fed. 223 (D. C. N. J.).

23. (1867) In *re Overton*, 5 N. B. Reg. 366.

24. Bankr. Act, § 47 (b): "Whenever three trustees have been appointed for an estate the concurrence of at least two of them shall be necessary to the validity of their every act concerning the administration of the estate."

It is the referee's duty at once to notify the trustee of his appointment; whereupon it becomes the trustee's duty in turn at once to notify the referee of his acceptance or rejection of the trust.²⁵ No oath of office is expressly required, although, by general rules, such oath is appropriate. A trustee must qualify within ten days from the day of his appointment. The court may by order give him a longer period, however, but not to exceed five days extra, making fifteen days in all.²⁶ If he has not qualified by the end of that time, the delay is fatal; the office becomes ipso facto vacant and a new election must be held.²⁷

Inferentially, *Breckons v. Snyder*, 15 A. B. R. 112, 211 Pa. St. 176: "Although it does not appear of record that the trustee obtained an extension of time for the filing of a bond, the presumption is in favor of the regularity of all proceedings before the referee, and that the trustee complied with all the requirements of the law, and was qualified to act."

The creditors are to fix the trustee's bond in each instance and the amount of it is to be fixed by the majority in number and amount of creditors present whose claims have been allowed, in accordance with the usual rules as to creditors' actions at their meetings. The amount of the bond may be increased by them at any time;²⁸ and presumably may also be decreased by them.

If the creditors fail to fix the amount of the bond, the referee must fix it.²⁹

There must be at least two sureties on the trustee's bond;³⁰ (except when a surety corporation is surety), and each surety must be proved to be worth the full amount of the bond over and above all his debts and exemptions.³¹ Corporations, that is to say surety companies, may be sureties on the trustee's bond;³² in which event two sureties will not be necessary.³³

Suits upon trustee's bonds properly are brought in the name of the United States and no leave of court is necessary. If brought in any other name, leave of court must, at least, be had.³⁴

25. Gen. Order XVI.

26. Bankr. Act, § 50 (b): "Trustees, before entering upon the performance of their official duties, and within ten days after their appointment; or within such further time, not to exceed five days, as the court may permit, shall respectively qualify by entering into bond to the United States, with such sureties as shall be approved by the courts, conditioned for the faithful performance of their official duties."

27. Bankr. Act, § 50 (k): "If any trustee fail to give bond as herein provided and within the time limited, he shall be deemed to have declined his appointment and such failure shall create a vacancy in his office."

28. Bankr. Act, § 50 (c).

29. Bankr. Act, § 50 (c).

30. Bankr. Act, § 50 (e).

31. Bankr. Act, § 50 (f).

32. Bankr. Act, § 50 (g).

33. *In re Kalter*, 2 A. B. R. 590 (Ref. Penna.). As to whether the premium for the bond is chargeable against the estate, see analogously, *In re Hoyt*, 9 A. B. R. 574, 119 Fed. 987 (D. C. N. Car.).

34. *Alex Union Surety & Guaranty Co.*, 11 A. B. R. 32, 89 N. Y., App. Div. 3 (N. Y. Sup. Ct.).

It has been held that such action may be brought in the United States District Court.³⁵

DIVISION 2.

APPROVAL AND DISAPPROVAL OF CREDITORS' ELECTION.

§ 878. Approval and Disapproval of Creditors' Election.—The creditor's selection of a trustee is subject to the approval or disapproval of the Judge or Referee.³⁶

In *re Henschel*, 6 A. B. R. 25, 109 Fed. 861; 6 A. B. R. 305 (D. C. N. Y., rev'd on other grounds 7 A. B. R. 662, 113 Fed. 443): "This provision of course means something; it means that a supervisory power is vested in the court to meet contingencies which could not be definitely provided for in the act, and which must appeal to the good judgment and conscience of the court, and whereby the court would be armed with the power to prevent the selection of a person, who, in its judgment, and notwithstanding the expressed desire of the majority in number and amount of the creditors, or even of all the creditors, would not be a proper selection, and whose appointment might result in a defeat of the proper, just and equitable administration of the bankrupt law in that particular case; but the emergency should not be a trivial one; it should be one of grave character and due weight, and unless such an emergency appears in the present case, it would become the duty of the referee to approve the selection, always subject of course, to a review of such action by the learned district judge."

In *re Eastlack*, 16 A. B. R. 533, 145 Fed. 68 (D. C. N. J.): "The present Bankrupt Act contains no provision like the one quoted above from the Act of 1867 but the Supreme Court has promulgated an order, Gen. Ord. 13 * * *. It is evident that the Supreme Court intended by this order to establish a rule concerning the approval or disapproval of elections by creditors similar to that which existed under the Act of 1867. The decisions under the present law on this point show that such has been the understanding of our federal courts."

In fact, the theory of the law is that creditors simply recommend the trustee and that the court appoints him; for § 2 in clause 17 provides that courts of bankruptcy shall have power "Pursuant to the recommendation of creditors, or when they neglect to recommend the appointment of trustees, appoint trustee, and upon complaints of creditors, remove the trustees for cause upon hearings and after notice to them."

§ 879. Statutory Qualifications of Trustee.—The only statutory qualifications of the trustee are that he have actual competency and have actual

35. U. S. ex rel. *v. Union Surety Co.*, 9 A. B. R. 114, 118 Fed. 482 (D. C. N. Y.). In *re Kajita*, 13 A. B. R. 19 (D. C. Hawaii). Trustee's bonds do not become void on the first recovery but continue in force for two years after the estate is closed, unless the amount thereof is previously exhausted.

36. Gen. Order No. XIII: "The appointment of a trustee by the creditors shall be subject to be approved or disapproved by the referee or by the judge, and he shall be removable by the judge only." In *re Hare*, 9 A. B. R. 522 (D. C. N. Y.).

The Bankruptcy Act of 1867 contained a similar provision in the statute itself. U. S. Rev. Stats., § 5034: "All elections or appointments of assignees shall be subject to the approval of the judge, and when in his judgment, it is for any cause needful or expedient, he may appoint additional assignees or order a new election."

residence or an office in the district; either individuals or corporations being competent.³⁷

The statute requires that the trustee be "competent to perform the duties of that office." Competency ought not to be limited to capability, but should exclude as well those whose relations to the estate are such as to make them unfit. It is with the question of what constitutes competency or incompetency that the courts have been mostly concerned.

In *re Henschel*, 6 A. B. R. 25 and 305, 109 Fed. 861 (Ref. and D. C. N. Y., rev'd on other grounds 7 A. B. R. 662, 113 Fed. 443): "To my mind the selection of a proper and competent person as a trustee, in a case of the importance of the present one, should be regarded not as a merely perfunctory matter, but as a matter to be treated in the interest of all the creditors, and when I say 'all the creditors,' I do not mean a majority, but all the creditors, and that presents the fact that the minority of creditors have also some rights which the court will recognize and respect; and to secure such a proper trustee, the person to be nominated and elected, and who shall be installed in the office, should be like Cæsar's wife, entirely above suspicion; that is to say, not only above suspicion, in so far as personal character or personal capacity are concerned, but also above the suspicion of having any undue affiliations or connections with the bankrupt; one holding no interest which is favorable to the bankrupt, and above the suspicion of having made anti-election bargains, pledges or promises with any clique or set of creditors, or with any number of attorneys representing certain interests.

"This is my view of what should be found in the proper trustees; it is not an ideal or fanciful creation, but it is what every trustee should be in order to properly execute the bankrupt law, according to its true spirit and intent."

§ 880. Neither Residence nor Citizenship Requisite, if Office in District.—Neither residence nor citizenship is required, but merely that the proposed trustee have an office or residence within the judicial district; that is to say, in this respect it is sufficient if the trustee have an office or residence anywhere in the district.

§ 881. Corporations Competent.—Surety companies may act as trustee.³⁸

§ 882. Creditors' Choice Not to Be Lightly Interfered with.—The choice of the creditors should not be interfered with on slight grounds; and, unless there be shown incompetency—either personal, as want of capacity or lack of integrity; or because of the trustee's relation towards the bankrupt; or of his having adverse interests towards the estate; or of course,

³⁷. Bankr. Act, § 45: "Trustees may be individuals who are respectively competent to perform the duties of that office, and reside or have an office in the judicial district within which they are appointed, or corporations authorized by their charters or by law to act in such capacity and having an office in the judicial district within which they are appointed."

³⁸. Bankr. Act, § 45.

because of his lack of an office or residence within the district, his appointment should be approved.³⁹

In *re Lloyd*, 17 A. B. R. 98, 148 Fed. 92 (D. C. Wis.): "It must be remembered, however, that, by the terms of the Act the creditors are empowered to select a trustee. It is a serious matter to disfranchise creditors and deprive them of rights expressly conferred by the Bankruptcy Act."

In *re Lazoris*, 10 A. B. R. 32, 120 Fed. 716 (D. C. Wis.): "Their selection is subject to approval or disapproval by the referee for cause only."

In *re Eastlack*, 16 A. B. R. 535, 145 Fed. 69 (D. C. N. J.): "These cases establish the rule that the election of a trustee by the creditors is not to be disapproved, unless there is good reason for believing that the election has been directed, managed or controlled by the bankrupt or his attorney or by some influence opposed to the creditors' interest."

§ 883. Candidate May Be Creditor.—Merely that the candidate is a creditor, or even is the largest creditor, is no disqualification in itself, no antagonistic relation being shown, and the claim not being disputed.⁴⁰

§ 884. Hostility Toward Bankrupt No Disqualification.—The trustee's hostility to the bankrupt is not a valid objection to the approval of his election, unless perhaps in extreme cases. It is not the trustee's duty to be unbiased toward the bankrupt.⁴¹

§ 885. Solicitation of Office No Disqualification, nor Solicitation of Claims Illegal.—Solicitation of the office is not in itself a disqualification, unless done in the interest of the bankrupt or at his request.⁴²

Nor is the solicitation of claims illegal.

Compare, In *re Lloyd*, 17 A. B. R. 98 (D. C. Wis.): "It is not professional, but is not unlawful, for lawyers to solicit claims. The ethics and best thought of the profession are opposed to any solicitation of business. But there is no doubt that the practice is common, and perhaps more prevalent in bankruptcy than in other departments. The habit is not to be commended, but matters of taste or etiquette must be left largely to the good sense of the individual attorney."

§ 886. Undischarged Bankrupt Incompetent.—A bankrupt who himself has not yet been discharged should not be appointed trustee over another bankrupt's estate.⁴³

39. In *re Lewensohn*, 3 A. B. R. 299, 99 Fed. 73 (D. C. N. Y.); compare, to same effect, In *re Gordon Supply & Mfg. Co.*, 12 A. B. R. 94 (D. C. Pa.), in which case, however, the court set aside the election because of possible adverse relations. In *re Blue Ridge Packing Co.*, 11 A. B. R. 36, 125 Fed. 619 (D. C. Penna.). Compare, to same effect, under law of 1867, In *re Smith*, 1 N. B. Reg. 243, 247, 2 Ben. 113, 22 Fed. Cas. 261; In *re Clairmont*, 1 N. B. Reg. 276, Fed. Cas. 810; In *re Funkenstein*, Fed. Cas. 1,004; In *re Barrett*, 2 N. B. Reg. 533, Fed. Cas. 909; (1867) In *re Grant*, 2 N. B. Reg. 106, 10 Fed. Cas. 973.

40. In *re Lazoris*, 10 A. B. R. 31, 120 Fed. 716 (D. C. Wis.).

41. In *re Lewensohn*, 3 A. B. R. 299, 98 Fed. 576 (D. C. N. Y.); In *re Manzan*, 13 A. B. R. 303, 133 Fed. 1000 (D. C. Pa.).

42. In *re Brown*, 2 N. B. N. & R. 590 (Ref.); [1867] In *re Haas*, 8 N. B. Reg. 189. But see [1867] In *re "A Bankrupt,"* 2 N. B. Reg. 100.

43. In *re Smith*, 1 A. B. R. 37 (Ref. N. Y.).

§ 887. Trustee Elected in Bankrupt's Own Interest Incompetent.

—The election of a trustee in the bankrupt's own interest should be disapproved. It is the policy of the bankruptcy law to take the management of bankrupt estates out of the hands of the bankrupts themselves. The bankrupt has no right to influence the choice of a trustee and he has no voice in the election. Accordingly, interference by the bankrupt, the voting of claims in his interest or at his direction, should be discountenanced and held to invalidate the choice of a trustee thus secured.⁴⁴

In re Lloyd, 17 A. B. R. 97, 148 Fed. 92 (D. C. Wis.): "No attorney should be permitted to vote any claim that has come to him through the instrumentality of the bankrupt. * * *

"It appeared in evidence that it has been customary for bankrupts to furnish lists of creditors to some certain lawyer before the schedules are filed. The referee, in his opinion, denounces this practice as reprehensible. I fully concur in that opinion. By applying to the bankruptcy court, the bankrupt voluntarily surrenders all control over his estate, and the same passes to the officers of the law, under the Act. Any effort on his part to control the selection of a trustee, or to shape any of the proceedings of the court, must be resented and rebuked. It is a pernicious intermeddling which cannot be too strongly condemned. Referees should be vigilant to detect, and take all lawful means to prevent, any such interference by the bankrupt in court proceedings. * * *

"If it appears that any disclosure of the contents of the schedules has been made before the same are filed, the presumption arises that the bankrupt is seeking thereby to accomplish some ulterior purpose, and any claims secured through such illicit practice should not be allowed any part in the selection of a trustee."

[1867] In re Wetmore, Fed. Cas. 17,466: "While the choice of an assignee is vested by law in a majority in number and amount of the creditors, it is subject, nevertheless, to the approval of the district judge—a provision which

⁴⁴ In re McGill, 5 A. B. R. 155, 106 Fed. 57 (C. C. A. Ohio), where the Circuit Court of Appeals decided that since the referee presiding at the first meeting of creditors must determine the qualifications of voters, he is right in refusing to permit one to vote who acts under a power of attorney nominally executed by certain creditors but in fact procured by the bankrupt himself in order to vote for his choice for trustee.

Falter v. Reinhard, 4 A. B. R. 782, 104 Fed. 292 (D. C. Ohio, affirmed sub nom. In re McGill, 5 A. B. R. 155, 106 Fed. 57, C. C. A.); to same effect, see In re Dayville Woolen Co., 8 A. B. R. 85, 114 Fed. 674, in which case one attorney, it appears, held the majority of the claims and was about to vote them. He had been attorney for the bankrupt before the bankruptcy. He refused to answer the question asked by some of the other creditors present whether any of the claims he was intending to vote were held in the interest of the bankrupt, claiming that there was no right to ask the question. The reviewing court held that it was the duty of the referee to have put the question and to have permitted a full investigation into the relations of the voter to the bankrupt and the creditors, and if there had appeared to be reasonable cause to believe any collusion existed that the referee should have declined either to receive the collusive votes or to approve the election. In re Lewensohn, 3 A. B. R. 293, 98 Fed. 576 (D. C. N. Y., cited, with approval, in In re McGill, 5 A. B. R. 155, 106 Fed. 57, C. C. A. Ohio). Also, obiter, In re Mabrie & Brown, 11 A. B. R. 449, 128 Fed. 316 (D. C. Pa.): "The votes cast upon proxies that had been solicited by the bankrupts were properly rejected." (1867) In re Houghton, Fed. Cases 6,729. But compare, In re Gordon Supply & Mfg. Co., 12 A. B. R. 94, 129 Fed. 622 (D. C. Pa.); In re Henschel, 6 A. B. R. 25 and 305, 109 Fed. 865 (Ref. and D. C. N. Y., reversed on other grounds 7 A. B. R. 662, 113 Fed. 443).

implies a discretionary power to disapprove a choice so made. While the judge ought not arbitrarily, capriciously, or from dislike or partiality, to overrule the decision of the creditors, he is bound to see that the rights of the minority are properly protected, and to refuse confirmation, where he has good reason to suspect the assignee had been chosen in the interests of the bankrupts."

[1867] *In re Bliss*, Fed. Cas. 1,543: "It is certainly against the policy of the act that a bankrupt should select his assignee, as, by electing a fraudulent person or person disposed to favor him, the rights of the creditors might suffer. It is true that, if the creditors do not care sufficiently for the matter to attend the meeting, they ought not to complain. But still the law is no less brought into contempt. A fraudulent discharge of a debtor, or the discharge of a debtor who does not surrender all his assets, is precisely what those charged with the execution of the law are bound to guard against. If the court could be advised that in any particular case the bankrupt had brought in one or more of his friends, although bona fide creditors, and had by them chosen an assignee who was also his friend and in his interest, it is clear that the court would withhold its approval."

In re Columbia Iron Wks., 14 A. B. R. 527, 142 Fed. 234 (D. C. Mich.): "Mr. Moore, it is shown by the report of the trustee, holds, with one of the bankrupt's attorneys, the power of attorney of Bennett, trustee, and also several powers of attorney running to himself jointly with another of the bankrupt's attorneys, and this does not appear to be denied. He was disqualified from voting for a trustee upon those claims (*In re Wetmore*, 16 N. B. R. 514; *In re McGill*, 5 A. B. R. 155, 106 Fed. 57-62), and his vote should have been rejected."

And the furnishing of lists of creditors in advance of the filing of the schedules is a reprehensible practice.⁴⁵

Thus, likewise, the trustee should not even be nominated by the bankrupt or his attorneys.

In re Rekersdres, 5 A. B. R. 811, 108 Fed. 206 (D. C. N. Y.): "Mr. Mintz also produced powers of attorney from three creditors to vote for a trustee, and these were a majority in number and amount of the creditors in attendance. Objection was made in behalf of another creditor to the nomination of a trustee by Mintz, and the referee refused to appoint the candidate so named, because his business association with Harvey, the attorney of the bankrupt, raised the presumption that the person nominated for trustee was nominated in fact by the bankrupt or his attorney, and therefore not a suitable person to act in the interest of the creditors, since the trustee should be the free and unbiased choice of the creditors, and not be influenced by any other interest. *Falter v. Reinhard*, 4 Am. B. R. 782; *In re McGill*, 5 Am. B. R. 155, 106 Fed. 57.

"The referee's ruling is approved. A trustee should be wholly free from all entangling alliances or associations that might in any way control his complete independence and responsibility. For this reason I disallow the appointment of attorney's clerks or other employees as trustees or receivers, under the practical control of other interests not directly responsible.

"For substantially similar reasons, proxies presented under circumstances of evident collusion with the bankrupt should be disallowed. It would be intolerable if the bankrupt by such means should be enabled to prevent or embarrass necessary investigation into his conduct or estate."

45. *In re Lloyd*, 17 A. B. R. 97, 148 Fed. 92 (D. C. Wis.).

Neither the bankrupt nor his attorney should be permitted to have any influence in the election of the trustee.⁴⁶ And a former attorney of the bankrupt is an improper person.⁴⁷

A stockholder and legal adviser of the bankrupt corporation is an improper person for trustee.

In *re Gordon Supply & Mfg. Co.*, 12 A. B. R. 94, 129 Fed. 622 (D. C. Pa.): "There can be no objection personally to the trustee who has been chosen by a majority of those interested in the estate, at the creditors' meeting; and the right to such majority under ordinary circumstances to control the matter must be conceded. The trustee is the representative of creditors and they are the ones to decide who he shall be, subject only to the right of the court to supervise the choice where it is objected to. In the present instance the trustee chosen is not only a stockholder in the bankrupt corporation against which the proceedings were instituted, but he has been admittedly associated closely as attorney and legal adviser with those who have been hitherto in control, and their management is not only the subject of criticism, but may call for action on the part of the trustee to hold them personally responsible. To approve of the trustee now selected comes too near, therefore, to a continuation of previous conditions to be warranted. With so many others who would be fully as efficient and entirely acceptable, the majority have no right to impose their present choice or the objecting minority.

"The election is therefore set aside and a new election ordered."

But where the circumstances preclude the inference of acting in the bankrupt's interests, it may not be improper to allow the bankrupt's former attorney to vote claims and even to be voted for as trustee. Thus, an attorney employed only for the special purpose of preparing and filing a bankrupt's petition, for which he is paid no fee, may vote for trustee upon claims of creditors sent to him without his solicitation or the procurement of the bankrupt, especially where the bankrupt had disappeared.⁴⁸ And where uninfluenced, the votes for a former attorney of the bankrupt are not to be rejected as nullities.⁴⁹

And it has been held, apparently, that some showing of actual influence effected must be made, and that only such votes as were so proved to have influenced should be rejected.

In *re Eastlack*, 16 A. B. R. 536, 145 Fed. 168 (D. C. N. J.): "There is no evidence whatever tending to show that any one of these persons was influenced in his vote either by the bankrupt or his attorney. It is true that, as the letter set

46. *Obiter*, In *re Cooper*, 14 A. B. R. 320, 135 Fed. 196 (D. C. Penna.); In *re Lloyd*, 17 A. B. R. 97, 148 Fed. 92 (D. C. Wis.).

47. *Inferentially*, In *re Gordon Supply & Mfg. Co.*, 12 A. B. R. 94, 129 Fed. 622 (D. C. Penn.). Compare cases cited in *In re Rung*, 2 A. B. R. 620 (D. C. N. Y.). It has been held that the attorney for the bankrupt should not even be allowed to appear for a creditor. In *re Kimball*, 4 A. B. R. 144, 100 Fed. 177 (D. C. Mass.). But such a broad rule is hardly proper. There may be occasions when such an appearance would be proper and again when it would not be proper. At any rate the creditor's claim itself should not on that account be disallowed. *Obiter*, In *re Kimball*, 4 A. B. R. 144, 100 Fed. 177 (D. C. Mass.).

48. In *re Cooper*, 14 A. B. R. 320, 135 Fed. 196 (D. C. Penn.).

49. In *re Machin & Brown*, 11 A. B. R. 449, 128 Fed. 316 (D. C. Penn.).

forth in the referee's certificate was sent 'to substantially all the creditors,' some, and possibly all, of these 32 creditors received copies of it. But not one of them was called as a witness on the question as to whether he was influenced by it. For aught that appears in the case, they may have made inquiry concerning Dr. Grace and, independently of the letter they received, have satisfied themselves that he was the best available man for the trusteeship. The situation was altogether different from what it would have been had these 32 creditors, or any considerable portion of them, been brought to the referee's office by the bankrupt or his attorney."

Compare, *In re Lloyd*, 17 A. B. R. 98 (D. C. Wis.): "I do not think the referee had power to disqualify the 13 creditors who appear to have employed Bouck & Hilton in the regular way, and who had no concern with the bankrupts in the matter, simply because Bouck & Hilton had received certain other claims through the instrumentality of the bankrupt. This would in effect be to punish creditors who were innocent in the premises."

But if the case *In re Eastlack* is to be interpreted as so laying down the rule, it is not to be approved. Such proof would be almost impossible to produce, and the cleverer and more dangerous the collusion, the more difficult would it be to disqualify the particular voters or candidates who have colluded.⁵⁰

§ 888. Votes Cast by Relatives.—Thus, it would likewise seem that votes cast by relatives of the bankrupt should be closely scanned, before allowing the election to turn on them.

§ 889. Prior Assignee or Receiver as Candidate.—A receiver or assignee for creditors in charge of the property under orders of a State Court, and who has been acting as such, is generally to be considered an improper person for trustee, because he holds adverse interests and may have to be required to account for and to surrender property to the bankruptcy court, and thus be called upon to hold antagonistic and inconsistent positions.⁵¹ However, in some instances where such receiver or assignee has taken no important steps under the receivership or assignment and has practically been simply holding the property until bankruptcy proceedings could be instituted, and where he is not otherwise disqualified, such receiver or assignee has sometimes been appointed receiver or trustee in the bankruptcy proceedings also. Especially does the practice prevail where no objection is made.

50. See *In re Morton*, 9 A. B. R. 508 (D. C. Mass.), for a peculiar state of facts: All unsecured and unpreferred creditors had been paid in full; a new trustee was to be selected to distribute the assets amongst preferred creditors who might thereafter have their claims allowed; some of these unpreferred creditors voted at the bankrupt's solicitation for a certain trustee; held, that the court would not disturb the selection, the bankrupt's solicitation not being shown to be by way of improper inducement.

51. But see contra, *In re Blue Ridge Packing Co.*, 11 A. B. R. 36, 125 Fed. 620 (D. C. Penn.). Also, contra, instance, *In re Byerly*, 12 A. B. R. 186 (D. C. Penn.).

§ 890. **Creditor with Disputed Claim Incompetent.**—A creditor whose claim is disputed and between whom and the estate contest is likely to arise and who from the circumstances is likely to be antagonistic to the estate, should not be approved.⁵²

§ 891. **Candidate Interested in Scheme of Composition Incompetent.**—A candidate who is interested in a scheme of composition with the creditors is an improper person for trustee.⁵³

§ 892. **Votes Cast for Disqualified Candidate Not Nullities.**—Votes cast for a disqualified or incompetent candidate are not absolute nullities so as to give the election to the other candidate, who has not received the votes of a majority of creditors present, both in number and amount, whose claims have been allowed, for the creditor is still “present” with an “allowed” claim.⁵⁴

In *re Machin & Brown*, 11 A. B. R. 449, 128 Fed. 316 (D. C. Pa.): “Conceding for present purposes that he could not be approved because of his previous relation, it does not follow that the votes voluntarily cast for him are not to be regarded at all. The creditors who cast them were exercising ‘a legal right in a legal and proper manner,’ to use the language of the referee, and even if they were voting for a candidate who could not be approved by the court, this did not make their votes a nullity so that the opposing candidate must be declared elected.”

But where the votes are by proxies and the proxies are not duly executed, the creditors are not to be considered as “present” and their proxy votes are not to be counted.⁵⁵

§ 893. **Question of Collusion to Be Definitely Disposed of before Approval.**—The question as to whether there is any collusion with the bankrupt or preferred creditor is one which should be definitely disposed of before the appointment, and, if there appears to be reasonable cause to believe such collusion exists, the referee should either decline to receive the collusive votes or to approve the election until the question is settled.⁵⁶

52. In *re Law*, 13 A. B. R. 650 (Ref. Ills., affirmed by D. C.): In this case the court held that powers of attorney obtained through the influence of the attorneys for creditors who have received alleged preferences may not be used in the selection of a trustee, especially in a case where the unsecured creditors have no possible way of realizing on their claims unless the trustee is able to recover the alleged preference. See (impliedly) In *re Lazoris*, 10 A. B. R. 31, 120 Fed. 716 (D. C. Wis.); compare, to same effect, cases cited in In *re Rung*, 2 A. B. R. 620 (D. C. N. Y.).

53. In *re Wrisley Co.*, 13 A. B. R. 193 (C. C. A. Ills.). Analogously, In *re E. T. Kinney Co.*, 14 A. B. R. 611 (D. C. Ind.).

54. If the incompetent candidate has received the majority in number and the other candidate the majority in amount, the referee may appoint. In *re Lazoris*, 10 A. B. R. 31, 120 Fed. 716 (D. C. Wis.).

55. In *re Henschel*, 7 A. B. R. 662, 113 Fed. 443 (C. C. A. N. Y., reversing 6 A. B. R. 305). See ante, § 582, et seq.

56. In *re Dayville Woolen Co.*, 8 A. B. R. 85, 114 Fed. 674 (D. C. Conn.).

§ 894. When Referee Disapproves, Order of Disapproval to Be Entered and Opportunity for Review Given.—When the referee disapproves of the creditors' choice, it is his duty to make an order to that effect, and the parties then may carry it up for review by the judge as in case of any other order made by the referee.

In re Hare, 9 A. B. R. 520, 119 Fed. 246 (D. C. N. Y., Ray, J.): "This they proceeded to do. The creditors having appointed a trustee, there was nothing for the referee to do in that regard except approve or disapprove such appointment. * * *

"It is plain that, the appointment by the creditors having been actually made, the referee was called upon to approve or disapprove the appointment. This he could not do by mental action or words alone. It was his duty to make an order in writing disapproving the appointment, if he disapproved, and on this the parties had a right to be heard before the judge, as 'he (the trustee) shall be removed by the judge only.' This general order confers no power on a referee to announce, as was done in this case, that he will not appoint the trustee already appointed by the creditors. It does authorize him to disapprove such' appointment by order, and should this be done at the time the appointment is made by the creditors it is probable that the creditors might proceed at once to appoint some other person, as this would be an acquiescence in such disapproval; but should they not do this the matter should be reported to the judge, who may remove the trustee appointed by the creditors, and order another appointment by the creditors."

§ 895. Upon Final Disapproval, Another Election Requisite, Referee Not to Appoint.—But if creditors do not carry up the order of disapproval or if, after it has been carried up, the judge affirms it, then *the creditors should hold another election*; and the referee has at no time the right, upon disapproval of the creditors' choice, at once and summarily to appoint a trustee himself; the creditors must be given an opportunity again to vote.⁵⁷

In re Hare, 9 A. B. R. 520, 119 Fed. 246 (D. C. N. Y.): "In no event can the referee ignore the appointment made by the creditors, and proceed summarily to appoint the trustee without holding another election, as was done in this case. He cannot compel the creditors to vote, but he can give them an opportunity. If they do not vote, they have neglected to appoint or recommend."

In re Lewensohn, 3 A. B. R. 299, 98 Fed. 576 (D. C. N. Y.): "If upon the referee's disapproval of an elected trustee or upon a trustee's refusal to accept or failure to qualify, there is a vacancy in the office of trustee, the case falls within § 44 of the Bankruptcy Act and a further election by the creditors must be had where such an election is practicable. The court may not, as a rule, appoint until after opportunity is afforded creditors for a new election where that is practicable."

In re MacKellar, 8 A. B. R. 669, 116 Fed. 547 (D. C. Penn.): "The right of a referee to disapprove or veto the choice made by the creditors is quite

57. In re Mangan, 13 A. B. R. 303, 133 Fed. 1000 (D. C. Penn.).

different from the right to himself name. The act expressly vests in the creditors the right to say who shall represent them in administering the bankrupt's estate (§ 44); and it is only when they make no choice that the court or referee is authorized to do so for them (*Ibid*). That is to say, where there has been no action on the part of creditors, the duty devolves upon the court of supplying it. It is not authorized to intervene, however, simply because the choice is one which cannot be approved; an unworthy choice is not the same as no choice at all; the creditors by actually acting having indicated their intention to avail themselves of the privilege given them by the law, which is not exhausted by a single exercise of it. The section which we are considering gives them the right to meet and appoint a trustee whenever and so often as there is a vacancy; and this occurs as is pointed out in *In re Lewensohn*, 3 Am. B. R. 299, 98 Fed. 576, when they have chosen someone whom the referee declines to approve. It therefore became the duty of the referee, not to name a trustee, as he did, but to call another meeting of the creditors and let them do so."

DIVISION 3.

TRUSTEE'S RELATION TO CREDITORS AND COURT.

§ 896. Occupies Dual Position—Official Custodian for All—Also Party Litigant.—The trustee occupies a dual position. He is both an officer of the court, like a receiver or marshal, protecting and administering the property in the interests of all, and also is the owner of an interest, a party litigant, as having the title to the general assets in trust for unsecured creditors.⁵⁸

McLean v. Mayo, 7 A. B. R. 116, 113 Fed. 106 (D. C. N. Car.): "While the Bankruptcy Act creates the office of trustee in bankruptcy, such trustee is a quasi officer of the court in a qualified sense; he is in reality elected by and represents the creditors of the bankrupt under the provisions of the Bankruptcy Act. The bankruptcy court will protect the trustee in the discharge of his quasi official duties, but as the representative of the creditors his duties as such representative must be discharged, not as an officer of the court, strictly speaking, but as provided in the Bankrupt Act."

Compare, *Goldman v. Smith*, 2 A. B. R. 104 (Ref. Ky.): "But it would violate the main purpose of the Bankruptcy Law which is to distribute the property of the bankrupt equally among his creditors, to hold that the trustee represented lien claims, or would or could do anything to perfect or preserve a lien against his estate."

Compare, *In re Smith*, 9 A. B. R. 603 (D. C. N. Y.): "A trustee in bankruptcy is defined by the Bankrupt Act as an officer (§ 1) and is, in a certain restricted sense, an officer of the Court—but he is not an officer of the court in any such sense as a receiver. He takes the legal title to the property, and in respect to suits stands in the same general position as a trustee of an express trust, or an executor."

⁵⁸. *In re Baber*, 9 A. B. R. 406, 110 Fed. 520 (D. C. Tenn.); impliedly, *Taylor v. Taylor*, 4 A. B. R. 215, 45 Atl. 440 (N. J. Ch.). Thus, notice to the trustee is notice to all creditors, *In re Hanson*, 5 A. B. R. 747, 107 Fed. 252 (D. C. Ore.).

For these reasons, while representing secured creditors in his capacity as custodian, he does not represent them in any other capacity, his capacity as a party litigant or party in interest being confined to representing unsecured creditors.⁵⁹

Taylor v. Taylor, 4 A. B. R. 215 (N. J. Ch.), 45 Atl. 440: "The point, however, made by the counsel for Mr. Murphy, is that the trustee represents all the creditors, and that, inasmuch as this is a suit brought by a creditor to reach the property of his bankrupt debtor, the right to sue for such assets upon bankruptcy passed to the trustee. In respect to general creditors of a bankrupt, the trustee is undoubtedly their representative. In gathering in the assets of a bankrupt, he can, as such representative of the general creditors, seek to uncover property fraudulently conveyed or concealed by the debtor. The right of a trustee to pursue and recover by suit any property which legally or equitably belongs to the estate of a bankrupt cannot be doubted. A receiver, as the representative of an insolvent corporation, may file a bill to set aside illegal or fraudulent transfers of the property of a corporation. *Smith, Rec.*, pp. 397-406; *Button Co. v. Spielman*, 50 N. J. Eq. 120, 24 Atl. 571; *Spielman v. Knowles*, 50 N. J. 796, 27 Atl. 1033. So an assignee, under our assignment act, and executors and administrators of an insolvent estate, as the representatives of the general creditors, may, for the benefit of the creditors, set aside conveyances of the assignor or decedent made in fraud of their creditors, to the extent that such property is needed for the payment of debts. *Pillsbury v. Kingdon*, 33 N. J. Eq. 287. But while the trustee so represents general creditors, and while the entire right of such creditors to pursue the property of the bankrupt passes to the trustee, who thus obtains an exclusive right to bring such suits (*McCartin's Ex'rs v. Perry's Ex'r*, 39 N. J. Eq. 198), such officer does not succeed to the rights of secured creditors. A creditor who has a lien upon the property of the bankrupt is his own representative, so far as concerns his security."

Compare, *In re Ducker*, 13 A. B. R. 769, 134 Fed. 43 (C. C. A. Ky.): "The trustee is the hand of the court. He stands as its agent to liquidate the assets, to protect them and bring them before the court, for final distribution. He is not, in fact, more representative of one creditor or claimant than another. The trustee, in the procedure, because he has the legal title to the assets and is charged with the duty of saving and protecting them, represents the general fund. He is not a purchaser, but as the title of his office imports, he is trustee for all who have interests, and according to those interests. He himself has no interest and there is nothing in his representation which stands between the court and those who have interests for the recognition and protection of which they appeal to its authority. We have thus explained our views upon this subject founded as they are upon what we conceive to be fundamental and controlling principles."

59. *Goldman v. Smith*, 2 A. B. R. 104 (Ref. Ky.), in which case it was held the trustee cannot perfect liens for secured creditors.

When asking for allowance out of the estate for his own compensation and for expenses, he does not represent creditors, but represents simply himself. But see, apparently contra, but obiter, *Gray v. Mercantile Co.*, 14 A. B. R. 780, 138 Fed. 344 (C. C. A. N. Dak.): "The trustee is not their representative. He is seeking to strike down the allowance of their claims, and in this is the representative of the general creditors of the estate. *Chatfield v. O'Dwyer*, supra. Of course he cannot represent or speak for both sides to the controversy."

§ 897. **Occupies Fiduciary Relation.**—A trustee stands to creditors in a fiduciary relation.⁶⁰

In re Wrisley Co., 13 A. B. R. 193, 133 Fed. 388, 390 (C. C. A. Ills.): "A trustee in bankruptcy is an officer of the court chosen by vote of the creditors. He stands to creditors in a fiduciary relation. He holds the estate in trust primarily for creditors; secondarily, if there be a surplus, for the benefit of the bankrupt. He should have no interest to serve except to conserve the estate. He should not be interested in any scheme of composition. In all matters between creditors and bankrupt he should stand indifferent. His sole care should be to make the most out of the estate, and that primarily in the interest of the creditors. When he goes beyond that, and seeks to aid the bankrupt at the expense of the creditors, and by concealment or by false representations induces creditors to act contrary to their interest, he violates his duty, and should be removed from the trust to which he has been false."

He is chosen to represent *all* creditors.⁶¹

In re Baird, 7 A. B. R. 448, 112 Fed. 960 (D. C. Pa.): "It may be safely said, however, that if a trustee bears in mind that he is the representative of the estate considered as a whole, is bound to be vigilant and attentive in advancing its interests, and is under obligation to seek to carry out in the strictest good faith the provisions of the Bankrupt Act where they seem to apply plainly to the estate committed to his charge, he is not likely to go far wrong in doing or refusing to do, what may be asked of him by the creditors."

He should not be interested in any scheme of composition.⁶²

He should have no interest to serve except to conserve the estate.⁶³ Amicable relations between the trustee and creditors are much to be desired.⁶⁴

§ 898. **Trustee Not to Be Dictated to by Creditors.**—He is not to be dictated to by creditors and he should follow his best judgment.⁶⁵

In re Columbia Iron Wks., 14 A. B. R. 526, 142 Fed. 234 (D. C. Mich.): "Equally removed from the interference of the creditors is the action of the trustee so long as that officer shall act with fidelity to his trust. He is chosen to represent all the creditors, not a majority, however great. * * * Subject to the control of the court and statutory limitations, the entire administration of the trust estate is in his hands. He cannot, therefore, yield his judgment to that of a majority of the creditors, merely because they are a

60. Compare, to same effect, In re Royce Dry Goods Co., 13 A. B. R. 267 (D. C. Mo.).

Before the election of a trustee, if no receiver is appointed, the bankrupt is the quasi trustee of the property, In re Wilson, 6 A. B. R. 287, 289 (D. C. W. Va.); obiter and inferentially, Blake v. Valentine, 1 A. B. R. 378, 89 Fed. 691 (D. C. Calif.); ante, § 383.

61. In re Lewensohn, 9 A. B. R. 368, 121 Fed. 539 (D. C. N. Y.); In re Columbia Iron Wks., 14 A. B. R. 530 (D. C. Mich.).

62. In re Wrisley Co., 13 A. B. R. 193 (C. C. A. Ills.).

63. In re Wrisley Co., 13 A. B. R. 193 (C. C. A. Ills.).

64. McPherson v. Cox, 96 U. S. 404; May v. May, 167 U. S. 310.

65. (1867) In re Dewey, 4 N. B. Reg. 412, 414; inferentially, In re Baber, 9 A. B. R. 406, 119 Fed. 525 (D. C. Tenn.); inferentially, In re Baird, 7 A. B. R. 448, 112 Fed. 960 (D. C. Pa.).

majority, without a breach of his trust. To thus abdicate his duties is to make himself a mere passive trustee. It is proper that he should consult with the creditors upon important matters and get the benefit of their knowledge and experience, but the responsibility of decision rests upon him. *Finance Co. v. Warren*, 82 Fed. 528. The 43rd section of the act of 1867 made provision for superseding the ordinary bankruptcy proceedings by a vote of three-fourths of the creditors and the conveyance to trustees of the estate of the bankrupt to wind up and settle the same under the direction of a committee of the creditors. * * * The present Bankruptcy Law has no corresponding provision. The strong inference from its absence is that the trustee must discharge his duties according to his best judgment, subject only to the control of the court. He has been held a quasi officer of the court. * * * It is equally objectionable, it would seem, for him to attempt to serve the body of the creditors represented by the trustee and his own clients, who have claims against the estate. *Ex parte Arrowsmith*, 14 Ves. 209. While thus far in the case at bar no conflict between his duty to the trustee and that owing to his clients seems to have arisen, such a conflict is not unlikely and should be forestalled."

But of course the trustee may, if he so desires, and it has even been held in one case that the court may order him, to submit questions concerning the administration of estates to the creditors for their advice.⁶⁶

And the court may appoint special counsel to advise the trustee.⁶⁷

He should not ask the Court for instructions, but should act on his own responsibility, under the advice of counsel if necessary.

In *re Baber*, 9 A. B. R. 406, 119 Fed. 525 (D. C. Tenn.): "Nor can this practice be resorted to for the purpose of carrying on litigation between himself and adverse parties in such an informal and irregular way as has been done in this case. Trustees in bankruptcy are *sui generis*. * * *

"He is not, like a receiver, a mere caretaker and manager of the estate to execute the orders of the court in the progress of administration, but he is the agent of the creditors, selected by them as a man of affairs to conduct the business of collecting the assets and distributing the proceeds among the creditors. The statute invests him with the title of the bankrupt, and makes him not only quasi owner, but the owner *pro hac* of all the property and rights of action belonging to the bankrupt. The management of the estate is committed to his discretion, and he is expected to exercise his powers and discharge his duties with the same intelligence that an owner would do, subject, of course, primarily, to the supervision of the creditors in their meetings called for the purpose, and the whole administration subject to the supervision of the court of bankruptcy. The proceedings are not conducted, like insolvency proceedings in the chancery courts of Tennessee, by a receiver, under the constant orders of the court, and who can do nothing, scarcely, without the previous direction of the chancellor; but the proceedings in bankruptcy are to be conducted according to the specific directions of the bankruptcy statutes and the rules and the forms prescribed by the Supreme Court. It is a comprehensive scheme of administration by the creditors through their trustee, with which the court interferes as little as possible."

66. In *re Arnett*, 7 A. B. R. 522, 112 Fed. 770 (D. C. Tenn.).

67. In *re Arnett*, 7 A. B. R. 522, 112 Fed. 770 (D. C. Tenn.).

Thus, as to whether the trustee should employ counsel or not, the trustees must exercise reasonable judgment; and the court will not undertake to give any direction, but will pass upon the propriety of the employment of counsel and the payment of a reasonable value for his services after such services have been rendered.⁶⁸

In *re Abram*, 4 A. B. R. 575, 103 Fed. 273 (D. C. Calif.): "The trustee of an estate in bankruptcy is entitled to the advice and assistance of counsel when necessary for the proper discharge of his duties as such trustee, and the reasonable expense incurred by him for such a purpose may be allowed as a charge against the estate; but the court will not, ordinarily, in the first instance, undertake to give any direction to the trustee in the matter of the employment of an attorney. The trustee must exercise a reasonable judgment in that matter; that is, he must exercise a reasonable judgment as to the necessity for securing the assistance of counsel—such judgment as a man of ordinary prudence would use in the transaction of his own business. When professional services have been rendered by an attorney to the trustee in his official capacity, the court will, in a proper proceeding, determine whether the employment of such an attorney was necessary, and, if found necessary, the reasonable value of his services."

But see, obiter, contra, In *re Baird*, 7 A. B. R. 448, 112 Fed. 960 (D. C. Pa.): "In doubtful cases the referee and the court will solve his perplexities."

The true rule might be that he should not ask the court's advice when acting simply as the representative of general creditors, but might do so when acting simply as an impartial officer of the Court, in custody of property belonging to different contestants.⁶⁹

§ 899. Approval of Court before Starting Litigation Not Necessary, Except Where Substituted in Pending Suit.—The trustee need not obtain the approval of the court in advance of starting a suit for the recovery of property or debts. It is his general duty to collect the assets, and he is responsible for failure to do so.⁷⁰

Traders' Ins. Co. v. Mann, 11 A. B. R. 272 (Sup. Ct. Ga.): "The fact that this is to be 'under the direction of the court' no more requires a preliminary order to sue than it would necessitate a special order to authorize him to go in person and present a note and demand payment. The money, when collected after suit or without suit, and the use to be made thereof, was to be 'under the direction of the court.' But being bound to collect he was not obliged to secure a special order to bring a suit necessary to collect. As to actions by or against the bankrupt pending at the time of the adjudication, the act requires him to obtain instructions from the court before intervening. But the express requirement that he must obtain an order in such instances, while being silent as to the necessity therefor in cases like this, is conclusive that special permission was not necessary where he had to sue in order to collect a debt due the estate."

⁶⁸. (1867) In *re Mallory*, 4 N. B. Reg. 157, 159.

⁶⁹. Compare, *McLean v. Mayo*, 7 A. B. R. 115, 113 Fed. 106 (D. C. N. C.).

⁷⁰. *Callahan v. Israel*, 186 Mass. 383; contra, obiter, In *re Ryburn*, 16 A. B. R. 315, 145 Fed. 662 (D. C. Conn.).

But the trustee must obtain the approval of the court before he may be substituted for the bankrupt in a pending case.⁷¹

§ 900. **Creditors Not to Elect "Supervising Committee."**—Creditors will not be allowed to nominate or elect a committee to supervise the trustee. He is, upon appointment, vested with discretion commensurate with his responsibility, and cannot be trammelled by any supervising committee.⁷²

§ 901. **Nor to Elect Attorney for Trustee.**—Nor should creditors be allowed to nominate and elect an attorney for the trustee; he should not be thus controlled by indirection; and it would not be fair to the minority.⁷³

In re Columbia Iron Wks., 14 A. B. R. 526, 142 Fed. 234 (D. C. Mich.): "He has a right generally to choose his own counsel, and that right will not be controlled unless it is plainly abused. The majority of creditors have no more power to dictate whom he shall employ as counsel than the beneficiaries, under a deed of trust or a will, have to determine that matter by the vote of the greater number."

[1867] In re Mallory, 4 N. B. Reg. 157, 159: "The assignee's attorney is a minister of the court, and his duty is to the estate, even to the prejudice of his own claim, and it is considered inconsistent with his duties if he acts also as attorney for the bankrupt."

§ 902. **But Trustee Not to Employ Counsel Representing Adverse Interests.**—However, the trustee should not be allowed to engage counsel representing interests adverse to the general estate.⁷⁴

In re Stern, 16 A. B. R. 513, 144 Fed. 956 (C. C. A. Iowa): "* * * from the inception of these proceedings he was represented and presumably advised by counsel who was also representing the creditor whose claim was challenged. Of course, this ought not to have been, no matter what may have been the belief of counsel respecting its propriety. The interests of the creditor were adverse to the bankrupt estate, with the protection of which the trustee was charged and were in conflict with the interests of others who were represented by the trustee."

In re Columbia Iron Wks., 14 A. B. R. 527, 142 Fed. 234 (D. C. Mich.): "It is equally objectionable, it would seem, for him to attempt to serve the body of the creditors represented by the trustee and his own clients, who have claims against the estate. Ex parte Arrowsmith, 14 Ves. 209. While thus far in the case at bar no conflict between his duty to the trustee and that owing to his clients seems to have arisen, such a conflict is not unlikely and should be forestalled."

71. Bankr. Act, § 11 (c); In re Price, 1 A. B. R. 606, 92 Fed. 987 (D. C. N. Y.); Bear v. Chase, 3 A. B. R. 746 (C. C. A. S. C.); impliedly, Traders' Ins. Co. v. Mann, 11 A. B. R. 272 (Sup. Ct. Ga.); impliedly, Callahan v. Israel, 186 Mass. 383; impliedly, Hahlo v. Cole, 15 A. B. R. 591, 112 App. Div. 636 (N. Y.).

72. (1867) In re Stillwell, 2 N. B. Reg. 104.

73. In re Arnett, 7 A. B. R. 522, 112 Fed. 770 (D. C. Tenn.); contra, In re Smith, 1 A. B. R. 37 (Ref. N. Y.); contra, obiter, In re Little River Lumber Co., 4 A. B. R. 682, 101 Fed. 558 (D. C. Ark.).

74. In re Rusch, 5 A. B. R. 565, 105 Fed. 608 (D. C. Wis.); In re Teuthorn, 5 A. B. R. 767 (D. C. Mass.), wherein it was held that the bankrupt's attorney may not act for the trustee in the examination of the bankrupt.

But in a composition, the bankrupt's attorney may not necessarily occupy such an adverse position.

Keyes v. McKirrow, 9 A. B. R. 322, 180 Mass. 261 (Sup. Jud. Ct. Mass.): "The only questions argued by the defendant are those that grow out of the fact that the plaintiff acted also as attorney for the bankrupt, the defendant's contention being that the contract for services between the plaintiff and the defendant was so far against public policy that the plaintiff cannot now have this money. The answer to this contention is that the services rendered to the trustee were in the collection of debts due the estate and that there were no adverse or conflicting interests between the bankrupt and the trustee in regard to this business. Although in general it is doubtless better that the trustee should not employ in the settlement of the estate the same counsel whom the bankrupt employs, and although the rule since adopted by the United States District Court forbidding such an employment is a good one, there may be matters, like the collection of debts, in which the bankrupt's attorney might serve the trustee without impropriety."

And there is no legal objection to permitting the attorney of the trustee to make out and present the formal proof of a creditor's claim, where the interests of the bankrupt estate are not prejudiced thereby.⁷⁵ And an attorney who represents litigants will be presumed to be rendering such services as he performs in their interest and at their expense, unless actually engaged by the trustee.⁷⁶

§ 903. Trustee Liable for His Attorney's Misfeasance.—The trustee is liable for the misfeasance of his attorney, although he has a right to employ counsel and has not been negligent in his selection.⁷⁷

In *re Howard*, 12 A. B. R. 462, 130 Fed. 1004 (D. C. Calif.): "That this court has jurisdiction in this summary proceeding to require the trustee to make restitution of all moneys received by him under the decree of the Circuit Court subsequently reversed by the decree of the Circuit Court of Appeals, I entertain no doubt. The trustee is an officer of the court, and as such is subject to its direction in all matters concerning money or property which may have come into his possession by virtue of his office. It is claimed, however, by the trustee, that he is only responsible for so much of the money as actually came into his hands under such reversed decree; that in the action referred to he was the representative of the estate of the bankrupt, and as such had a right to employ an attorney; that he was not guilty of any negligence in the matter of the employment of such attorney, and cannot, therefore, be made personally responsible for the wrongful act of the attorney in appropriating a part of the moneys received on said judgment in payment of the fee claimed by him. It may be conceded that such would be the rule if the question were presented upon the settlement of the trustee's account in the estate in bankruptcy, but, as between the trustee and his petitioner, a stranger, the trustee cannot be permitted to avoid compliance with the final decree of the United

⁷⁵. In *re McKenna*, 15 A. B. R. 4, 137 Fed. 611 (D. C. N. Y.).

⁷⁶. Inferentially, In *re Kelly Dry Goods Co.*, 4 A. B. R. 530, 102 Fed. 747 (D. C. Wis.).

⁷⁷. Analogously (receiver), *Mason v. Wolkowich*, 17 A. B. R. 712 (C. C. A. Mass.).

States Circuit Court directing him to make restitution of moneys received by him under the reversed decree by a plea that a portion of such moneys was unlawfully appropriated by his attorney in the action in which such decree was rendered. The money received by his attorney was, in judgment of law, received by the trustee, and must be restored by him to the petitioner."

§ 904. Trustee within Summary Jurisdiction of Bankruptcy Court.—The trustee is an officer of the court, and is subject to the direction of the court in all matters concerning money or property, which may have come into his possession by virtue of his office.⁷⁸

DIVISION 4.

DUTIES AND POWERS OF TRUSTEE.

§ 905. Statutory Duties and Those Not Statutory.—The statute in § 47 lays down certain duties for the trustee to perform. While this section lays down certain duties, it is not to be taken as excluding other duties not explicitly named. Presumably it touches mostly upon such duties as might otherwise be left in doubt. Thus, the first duty, that of accounting for and paying over interest received has not always been clearly considered as a duty of an officer receiving public funds, or funds in litigation, where the statute has been silent upon the point. Likewise, there are certain of these enumerated duties that arise from the peculiarities of the bankruptcy law itself. Nevertheless, there are certain other duties of the trustee, very essential to the proper administration of the bankruptcy act, that are not specifically mentioned at all in this section. Thus, it is undoubtedly a most important duty of the trustee to oppose the allowance of all improper claims against the estate, as it likewise is a most important duty of the bankrupt as laid down in § 7 (7) "in case of any person having to his knowledge proved a false claim against his estate" to "disclose that fact immediately to his *trustee*;" it being furthermore ruled, that all proceedings on review of an order allowing or disallowing a claim, must be taken by the trustee or in his name.⁷⁹ Yet this very important duty of the trustee is not specifically mentioned in the enumeration of his duties in § 47, nor is it mentioned in the General Orders in Bankruptcy.

...

§ 906. Trustee to Account for Interest.—The trustee must account for and pay over to the estate in his control all interest received by him upon property of the estate.⁸⁰

§ 907. To Collect Assets and Reduce Them to Money.—The trustee

78. In re Howard, 12 A. B. R. 462, 130 Fed. 1004 (D. C. Calif.). See post, subject of "Summary Jurisdiction to Order Trustee to Surrender Property to Rightful Owners," § 1872, et seq. See post, subject of "Summary Jurisdiction over Trustee and Receiver to Prevent Their Interference, etc.," § 1900.

79. See ante, § 824, and post, subject of "Appeals and Error," § 2864, et seq.

80. Bankr. Act, § 47 (a) (1).

must collect the property of the estate and reduce it to money, under the direction of the court.⁸¹

§ 908. **To Close Estate Expeditiously.**—The trustee is to close up the estate as expeditiously as is compatible with the best interests of the parties in interest.⁸²

§ 909. **To Deposit Moneys in Depository.**—All moneys received by the trustee must be deposited in an officially designated depository.⁸³

§ 910. **Failure to So Deposit—Bond Liable on Loss.**—Failure to so deposit them renders the trustee's bond liable in the event of loss.⁸⁴ Also the referee's bond if done by his order.⁸⁵

According to the holdings of one court, a trustee will not be allowed for his disbursements, unless the fund from which the same are checked has been deposited in the designated depository.⁸⁶

Obiter, *In re Hoyt*, 9 A. B. R. 574, 119 Fed. 987 (D. C. N. Car.): "Amounts paid out by trustees otherwise than is allowed in the Bankrupt Act will not be allowed in the settlement of the estate. The manifest purpose of Congress in requiring trustees, referees and designated depositories to give bonds was to protect estates in bankruptcy from (among other acts) paying out funds otherwise than the law and rules permit."

But this is an unwarranted deduction from the rule.

§ 911. **Disbursements Only on Order of Court.**—Disbursements must be made only on the order of the court, and the trustee takes his own risk in paying out funds of the estate without order of the court.⁸⁷

81. Bankr. Act, § 47 (a) (2); Bankr. Act, § 2 (7): " * * * cause the estate of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided."

82. Bankr. Act, § 47 (a) (2); *Boyd v. Glucklich*, 8 A. B. R. 393, 116 Fed. 131 (C. C. A. Iowa); obiter, *In re Paine*, 11 A. B. R. 354, 127 Fed. 246 (D. C. Ky.); obiter, *In re Koenig*, 11 A. B. R. 618, 127 Fed. 891 (D. C. Tex.). Ante, § 23.

83. Bankr. Act, § 47 (3); Bankr. Act, § 61: "Courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the residences of trustees and shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and may, from time to time, as occasion may require, by like order increase the number of depositories or the amount of any bond, or change such depositories."

In re Carr, 8 A. B. R. 637, 116 Fed. 556, 9 A. B. R. 58, 117 Fed. 572 (D. C. N. Car.), where the court says they should be deposited to the trustee as such, designating the estate. *In re Hoyt*, 9 A. B. R. 574, 119 Fed. 987 (D. C. N. Car.); *In re Cobb*, 7 A. B. R. 202, 112 Fed. 655 (D. C. N. Car.); *In re Hoyt & Mitchell*, 11 A. B. R. 784, 127 Fed. 968 (D. C. N. Car.).

84. *In re Hoyt*, 9 A. B. R. 574, 119 Fed. 987 (D. C. N. Car.); *In re Hoyt & Mitchell*, 11 A. B. R. 784, 127 Fed. 968 (D. C. N. Car.); obiter, *In re Cobb*, 7 A. B. R. 232, 112 Fed. 655 (D. C. N. Car.).

85. *In re Hoyt*, 9 A. B. R. 574, 119 Fed. 987 (D. C. N. Car.).

86. *In re Hoyt & Mitchell*, 11 A. B. R. 784, 127 Fed. 968 (D. C. N. Car.).

87. Impliedly, *In re Hoyt & Mitchell*, 11 A. B. R. 784, 127 Fed. 968 (D. C. N. Car.); impliedly, *In re Cobb*, 7 A. B. R. 202, 112 Fed. 655 (D. C. N. Car.). But the apparent ruling in *In re Cobb*, 7 A. B. R. 202, 112 Fed. 655 (D. C. N. Car.), to the effect that the referee cannot make the order for distribution is "hæret in cortice." Without exception, unless in North Carolina, the referee makes the order of distribution and a contrary practice would lead to interminable confusion in large commercial districts.

In *re Rude*, 4 A. B. R. 319, 101 Fed. 805 (D. C. Ky.): "The trustee made the distribution in this case without any order or judgment as a basis for it, and this action of his cannot defeat the rights of the attorney if they otherwise existed. There was no legal warrant for the distribution, and the trustee, when making it, took the chances of disapproval in whole or in part. The fund must be regarded as still in the hands of the trustee, and under the control of the court, to be paid out according to its order."

And it has been held by one court that the trustee will not be allowed for unauthorized disbursements, although the court, upon application, might have authorized them originally.⁸⁸

§ 912. Disbursements to Be by Check, Countersigned.—All disbursements by the trustee must be by check, and the checks must be countersigned by the judge or referee, etc.⁸⁹

§ 913. Depository Liable for Payment of Improperly Drawn Orders.—And a depository will be liable for paying out funds on orders not drawn in accordance with General Order No. 29.⁹⁰

§ 914. Trustee to Furnish Information.—The trustee must furnish such information concerning the estate and its administration as may be requested by parties in interest.⁹¹

§ 915. His Accounts and Papers Open to Inspection.—The accounts and papers of the trustee are to be open to the inspection of officers and all parties in interest.⁹²

In *re Sauer*, 10 A. B. R. 353, 122 Fed. 101 (D. C. N. Y.): "A trustee defending a reclamation proceeding apparently occupies quite a different relation toward the reclaiming creditor from what he does toward the body of general creditors. But I think upon consideration that the provisions of §§ 47 and 49 of the Bankrupt Act give any person interested in any bankrupt estate an absolute

^{88.} In *re Hoyt & Mitchell*, 11 A. B. R. 784, 127 Fed. 965 (D. C. N. Car.). But see In *re Cobb*, 7 A. B. R. 202, 112 Fed. 655 (D. C. N. Car.), where Judge Purnell seems to have relaxed his somewhat rigid rules.

^{89.} Bankr. Act, § 47 (a) (4): "* * * disburse money only by check or draft on the depositories in which it has been deposited."

Gen. Order XXIX: "No moneys deposited as required by the act shall be drawn from the depository unless by check or warrant, signed by the clerk of the court, or by a trustee, and countersigned by the judge of the court, or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge, stating the date, the sum and the account for which it is drawn; and an entry of the substance of such check or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn; shall be forthwith made in a book kept for that purpose by the trustee or his clerk; and all checks and drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of each estate. A copy of this general order shall be furnished to the depository, and also the name of any referee or clerk authorized to countersign said checks."

^{90.} Obiter, In *re Cobb*, 7 A. B. R. 202, 112 Fed. 655 (D. C. N. Car.).

^{91.} Bankr. Act, § 47 (a) (5); In *re Sauer*, 10 A. B. R. 353, 122 Fed. 101 (D. C. N. Y.).

^{92.} Bankr. Act, § 49 (a).

statutory right to the inspection of all accounts and papers of the trustee and to be furnished with any information concerning the bankrupt estate which the bankrupt has."

Obiter, *In re Sully*, 15 A. B. R. 323, 142 Fed. 895 (D. C. N. Y.): "Ordinarily creditors have an absolute right under the Act to examine all the books and papers relating to the estate, in the possession of the trustee."

Impliedly, *In re Sully*, 18 A. B. R. 126 (C. C. A. N. Y.): "But if they had reasonable grounds for asserting the right secured to them by the Bankrupt Act, whether they chose to do so for their own advantage or for that of third persons is quite immaterial. The element of motive cannot prejudice the assertion of a clear legal right or statutory privilege."

Even adverse claimants are entitled to such inspection.

In re Sauer, 10 A. B. R. 353, 122 Fed. 101 (D. C. N. Y.): "It might often happen that the bankrupt's papers would furnish the only evidence to support the reclaiming creditor's claim. It is not the duty of a trustee to resist every reclamation proceeding. It is his duty to investigate every such claim and to resist those that ought to be resisted, and I think that a reclaiming creditor has the same rights as any other creditor in a bankruptcy proceeding to inspect all the accounts and papers."

But the right to such inspection may be denied to mere debtors of the estate.⁹³

It was held in one case that inspection might be denied the creditors who were not acting in good faith.⁹⁴ But this case was reversed on a related point on review. The creditor has an absolute legal right to such inspection and his particular motive is immaterial.⁹⁵

§ 916. Trustee to Keep Accounts.—The trustee must keep regular accounts showing all amounts received and from what sources, and all amounts expended and on what accounts.⁹⁶

§ 917. To File Reports.—The trustee must file written reports with the court of the condition of the estate and the amount of money on hand, and such other details as may be required by the court, within the first month after his appointment and every two months thereafter, unless otherwise ordered by the court.⁹⁷

He must lay before the final meeting of creditors a detailed statement of the administration of the estate, and must file his final report and account fifteen days before the time fixed for the final meeting of creditors.⁹⁸

^{93.} *In re Sully*, 18 A. B. R. 125 (C. C. A. N. Y., affirming 15 A. B. R. 323, *supra*).

^{94.} *In re Sully*, 18 A. B. R. 125 (C. C. A. N. Y.).

^{95.} *Inferentially*, *In re Sully*, 18 A. B. R. 125 (C. C. A. N. Y.).

^{96.} Bankr. Act, § 47 (a) (6). As to auditing same, see ante, § 517, "Referee's Duties."

^{97.} Bankr. Act, § 47 (a) (10).

^{98.} Bankr. Act, § 47 (a) (7) (8). See post, subject of "Final Meeting of Creditors." For forms, see No. 48, "Trustee's Return of No Assets," and Nos. 49 and 50, "Account of Trustee" and "Oath to Account."

§ 918. **To Pay Dividends within Ten Days.**—The trustee must pay dividends within ten days after they are declared by the referee.⁹⁹

§ 919. **To Set Apart Exempted Property.**—The trustee must set apart the bankrupt's exemptions.¹⁰⁰

§ 920. **Where Real Estate, Trustee to File Certificate with Recorder.**—The trustee must, within thirty days after the adjudication, file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded in every county where the bankrupt owns real estate not exempt from execution, and pay the fee for such filing, and he will receive a compensation of fifty cents for each copy so filed, which, together with the filing fee, will be paid out of the estate of the bankrupt as part of the cost and disbursements of the proceedings.

§ 921. **Trustee to Deliver to Referee Claims Filed with Him.**—Proofs of debt received by any trustee must be delivered to the referee to whom the cause is referred.¹⁰¹

From this statutory provision has been deduced the rule that filing with the trustee will toll the year's limitation for filing claims.¹⁰²

§ 922. **Arbitration of Controversies.**—The trustee may, pursuant to the direction of the court, submit to arbitration any controversy arising in the settlement of the estate.¹⁰³

§ 923. **Allegations of Application to Arbitrate.**—The application must clearly and distinctly set forth the subject matter of the controversy, and the reasons why the trustee thinks it proper and most for the interest of the estate that the controversy should be settled by arbitration or agreement.¹⁰⁴

§ 924. **Manner of Procedure on Arbitration.**—Three arbitrators shall be chosen by mutual consent, or one by the trustee, one by the other party

99. Bankr. Act, § 47 (9). See post, subject of "Dividends."

100. See post, subject of "Exemptions," § 1073.

101. Rule XXI (1); *Orcutt v. Green*, 17 A. B. R. 75, 204 U. S. 96 (reversing, on other grounds, *In re Ingalls Bros.*, 13 A. B. R. 512, 137 Fed. 517, C. C. A. N. Y.); *In re Ingalls Bros.*, 13 A. B. R. 512, 137 Fed. 517 (C. C. A. N. Y.). As to compensation of trustees, see post, subject of "Costs of Administration," § 2108.

As to other matters pertaining to the trustee's duties, see respective titles.

102. Ante, § 729.

103. Bankr. Act, § 26 (a).

104. Rule XXXIII: "Whenever a trustee shall make application to the court for authority to submit a controversy arising in the settlement of a demand against a bankrupt's estate, or for a debt due to it, to the determination of arbitrators, or for authority to compound and settle such controversy by agreement with the other party, the application shall clearly and distinctly set forth the subject matter of the controversy, and the reason why the trustee thinks it proper and most for the interest of the estate that the controversy should be settled by arbitration or otherwise."

to the controversy, and the third by the two so chosen, or if they fail to agree in five days after their appointment, the court shall appoint the third arbitrator.¹⁰⁵

§ 925. **Findings of Arbitrators Have Force of Verdict, and Reviewable.**—The written findings of the arbitrators, or a majority of them, as to the issues presented, may be filed in court and shall have like force and effect as the verdict of a jury.¹⁰⁶ And such findings are reviewable by the court and may be set aside or adjudged upon as a verdict of a jury.¹⁰⁷

§ 926. **Compromise of Controversies.**—The trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interests of the estate.¹⁰⁸

§ 927. **Allegations of Application to Compromise.**—The application must clearly and distinctly set forth the subject matter of the controversy and the reasons why the trustee deems it for the best interests of the estate that the same be settled by agreement.¹⁰⁹ It should also, by good practice, state the terms on which the controversy can be settled.

§ 928. **Ten Days Notice by Mail Requisite.**—Ten days notice by mail to all creditors is requisite.¹¹⁰

§ 929. **Creditors Entitled to Be Heard, but Vote Not Conclusive.**—Creditors are entitled to be heard and even to vote, but their action is not conclusive upon the court but merely advisory.¹¹¹

§ 930. **What Claims May Be Compromised.**—Demands against the estate and debts due it may both be compromised.¹¹² Thus, a judgment against the trustee in the State Court for conversion of another's property where the time for appeal has not yet expired may be compromised and an accord and satisfaction made during the meantime be approved.¹¹³

105. Bankr. Act, § 26 (b).

106. Bankr. Act, § 26 (c).

107. *In re McLam*, 3 A. B. R. 245, 97 Fed. 922 (D. C. Vt.).

108. Bankr. Act, § 27 (a).

109. Rule XXXIII, *supra*.

110. Bankr. Act, § 58: "Creditors shall have at least ten days notice by mail * * * of (7) the proposed compromise of any controversy."

See *In re Greeman*, 9 A. B. R. 68, where the ten days notice does not appear to have been given. Yet the failure to give such notice could, it would seem, only be available to the creditors, not to the party making the settlement. Query, but suppose the creditors dissented, would the compromise be valid? and if not, would it be binding on the other party?

111. *In re Heyman*, 5 A. B. R. 808, 108 Fed. 207 (D. C. N. Y.).

112. Bankr. Act, § 27 (a); Rule XXXIII.

113. *In re Freeman*, 9 A. B. R. 68 (D. C. N. Y.).

§ 931. **Rights of Lienholders Not to Be Prejudiced.**—The rights of lienholders may not be prejudiced thereby and all parties must be considered.¹¹⁴

§ 932. **Abandonment of Worthless or Burdensome Assets.**—The trustee may decline to accept, or may abandon, property that is burdensome because worthless, encumbered with liens in excess of its value or charged with burdens, or otherwise unprofitable.¹¹⁵

§ 933. **Is Matter of Discretion.**—The question as to whether or not the trustee shall elect to take burdensome property is not one of jurisdiction or right, but of discretion.¹¹⁶

§ 934. **Manner of Effecting Abandonment.**—It would appear that the trustee may either file a formal petition for leave to abandon, which would be the only proper practice where the property is already in his custody; or, where the property is not in his custody, simply refuse to accept it, unless he desires the formal action of the court by petition to abandon.

Probably, notice to creditors is not necessary, since there is no mention of it in § 58; but, inasmuch as an abandonment of property is not different in its nature from other parting with title thereto, it is good practice for notice to creditors to be given.

§ 935. **Declining, or Failing after Notice to Accept, Abandonment.**—If the trustee, with knowledge and after a reasonable time, declines to accept property of an onerous or unprofitable character, the bankrupt may reassert title.¹¹⁷

But such declining will not so operate unless done with knowledge or notice of all essential facts.¹¹⁸

§ 936. **Once Abandoned, Not Afterwards Reclaimable.**—Property abandoned may not be reclaimed by the trustee if afterwards found valuable.¹¹⁹

114. *In re Adamo*, 18 A. B. R. 181, 151 Fed. 716 (D. C. N. Y.).

115. *Equitable Loan & Security Co. v. Moss*, 11 A. B. R. 111 (C. C. A.); *In re Jersey Island Packing Co.*, 14 A. B. R. 689, 138 Fed. 625 (C. C. A. Calif.); *In re Cogley*, 5 A. B. R. 731, 107 Fed. 73 (D. C. Iowa). Abandonment may be granted at the cost of the lienholder or other party benefited thereby, *Equitable Loan & Security Co. v. Moss*, 11 A. B. R. 111 (C. C. A.).

116. *In re Cogley*, 5 A. B. R. 731, 107 Fed. 73 (D. C. Iowa).

117. *First Nat'l Bank v. Lasater*, 13 A. B. R. 698, 196 U. S. 115; *Amer. File Co. v. Garrett*, 110 U. S. 288, 295; *Sparhawk v. Yerkes*, 142 U. S. 1; *Sessions v. Romadka*, 145 U. S. 29; *Dushane v. Beal*, 161 U. S. 513.

118. *First Nat'l Bk. v. Lasater*, 13 A. B. R. 698, 196 U. S. 115.

119. *Instance, Meyers v. Josephson*, 10 A. B. R. 687, 124 Fed. 734 (C. C. A. Ga.), which was a case where a life insurance policy was abandoned by the trustee, the bankrupt subsequently dying before the estate was closed. *Rueslev v. Robinson*, 19 Ala. 404.

§ 937. **Redeeming from Liens.**—The trustee may redeem property encumbered by liens or held under charges.¹²⁰

§ 938. **Selling Subject to Liens.**—The trustee may sell property subject to liens.¹²¹

§ 939. **Selling Free from Liens.**—The trustee may sell property free from liens.¹²²

§ 940. **Free from Some, Subject to Others.**—The trustee may sell property free from some liens and subject to others.¹²³

DIVISION 5.

REMOVAL AND DEATH, AND OTHER VACANCIES IN TRUSTEESHIP.

§ 941. **Removal of Trustees.**—Courts of bankruptcy have the power upon complaint of creditors to remove trustees for cause, upon hearing and after notice to them.¹²⁴

§ 942. **Judge Alone May Remove.**—The judge, in contradistinction from the referee, has sole power of removal, and the referee has no power of removal.¹²⁵

§ 943. **Good Cause to Be Shown.**—Good cause must be shown for the removal. What is good cause may be discovered by the holdings in analogous cases, but to attempt a definition of it would be as unwise and impolitic, as it is said to be to attempt to define "fraud" in terms that would cover all its numerous forms.¹²⁶

§ 944. **Notice and Due Hearing Requisite.**—And the trustee must have been given notice in order to have time to fairly prepare himself, and due hearing must be had.¹²⁷

120. Impliedly, Supreme Court's Official Form No. 43. In re Bacon, 12 A. B. R. 730, 132 Fed. 157 (D. C. N. Y.). Post, "Redemption of Property from Liens and Charges," § 1868, et seq.

121. Supreme Court's Official Form No. 44.

122. See post, § 1963, et seq., "Selling Property Subject to and Free from Liens."

123. See post, § 1965, "Selling Free from Liens."

124. Bankr. Act, § 2 (17).

125. Sup. Court's Gen. Ord. XIII.

126. (1867) In re Blodgett, 5 N. B. Reg. 772; (1867) In re Perkins, 8 N. B. Reg. 56. Obiter, In re Wisley Co., 13 A. B. R. 193, 133 Fed. 388 (C. C. A. Ills.). This was a case of a trustee who was interested in a scheme of composition with creditors; and who, by concealment and false representations in aid of the bankrupt, induced creditors to act contrary to their interest. Also, see Bankr. Act, § 2 (17).

127. Bankr. Act, § 2 (17).

§ 945. **Hearing Should Be on Petition.**—The creditor seeking the removal should prepare a petition and file it before the judge, setting up the grounds upon which the removal is asked.¹²⁸

§ 946. **But Referee to Report Derelict Trustee for Removal Though No Creditor Petitions.**—Even without complaint of creditors, the referee may report the trustee for removal; and it is his duty to do so, if the trustee fails to file a report or perform an order required by law for five days after the same shall have become due.¹²⁹

§ 947. **Death or Removal of Trustee Not to Abate Pending Suits.**—The death or removal of a trustee will not abate pending suits.¹³⁰

§ 948. **Creditors to Elect New Trustee on Death, Removal, etc.**—Creditors may elect not only at the first meeting, but also after a vacancy has occurred in the office of trustee, as by failure to qualify, final disapproval by the court, death, resignation or removal.¹³¹

§ 949. **Also on Reopening of Estate.**—Also, after an estate once closed has been reopened for further proceedings, creditors should elect a new trustee.¹³²

128. (1867) In re Hicks, 19 N. B. Reg. 449.

129. Gen. Ord. No. XVII.

130. Bankr. Act, § 46 (a): "Death or removal of a trustee shall not abate any suit or proceedings which he is prosecuting or defending at the time of his death or removal, but the same may be proceeded with or defended by his joint trustee or successor in the same manner as though the same had been commenced or was being defended by such joint trustee alone or by such successor."

Death before Adjournment of Meeting.—Where the trustee elect dies before qualifying it is proper at a continuation of the meeting at which he was chosen, to allow the creditor who named him to name his successor. No new notice to creditors is necessary. In re Wright, 2 A. B. R. 497, 97 Fed. 187 (Ref. N. Y.).

131. Bankr. Act, § 44 (a). In re Lewensohn, 3 A. B. R. 299, 98 Fed. 576 (D. C. N. Y.).

132. Bankr. Act, § 44 (a). Fowler v. Jenks, 11 A. B. R. 255, 90 Minn. 74 (Minn. Sup. Ct.).

PART IV.

ASSETS AND TITLE TO ASSETS.

§ 950. **In Orderly Progress, Subject of Assets Reached.**—In the usual course of a bankruptcy case, after the election of the trustee, comes naturally a more particular consideration of the question of assets—as to what assets pass to the creditors and what title creditors take to them. Of course the question of assets has already been touched upon more or less as incidental to a discussion of the provisional remedies available to creditors pending the hearing upon the petition for adjudication, but the place for a more complete consideration of the subject comes at the stage of the proceedings immediately following the election of the trustee, for it is only upon the trustee's election and qualification, as will be later noted, that the complete title of creditors vests and it is only then, also, that all the remedies become available for collecting in the assets for creditors. And first comes the consideration of the question of what kinds and classes of property pass to the trustee in bankruptcy.



CHAPTER XXVII.

KINDS OF PROPERTY PASSING AND NOT PASSING TO THE TRUSTEE BY VIRTUE OF THE BANKRUPTCY.

Synopsis of Chapter.

- § 951. Kinds of Property Passing and Not Passing to Trustee.
- § 952. Distinct Scope to Each Class.
- § 953. Local Law Determines Whether Particular Property within Classification.

DIVISION 1.

- § 954. "Documents" Pass.
- § 955. "Documents" Include Books, Deeds, Instruments, Papers, Relating to Business.
- § 956. Title Itself Passes—Trustee Becomes Owner.
- § 957. Documents, Books and Papers Not Relating to Bankrupt's Property Do Not Pass.

DIVISION 2.

- § 958. Patents, Copyrights and Trade Marks Pass.
- § 959. Pending Applications Do Not Pass.

DIVISION 3.

- § 960. "Powers" Pass.
- § 961. But Not Powers Not Exercisable for Bankrupt's Own Benefit.

DIVISION 4.

- § 962. Fraudulently Transferred Property Passes.

DIVISION 5.

- § 963. Property Transferable, or Capable of Subjection by Legal Process, Passes.
- § 964. If Capable Either of Transfer or of Being Levied on.
- § 965. If Transferable "by Any Means," or Leviable upon, It Passes, Otherwise Not.
- § 966. Broad Scope of Class 5.

SUBDIVISION "A."

- § 967. Thus, Memberships in Stock Exchanges, Clubs, etc., Licenses and Personal Privileges, Pass.
- § 968. Though Subject to Contingency of Election or of Approval of Public Authorities.
- § 969. And Though "Transferable" Only by Peculiar and Unusual Means.

SUBDIVISION "B."

- § 970. Property Rights Must Exist in Bankrupt.
- § 971. Mere Inchoate Interests Do Not Pass.
- § 972. Vested Interests Pass.

SUBDIVISION "C."

- § 973. Property Held in Trust for Bankrupt Passes.
- § 974. Property Held by Bankrupt as Trustee of Resulting Trust, Not.
- § 975. Spendthrift Trusts and Restrictions on Alienation.

SUBDIVISION "D."

- § 976. Unpaid Stock Subscriptions Pass.
- § 977. Bankruptcy Court May Make "Call."
- § 978. Statutory Secondary Liability of Stockholders Not an Asset.

SUBDIVISION "E."

- § 979. Bankrupt as Landlord.
- § 980. Bankrupt as Tenant.
- § 981. Tenant's Bankruptcy Not Ipso Facto Termination of Lease.
- § 982. Trustee Not Bound to Accept Lease as Asset.
- § 983. Entitled to Time to Accept or Reject.
- § 984. Trustee's Right to Occupy Premises for Reasonable Period.
- § 985. Whether Bound to Pay Rent Stipulated, or Only for Use and Occupation.
- § 986. Previous Forfeiture Not Nullified by Tenant's Bankruptcy.
- § 987. Covenants of Forfeiture for Assigning or Subletting, Not Violated by Bankruptcy.
- § 988. Leasehold Liberated from Forfeiture Clause.
- § 989. Bankruptcy Works Forfeiture, if Specifically Provided.
- § 990. But if Specific Method Stipulated, Such Method Alone Effective.
- § 991. Where Future Rent Already Paid, Leasehold Passes.
- § 992. Receiver or Trustee Occupy Free, for Any Period for Which Landlord Holds Provable Claim.
- § 993. Rents of Mortgaged Premises, Uncollected or Accruing after Bankruptcy.

SUBDIVISION "F."

- § 994. Uncompleted Contracts Involving Personal Skill or Confidence.
- § 995. Personal Right to Purchase Not Transferable.
- § 996. Property Not Scheduled, or Concealed Otherwise, Passes.
- § 997. Property Sold on Conditional Sale with Power to Sell in Usual Course.
- § 998. Property Belonging to Bankrupt by Marital or Parental Right.
- § 999. Encumbered Property Passes.
- § 1000. Fixtures May Pass.
- § 1001. Stocks, Bonds, Commercial Paper, Mortgages, Merchandise, etc., Pass.

SUBDIVISION "G."

- § 1002. Life Insurance Policies as Assets.
- § 1003. Policies Exempt by State Law Do Not Pass.
- § 1004. Payable Absolutely to Third Person Do Not Pass.
- § 1005. Payable to Bankrupt, His Estate or Personal Representatives, Pass.
- § 1006. If Payable Conditionally, Contingently or Partly to Bankrupt's Estate, as "Endowment" and "Tontine" Policies; Policies Assigned as Security, etc.
- § 1007. Change of Beneficiary.
- § 1008. All Such Pass, Provided Interest of Bankrupt Have Actual Value.

- § 1009. Bankrupt Required to Execute Assignment to Effect Transfer.
- § 1010. May Not Compel Third Party, Interested, to Accept Paid-Up Policy, nor to Apply for Cash Surrender Value.
- § 1011. Trustee Not to Wait for Maturity, but to Sell Interest for Present Worth.
- § 1012. If of No Actual Value at Date of Adjudication, Will Not Pass.
- § 1013. Whether Trustee to Pay Premiums.
- § 1014. Cash Surrender Value and Redemption of Policy.
- § 1015. Only Policies Having Cash Surrender Value Redeemable.
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DIVISION 6.

- § 1019. Rights of Action on Contracts and for Injury, etc., to Property, Pass.
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DIVISION 7.

- § 1022. Exempt Property Does Not Pass.
- § 1023. Not Unconstitutional for Lack of "Uniformity" as to Exemptions.
- § 1024. No Title to Exempt Property Passes.
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SUBDIVISION "A."

- § 1026. Bankruptcy Court's Jurisdiction Over Exemptions, Exclusive.
- § 1027. Trustee Entitled to Possession Long Enough to Set Apart.
- § 1028. Court May Enjoin Interference.
- § 1029. But Will Not Necessarily Order Surrender.
- § 1030. Nor Authorize Trustee to Intervene in Attachment Case to Obtain Possession.
- § 1031. After Obtaining Possession, No Amendment of Claim of Exemptions to Defeat Lienholders as to Whom Property Not Exempt.
- § 1032. Bankruptcy Court May Not Administer but Only Determine and Set Apart Exemptions.
- § 1033. But Not to Deliver to Bankrupt Simply because Claimed Exempt, if Third Party Claims Ownership.
- § 1034. Waiver of Exemptions in Notes.
- § 1035. Property Not Exempt as to "Necessaries," "Manual Work and Labor," "Unpaid Purchase Price" or Judgments for Torts.
- § 1036. Sales of Merchandise in Bulk, whether Bankrupt Entitled to Exemptions Out of Unpaid Purchase Price, until Creditors Paid.
- § 1037. Exempt Property Not in Possession or Already Set Off Not to Be Retaken, for Benefit of Parties as to Whom Not Exempt, nor of Lienholders.

SUBDIVISION "B."

- § 1038. State Law of Domicile Governs.
- § 1039. Whether Court of Bankrupt's Domicile May Set Apart Homestead in Real Estate in Another State Having Different Homestead Laws.

- § 1040. State Law Governs Kind and Amount and Person Entitled.
- § 1041. State Law Governs.
- § 1042. As Construed by Highest State Tribunal.
- § 1043. But Where Decisions Not Authoritative or Conflicting, etc., Bankruptcy Court Construes.
- § 1044. May Select in Kind, Regardless of Impairment of Remainder.
- § 1045. Whether Wife May Claim Where Bankrupt Husband Neglects.
- § 1046. Converting Nonexempt Property into Exempt, on Eve of Bankruptcy.
- § 1047. Instances of Exemptions Allowed and Disallowed in Bankruptcy in Accordance with State Law.

SUBDIVISION "C."

- § 1048. But Time and Manner of Claiming and Setting Apart Exemptions Fixed by Act Itself.
- § 1049. First Requirement of Exemption Claim—To Be in Writing and Sworn to.
- § 1050. To Be Scheduled as Assets Elsewhere in Schedule "B," as Well as in Schedule "B" (5).
- § 1051. Second Requirement—To Be Filed with Schedules.
- § 1052. Third Requirement—Property to Be Particularly Described.
- § 1053. Fourth Requirement—Description to Be as of Date of Adjudication, etc.
- § 1054. Claiming Money When No Actual Money, but Only Goods in Estate.
- § 1055. Claiming So Much Worth Out of Mass.
- § 1056. Where Exemption Claimed in Mortgaged Property.
- § 1057. Claiming "Proceeds," Where Property Still in Specie.
- § 1058. But Where Not in Specie.
- § 1059. Fifth Requirement—Estimated Values to Be Given.
- § 1060. Sixth Requirement—State Statute to Be Mentioned.
- § 1061. Seventh Requirement—Claim to Be Made by Bankrupt, Not by Mortgagee, Assignee, nor Other Third Person.
- § 1062. Wife Claiming Where Bankrupt Fails or Refuses to Claim.
- § 1063. Failure to Claim Exemptions, Deemed, Prima Facie, Waiver.
- § 1064. Failure to Claim, or to Describe Particularly, Not Necessarily Fatal.
- § 1065. Claim of "Proceeds," etc., May Authorize Trustee to Sell Exemptions with Remainder as Entirety.
- § 1066. Claim May Be Inserted or Corrected by Amendment.
- § 1067. Leave or Order to Amend Requisite.
- § 1068. Amendment Required by Court, Where Exemptions Claimed Improperly.
- § 1069. Leave Liberally Granted.
- § 1070. Leave Refused Where Omission with Fraudulent Intent or Third Parties Injured.
- § 1071. Amendment Reverts to Date of Filing Original Claim.

SUBDIVISION "D."

- § 1072. Setting Apart of Exemptions Governed by Bankruptcy Act Itself.
- § 1072½. No Demand to Set Apart Requisite.
- § 1073. Trustee to Set Apart.
- § 1074. Must Set Aside "Soon as Practicable" and within Twenty Days.
- § 1075. Trustee's Report to Be Itemized, with Estimated Values.

- § 1076. Statutory Method of Bankruptcy Act to Be Followed—No Different Manner Proper.
- § 1077. Not to Set Aside Property Not Exempt by State Law.
- § 1078. Nor Property Not Claimed.
- § 1079. Not Bound to Set Aside, if Bankrupt Not Entitled.
- § 1080. Appraisal Not Binding.
- § 1081. Who May Except to Trustee's Report of Exempted Property—Bankrupt and Creditors.
- § 1082. Creditor Must File Exceptions within Twenty Days.
- § 1083. Schedule (b) 5, and Written Exceptions, Only Pleadings.
- § 1084. Whether Exceptions to Be Verified.
- § 1085. Burden of Proof on Bankrupt, if Exceptions Amount to General Denial.
- § 1086. Res Judicata—Order Approving or Disapproving Trustee's Report of Exempted Property Res Judicata Elsewhere.
- § 1087. Conversely, Judgment of State Court as to Exemptions in Same Fund Res Judicata.
- § 1088. No Second Exemption Out of Same Fund.
- § 1089. Selling Exemptions with Other Assets as Entirety and Allowance Out of Proceeds.
- § 1090. Trustee Not Entitled to Indemnity before Delivering Exemptions.
- § 1091. Not to Refuse to Set Apart until Costs Paid.
- § 1092. Bankrupt Not Entitled to Reimbursement for Care of Exempt Property Pending Setting Off.
- § 1093. Rent, Storage, etc., Pending Setting Off.

SUBDIVISION "E."

- § 1094. Exemptions on Recovery of Preferences and Fraudulent Transfers; and in Cases of Assignment, etc.
- § 1095. On Recovery of Preferences.
- § 1096. On Recovery of Fraudulently Transferred Property.
- § 1097. Where General Assignment Nullified by Bankruptcy.
- § 1098. Forfeiting Exemptions by Fraudulent Concealments or Removals.
- § 1099. Whether Concealing Other Assets Presumed Selection as Exempt, Warranting Refusal of Exemptions Claimed in Schedules.

SUBDIVISION "F".

- § 1100. Whether Liens by Legal Proceedings on Exempt Property within Four Months Nullified.
- § 1101. Property Claimable as Exempt, but Not Claimed, Levies Nullified.

SUBDIVISION "G."

- § 1102. Levying on Exempt Property before and after Discharge, and Withholding Discharge to Permit Levy.
- § 1103. Bankrupt Staying Creditor Pending Hearing on Discharge.
- § 1104. Withholding Discharge to Permit Creditor to Levy, Where Property Not Exempt as to Him.
- § 1105. No Withholding if Exemptions Good against Levy.
- § 1106. Subjecting Exempt Property While in Trustee's Hands, by Equitable Action in State Court.

§ 1107. Levying Attachment, or Execution or Ordering Surrender to Sheriff Holding Writ.

§ 1108. Levying Direct Execution after Exempt Property Set Apart.

SUBDIVISION "H".

§ 1109. "Review," Not "Appeal," Proper in Exemption Matters.

§ 1110. Review under §.24 (b) Proper.

§ 1111. No Review unless Trustee Appointed and Has Set Apart or Refused to Set Apart.

§ 951. Kinds of Property Passing and Not Passing to Trustee.—All kinds of property (save such as is exempt) which, before the filing of the bankruptcy petition, was capable of being transferred by any means by the bankrupt, or of being levied on by creditors or otherwise seized by judicial process and sold thereunder, pass to the trustee in bankruptcy, likewise certain powers and rights and documents, not always considered strictly as transferable or leviable property, pass to the trustee.¹

Section 70 states not only the time the title vests but also the manner of its vesting, the kinds of property vesting, and the nature of the title to the property that passes to the trustee.

Compare, *In re Burke*, 5 A. B. R. 14, 104 Fed. 326 (D. C. Mo.): "After a careful consideration of the provisions of this section I am persuaded that there are two separate subjects treated of: First, the time at which the title to something vests in the trustees; second, the 'something' or property the title to which is to vest in the trustee."

Thus the title vests on the trustee's appointment and qualification, but reverts to the date of adjudication; the title vests by operation of law; title vests to all kinds of property that was capable of being levied on and sold by judicial process or of being transferred, by any means, at the time of the

1. Bankr. Act, § 70 (a): "The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged bankrupt, except in so far as it is to property which is exempt, to all (1) documents relating to his property; (2) interests in patents, patent rights, copyrights, and trade marks; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him; provided, that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continued to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; and (6) rights of action arising upon contracts or from unlawful taking, or detention of, or injury to, his property."

filing of the petition, as well as certain other property; and finally, the title that passes is that of the bankrupt and also that of creditors.

In *re Pease*, 4 A. B. R. 578 (Ref. N. Y.): "Section 70a, providing that a trustee in bankruptcy shall be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, is not antagonistic to § 70a (5), providing that the trustee shall be vested with property which prior to the filing of the petition the bankrupt could have transferred, etc. The former refers to the time the title vests; the latter to what title."

§ 952. **Distinct Scope to Each Class.**—Of course, by far the widest of the classes of assets passing to the trustee is class (5) "property which * * * he could by any means have transferred or which might have been levied upon, etc." And, in many instances, this class will be found to include assets usually considered likewise to belong to some of the other classes. Nevertheless, the other classes are added to clear up all uncertainty and to cover instances of powers, rights, documents, etc., not usually classed as "property," much less as "transferable" or "leviable" property. Thus, it is evident, the lawmakers intended to give the trustee in bankruptcy most extensive ownership.

These different classes must be given distinct scope.

Cleland v. Anderson, 11 A. B. R. 605 (Neb. Sup. Ct.): "If a right of action in tort, upon which an action is pending may, under our statute, be classed in any sense as property, it does not follow that it is included in the fifth subdivision of the federal statute in question. That statute classifies these matters for itself. It specifies, first, documents; second, interests; third, powers; fourth and fifth, property; and sixth, rights of action. Upon such a classification, it will not do to say that rights of action are property. The plain intention of the statute is to otherwise classify them, and to distinguish, for the purpose of this classification, between property and rights of action. The sixth subdivision, therefore, must be taken to specify all rights of action that pass to the trustee in bankruptcy; and, as the right of action involved in this case is not included, it follows that it did not pass."

In *re Dann*, 12 A. B. R. 27, 129 Fed. 495 (D. C. Ills.): "As stated by Judge Jenkins in *In re Rouse-Hazzard & Co.*, 1 A. B. R. 234, the principle of construction is elementary that 'specific provisions relating to a particular subject' must 'govern in respect to that subject as against general provisions contained in the same act.' * * * Section 70 thus provides specifically for vesting in the trustee the interest of the bankrupt in patents and patent rights, and the presumption arises therefrom when followed by clause 5 in reference to general property, that it was so provided in recognition of the distinction of this class of interests from the general classification of property, as pointed out in the foregoing citations. Under the rule of interpretation referred to I am of opinion that the interest of the bankrupt in the alleged invention cannot be reached through the general terms of clause 5 in the face of this specific provision for patent interests."

§ 953. **Local Law Determines whether Particular Property within Classification.**—Whether the property is of such a nature that its title passes, or not, is in general, to be determined by local law.²

2. In *re Shenberger*, 4 A. B. R. 487, 102 Fed. 978 (D. C. Ohio).

DIVISION 1.

DOCUMENTS.

§ 954. **Documents Pass.**—The title to all documents relating to the bankrupt's property passes to the trustee in bankruptcy.³

§ 955. **"Documents" Include Books, Deeds, Instruments, Papers, Relating to Business.**—Not only "documents" as the term is popularly used, but also all books, deeds, instruments and papers relating to the bankrupt's property, pass to the trustee.⁴

In *re Hess*, 14 A. B. R. 559, 136 Fed. 988 (D. C. Penna.): "Under § 70, clause 1, the trustee of a bankrupt is vested by operation of law with the title to all "documents relating to the bankrupt's property." Section 1, clause 13, defines a 'document' to include any books, deed or instruments of writing, and includes deeds, all other muniments of title, contracts, securities, bills receivable, notes, bank books, bills of exchange, account books, and all papers and books relating to his business. These books and papers of the bankrupt, which come within the designation of documents, are regarded by the Bankrupt Act as personal property, the title to which, by operation of law, is vested in the trustee."

§ 956. **Title Itself Passes—Trustee Becomes Owner.**—The title itself passes, so the trustee owns the documents and does not simply have the right to inspect them.⁵

§ 957. **Documents, Books and Papers Not Relating to Bankrupt's Property Do Not Pass.**—It is only to the documents relating to the bankrupt's property that title passes. His purely personal papers, not relating to his property, do not pass to the trustee.

DIVISION 2.

PATENTS, COPYRIGHTS AND TRADE MARKS.

§ 958. **Patents, Copyrights and Trade Marks Pass.**—The title to all interests in patents, patent rights, copyrights and trade marks passes to the trustee in bankruptcy.⁶

3. Bankr. Act, § 70 (a) (1); In *re Hess*, 14 A. B. R. 559, 136 Fed. 988 (D. C. Penna.); In *re Madden*, 6 A. B. R. 614 (C. C. A. N. Y.).

4. Bankr. Act, § 1 (13): "'Document' shall include any book, deed, or instrument in writing."

5. In *re Madden*, 6 A. B. R. 614, 110 Fed. 348 (C. C. A. N. Y.). Nevertheless it is doubtful whether the bankrupt can be compelled to deliver them over, if he claims his privilege not to give incriminating evidence against himself. In *re Hess*, 14 A. B. R. 559, 136 Fed. 988 (D. C. Pa.); compare, In *re Rosenblatt*, 16 A. B. R. 308 (D. C. Pa.). Also, see post, subject, "Discovery of Assets, Incriminating Evidence," § 1558.

6. Bankr. Act, § 70 (a) (2). Compare, In *re McBride & Co.*, 12 A. B. R. 81, 132 Fed. 285 (D. C. N. Y.), where it was held, that a contract between a publisher and an author whereby the former undertook to publish and market literary productions of the latter, was a personal engagement involving trust and confidence and could not be assigned or delegated to another by the trustee in

In *re Howley Dresser Co.*, 13 A. B. R. 94, 132 Fed. 1002 (D. C. N. Y.): "Upon an absolute assignment of a copyright the property therein vests in the assignee and passes to the assignee's trustee in bankruptcy."

§ 959. **Pending Applications Do Not Pass.**—But no title passes to mere pending applications for patents, although after adjudication the patent is actually issued.⁷

In *re Dann*, 12 A. B. R. 27, 129 Fed. 495 (D. C. Ills.): "The term is in no sense applicable to the incorporeal interest of an inventor in an alleged invention for which no patent has issued, though application is pending. It would be a misnomer if employed in the latter sense, for no right to a patent exists except as provided by statute and upon allowance thereunder. Without such allowance of an application the applicant has no interest which can be denominated a 'patent right' whatever may be his interest in the invention claimed."

DIVISION 3.

POWERS.

§ 960. **"Powers" Pass.**—The title to all powers which the bankrupt might have exercised for his own benefit passes to the trustee in bankruptcy.⁸

§ 961. **But Not Powers Not Exercisable for Bankrupt's Own Benefit.**—But not powers which he could only have exercised for some other person.

As to what is probably meant by the word "powers" as here used, see *Fisher v. Cushman*, 4 A. B. R. 654, 103 Fed. 860 (C. C. A. Mass.): "In behalf of the trustee in bankruptcy, reference is made to the paragraph of § 70 of the Bankrupt Act which provides that the trustee shall be vested with certain 'powers;' and it is claimed that this applies at bar, because the bankrupt had the power to realize from the license. However, we prefer not to attempt to rest the case on this expression, because we doubt whether so popular a signification can be given to the word, and whether, on a careful examination of the English statutes from which this was drawn, and of the decisions of the English courts in regard thereto, we might not be required to determine that it is to be construed technically, as known to the common law."

Hesseltine v. Prince, 2 A. B. R. 600, 95 Fed. 802 (D. C. Mass.): "Section 70 (3) was relied upon in argument by counsel for the trustee; but, however, the husband's right in his wife's real estate should be described, it certainly is not a power."

bankruptcy of the publisher without the author's consent; and that this rule obtains even though the publisher is a corporation; and that where, in pursuance of such a contract, the copyrights had been acquired in the name of the publisher, the District Court had jurisdiction to entertain a summary proceeding by the author to compel the trustee in bankruptcy of the publisher to assign the copyrights.

7. In *re McDonald*, 4 A. B. R. 92, 101 Fed. 239 (D. C. Iowa).

8. In *re Kellogg*, 10 A. B. R. 10, 112 Fed. 52 (C. C. A. N. Y., affirming 7 A. B. R. 623). To plead usurv.

DIVISION 4.

PROPERTY FRAUDULENTLY CONVEYED.

§ 962. **Fraudulently Transferred Property Passes.**—The title to all property transferred by the bankrupt in fraud of his creditors passes to the trustee in bankruptcy.⁹

Now, while this kind of property could not "by any means be transferred by the bankrupt," already having once been fraudulently transferred by him, and therefore could not come under the one branch of class 5, "property which he could by any means have transferred," yet it precisely fits under the other branch; for fraudulently conveyed property can be "levied upon and sold under judicial process against the debtor," although it cannot be again transferred by him. So, in theory, this is merely an instance under class 5, rather than a distinct class by itself. Yet, by its separate mention, it is made clear that, at least as to fraudulently conveyed property, the trustee does not stand precisely in the bankrupt's shoes.

DIVISION 5.

TRANSFERABLE PROPERTY AND PROPERTY CAPABLE OF SUBJECTION BY
LEGAL PROCESS.

§ 963. **Property Transferable, or Capable of Subjection by Legal Process, Passes.**—By far the most extensive class of assets passing to the trustee in bankruptcy is class 5.

Property which prior to the filing of the petition, the bankrupt could by any means have transferred or which might have been levied upon and sold under judicial process against him (with the exception of exempt property and with certain qualifications relative to life insurance policies) passes to the trustee.¹⁰

Gould v. N. Y. Life Ins. Co., 13 A. B. R. 235, 132 Fed. 927 (D. C. Ark.): "It will be noticed that this subdivision 5, § 70 (a), provides for the vesting in the trustee of the title not only of all property subject to seizure or sale under judicial process, but also all property which prior to the filing of the petition the bankrupt might have transferred. This practically covers everything the bankrupt might own, and from which by sale some funds could be realized by the trustee for the benefit of the estate."

In re Jersey Island Packing Co., 14 A. B. R. 692, 138 Fed. 625 (C. C. A. Calif.): "And the beneficial interest of a bankrupt in property held in trust

9. *Barnes Mfg. Co. v. Norden*, 7 A. B. R. 553 (Sup. Ct. N. J.). And a creditor cannot maintain a fraudulent conveyance suit therefor for his own benefit. For full discussion of fraudulently conveyed property, see post, § 1216, et seq.

10. Bankr. Act, § 70 (a) (5). *In re Harris*, 2 A. B. R. 359, 99 Fed. 71 (Ref. Ills.); *In re Russie*, 3 A. B. R. 6, 96 Fed. 608 (D. C. Ore.); *Brown v. Barker*, 8 A. B. R. 450 (N. Y. Sup. Ct. App. Div.); *In re Rennie*, 2 A. B. R. 182 (Ref. Ind. Terr.); *In re Rasmussen*, 13 A. B. R. 466, 136 Fed. 704 (D. C. Ore.); *obiter*, *In re Burka*, 5 A. B. R. 12, 104 Fed. 326 (D. C. Mo.); *In re Coffin*, 16 A. B. R. 686, 146 Fed. 181 (D. C. Conn.).

passes, also, in all cases where that interest might have been transferred to another by the bankrupt or might have been levied upon under judicial proceedings against him."

In *re Howland*, 6 A. B. R. 495, 109 Fed. 869 (D. C. N. Y.): "In this State, where merchandise is sold on a conditional contract, but with the understanding that it is to be dealt with in the same manner as other property owned by the vendee, such sale is inconsistent with the continued ownership of the vendor and the property may be seized and sold on execution by the creditors of the vendee. The property sold to the bankrupt by the Mishawaka Company falls within this rule. It was placed in the general stock of the bankrupt and a portion was sold at retail over his counter. The merchandise in question, therefore, passed to the trustee pursuant to the provisions of Bankr. Act, § 70 (5) as property 'which might have been levied upon and sold under judicial process against the bankrupt.' Neither this section nor § 67a, which is also in point, is found in the act of 1867."

§ 964. If Capable Either of Transfer or of Being Levied on.—If it was capable either of being transferred or of being levied upon, it will pass.¹¹

Page v. Edmunds, 9 A. B. R. 281, 187 U. S. 596: "Was the seat in the stock exchange property which could have been by any means transferred, or which might have been levied upon and sold under judicial process? If the seat was subject to either manner of disposition, it passed to the trustee of the appellant's estate.

"We think it could have been transferred within the meaning of the statute. The appellant could have sold his membership, the purchaser taking it subject to election by the exchange, and some other conditions. It had decided value. The appellant paid for it in 1880, \$5,500, and he testified that the last price he had heard paid for a seat was \$8,500. One or the other of these sums, or, at any rate, some sum, was the value of the seat. It was property and substantial property to the extent of some amount, notwithstanding the contingencies to which it was subject. In other words, the buyer took the risk of the contingencies. And they seem to be capable of estimation. The appellant once estimated them and paid \$5,500 for the seat in controversy; another buyer estimated them and paid \$8,500 for a seat. A thing having such vendible value must be regarded as property, and as it could have been transferred by some means by appellant (one of the conditions expressed in § 70), it passed to and vested in his trustee."

Thus, also, a lease providing for forfeiture or attempted assignment cannot be "transferred" by the debtor but may be levied on and sold under judicial process against him.¹²

§ 965. If Transferable "by Any Means," or Leviable, It Passes, Otherwise, Not.—If capable of being disposed of or its possession parted with by any means, and either absolutely or conditionally, it passes to the

11. *O'Dell v. Boyden*, 17 A. B. R. 757, 150 Fed. 731 (C. C. A. Ohio).

12. See post, subject of "Leaseholds," § 979, et seq.

trustee; but if not so capable it does not pass, unless leviable upon or coming within some one of the other classes of § 70 (a).¹³

§ 966. **Broad Scope of Class 5.**—The broadest possible scope is given to this class 5 of assets. Not only is “transfer” a word of widest content by the definition of the Bankruptcy Act itself, including all possible interests of the bankrupt in property, but also in class 5 of assets it is further provided that such interests pass if “by any means” they can be made to pass. Thus, conditional and contingent interests pass, even if, in addition to being conditional or contingent, the assistance of the bankrupt or of some one else over whom the bankruptcy court has control is requisite in order to consummate the “disposing of” the property.¹⁴

SUBDIVISION “A.”

MEMBERSHIP IN STOCK EXCHANGES, CLUBS, ETC., LICENSES AND OTHER PRIVILEGES.

§ 967. **Thus, Memberships in Stock Exchanges, Clubs, etc.; Licenses and Personal Privileges, Pass.**—A good example of the broad scope of this class 5 of assets is furnished by memberships in stock exchanges. The transferability of such memberships is wholly contingent upon the purchaser being elected a member by the exchange. Again, its transfer commonly is not to be affected by any of the ordinary and usual means of transferring property—neither by sale, assignment, pledge, mortgage, etc.—but only by the holder making written request upon the exchange to transfer the membership. Thus, memberships in stock exchanges illustrate, most aptly, the broad inclusiveness of class 5. Such property not only is capable merely of contingent transfer, but also is capable of transfer only by peculiar means.

Personal privileges, if in any way they can be sold even conditionally and though they require peculiar means for consummating the transfer, thus pass to the trustee, as memberships in clubs and in stock exchanges and licenses. Thus, a membership in a chamber of commerce will pass.¹⁵

And the money value of a seat in the stock exchange belonging to a bankrupt member passes to the trustee, in the absence of any forfeiture clause in the constitution or by-laws.¹⁶

O'Dell v. Boyden, 17 A. B. R. 758, 150 Fed. 731 (C. C. A. Ohio): “Though possessing none of the qualities of a negotiable or even a nonnegotiable instru-

13. Bankr. Act, § 1 (25): “‘Transfer’ shall include the sale and every other and different mode of disposing of or parting with property or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security.”

14. *Gould v. N. Y. Life Ins. Co.*, 13 A. B. R. 235, 132 Fed. 930 (D. C. Ark.).

15. *In re Neimann*, 10 A. B. R. 739, 124 Fed. 738 (D. C. Wis.).

16. *Page v. Edmonds*, 9 A. B. R. 281, 187 U. S. 596, quoted at § 964; *In re Gaylord*, 7 A. B. R. 195, 111 Fed. 717 (D. C. Mo.); *In re Hurlbutt, Hatch & Co.*, 13 A. B. R. 50, 135 Fed. 504 (C. C. A. N. Y.).

ment, this membership has a pecuniary market value and constitutes a property right which, under the settled principles of the law, is capable of passing by will or inheritance. In *re Hellman*, 174 N. Y. 254. Though its sale and transfer are clogged with onerous conditions and the property one of a narrow character, these conditions and characteristics go only to the reduction of the pecuniary market value and do not deprive it of its character as property. *Powell v. Waldron*, 89 N. Y. 328. As a valuable property right, incorporeal in character, it may be reached and subjected as property by a creditor through the flexible remedies of equity. A court of chancery through a decree in personam may compel the co-operation of the member in steps necessary to consummate a sale and transfer under the rules of the association. * * * Such a seat constitutes a property right which is not only descendable, taxable and assignable, but is one which passes to the trustee of a bankrupt member, and the bankrupt court may compel the bankrupt to sign all transfers, or consents essential to bring about its sale under the rules of the exchange. * * * That an assignee or transferee, in pledge or otherwise, would obtain such an equitable right as would enable him through the aid of equity to bring about its transfer through the co-operation of the member, cannot be doubted. If a creditor, having no equitable lien by contract, might obtain one by aid of equity, there is no reason why an assignee or transferee might not also."

A liquor license will pass, or not pass, according to local law.
Thus, it will pass in Minnesota.

In *re May*, 5 A. B. R. 1 (Ref. Minn. affirmed D. C.): "Without undertaking to make nice discriminations between what may properly be classified as property, and what clearly appears to be a mere personal privilege, it is held that whatever has a money value in the hands of a trustee, so that some person may be willing to buy from him at a price, even though it partake of the qualities of a personal privilege, in the sense of being not legally assignable, passes to the trustee, except such property as is expressly exempted by law.
* * *

"The village liquor license now in the possession of the bankrupt, is in some sense property. It represents the investment of a large amount of money, and will be deemed to have a money value. The trustee in bankruptcy is entitled to said license, and is bound to realize upon it, whatever he may be able to sell it for. The question as to what title he may be able to give, is for the consideration of an intending purchaser."

But a liquor license will not pass in Georgia, because it is not a contract nor a property right.¹⁷ And it has been held, that a liquor license in Pennsylvania will not pass since it is peculiarly a personal privilege;¹⁸ al-

17. In *re Keller*, 16 A. B. R. 727 (D. C. Ga.).

18. In *re Olewine*, 11 A. B. R. 40, 125 Fed. 840 (D. C. Penna.). Contra, In *re Becker*, 3 A. B. R. 412, 98 Fed. 407 (D. C. Penna.): "No doubt there is a clearly visible distinction between a right to property and a mere personal privilege; but I see no abstract reason why some personal privileges may not also come to have qualities belonging usually to property rights alone—such, for example, as capacity to be transferred, and sufficient attractiveness to make other persons willing to pay money for the opportunity to acquire them. Where, as in the case of a license to sell liquor, these qualities are found to exist in fact, it seems to me that the privilege has ceased to be a privilege merely, and has become, in some sense and in some degree, property also. It can hardly be correct to hold that a bankrupt's creditors may not avail themselves of the fact that money can be had for the chance of stepping into the licensee's place, but

though in Massachusetts it will pass,¹⁹ conditioned, however, on the assent of the public authorities to the transfer.²⁰ But even in Massachusetts if the public authorities refuse assent to the mortgaging of the liquor license by the bankrupt, the proceeds of the sale of the liquor license will not be turned over to satisfy the mortgagee.²¹ Likewise, a market stall license passes to the trustee under the same rulings.²²

§ 968. Though Subject to Contingency of Election or of Approval of Public Authorities.—This is so notwithstanding the membership may be a subject of election; the purchaser buys subject to the contingency that he may not be elected. Also, notwithstanding such personal privileges cannot be levied on and sold; they may be transferred by the bankrupt, for “transfer” includes *conditional* sales and “any and every mode of parting with property or the possession of it,” according to the definition of the term “transfer” contained in § 1.²³

§ 969. And Though “Transferable” Only by Peculiar and Unusual Means.—And this is so, also, though the privilege is transferable only by peculiar and unusual means. Thus, where transferable only on the former owner’s written application, the bankrupt may be compelled to sign an application to the stock exchange for a sale and transfer of the seat and a payment of the proceeds to the trustee in bankruptcy;²⁴ and may be compelled to execute the instruments conferring upon the trustee the right to sell.²⁵ And the bankrupt also may be compelled to execute an assignment of a license to the trustee.²⁶

O’Dell v. Boyden, 17 A. B. R. 759 (C. C. A. Ohio): “Only through a court of equity can the pecuniary value of such an asset be realized to creditors or assignees. Only by decree in personam compelling the bankrupt member,

that the bankrupt himself may make the same bargain, and put the money safely into his pocket. The license court may or may not accept the buyer as the bankrupt’s successor. That is the buyer’s affair, and is not decisive upon the point now being considered. He buys a contingency, and buys it with his eyes open; but, in my opinion, the trustee has the contingency to sell, and the bankrupt is bound to execute the instruments necessary to carry out the sale.”

19. In re Fisher, 3 A. B. R. 406, 98 Fed. 89 (D. C. Mass.); In re Brodbine, 2 A. B. R. 53, 93 Fed. 643 (D. C. Mass.).

20. *Fisher v. Cushman*, 4 A. B. R. 646, 103 Fed. 860 (C. C. A. Mass., affirming In re Fisher, 3 A. B. R. 406, 98 Fed. 89, affirming 1 A. B. R. 557).

21. In re McArdle, 11 A. B. R. 358, 126 Fed. 442 (D. C. Mass.).

22. In re Emrich, 4 A. B. R. 89, 101 Fed. 231 (D. C. Ga.).

23. *Page v. Edmunds*, 9 A. B. R. 277, 187 U. S. 596 (affirming In re Page, 5 A. B. R. 707, and 4 A. B. R. 467, 102 Fed. 746); In re Neimann, 10 A. B. R. 739, 124 Fed. 738 (D. C. Wis.); In re May, 5 A. B. R. 1 (Ref. Minn.); In re Hurlbutt, et al., 13 A. B. R. 50, 135 Fed. 504 (C. C. A. N. Y.); In re Gaylord, 7 A. B. R. 195, 111 Fed. 717 (D. C. Mo.); *O’Dell v. Boyden*, 17 A. B. R. 757, 150 Fed. 731 (C. C. A. Ohio); In re Emrich, 4 A. B. R. 89, 101 Fed. 231 (D. C. Pa.); In re Olewine, 11 A. B. R. 40, 125 Fed. 840 (D. C. Pa.); In re Becker, 3 A. B. R. 412, 98 Fed. 407 (D. C. Pa.).

24. In re Hurlbutt, 13 A. B. R. 50, 135 Fed. 504 (C. C. A. N. Y.).

25. In re Becker, 3 A. B. R. 412, 96 Fed. 407 (D. C. Pa.).

26. In re Emrich, 4 A. B. R. 89, 101 Fed. 231 (D. C. Pa.).

can such a transfer of membership be effectuated as will put the buyer in the place of Henrotin as a member. Over him for that purpose the bankrupt court has exclusive control, and, in this sense, also, may it be said, that the 'seat' or 'membership' was in custodia legis when the trustee sought the aid of the court to adjudicate the claims and liens asserted by O'Dell."

'SUBDIVISION "B."

EXPECTANCIES AND POSSIBILITIES OF ACQUIRING PROPERTY; INCHOATE INTERESTS; VESTED AND CONTINGENT INTERESTS; LEGACIES; REMAINDERS; LIFE ESTATES AND REVERSIONARY INTERESTS.

§ 970. **Property Rights Must Exist in Bankrupt.**—Although the property may consist of a contingent or conditional interest and be transferable only by peculiar "means," yet there must at least be something there which the law would denominate a property right.²⁷

Thus, mere expectancies and bare possibilities of acquiring property do not pass. They do not constitute property nor title to property, nor can they be transferred or levied on, therefore they do not pass to the trustee.²⁸

In *re Wetmore*, 6 A. B. R. 214, 108 Fed. 210 (C. C. A. Penna., affirming 4 A. B. R. 335): "A bare possibility or mere expectation of acquiring property does not constitute property or a title to property; nor can it be transferred or levied upon. While the right of enjoyment may be uncertain and contingent, it is necessary that an interest or title of some kind be vested in the bankrupt in order that it may pass by operation of law to the trustee."

Thus, as to a claim of alimony existing at the time of filing the petition, where the alimony is not awarded until subsequently thereto.

In *re LeClaire*, 10 A. B. R. 733, 124 Fed. 654 (D. C. Iowa): "Certainly, at the date of the adjudication in this case, the mere claim or possible right to alimony asserted by the bankrupt in the divorce proceedings could not have been levied on and sold under judicial process, nor was it a property right which could be made the subject of barter and sale with third parties by the bankrupt himself. Prior to the entering of the decree of divorce in the District Court of Clay county, which was not done until some days after the date of adjudication, it could not be known whether a divorce would be granted to the bankrupt, or whether any alimony would be allowed her; and, if allowed, it could not be known whether it would be in the form of stated amounts of money to be paid by the husband, or by setting apart specific property to her, both of which methods are permissible under the statute of Iowa. * * * It seems clear that a claim for alimony asserted in a suit for divorce is not a property right that can be sold and transferred by the claimant, or that can be levied on by judicial process."

²⁷. In *re Wetmore*, 6 A. B. R. 214, 108 Fed. 210 (C. C. A. Pa., affirming 4 A. B. R. 335).

²⁸. In *re Gardner*, 5 A. B. R. 432 (D. C. N. Y.); In *re Woods*, 13 A. B. R. 240, 133 Fed. 82 (D. C. Pa.); In *re Braeutigam*, 3 N. B. N. & R. 461 (Ref. N. J.); In *re Hoadley*, 3 A. B. R. 780, 101 Fed. 233 (D. C. N. Y.); In *re Freeman*, 2 N. B. N. & R. 569 (Ref. Tenn.); In *re Ehle*, 6 A. B. R. 476 (D. C. Vt.); apparently, contra. In *re Twaddell*, 6 A. B. R. 539, 110 Fed. 145 (D. C. Del.).

Thus, a stockbroker's lien upon customer's securities.

In *re Berry*, 15 A. B. R. 360, 146 Fed. 623 (D. C. N. Y.): "The stock was the customers' property. If the bankrupts had what is called a special property in it, in the way of a lien upon it, I do not think that that is what is referred to in the Bankrupt Act as the bankrupt's property."

§ 971. **Mere Inchoate Interests Do Not Pass.**—Nor would a mere inchoate interest pass, and this would be so although the bankrupt by joining in a deed or otherwise might be able to estop himself from afterwards claiming title to the property when the inchoate interest actually should become consummate and vested. Yet this ability to estop one's self does not amount to an ability to transfer the title and so such property does not pass to the trustee.²⁹ Thus inchoate dower interests do not pass;³⁰ nor do estates by curtesy initiate.³¹ But estates by curtesy consummate do pass.³²

§ 972. **Vested Interests Pass.**—If the interest actually is a vested interest, it passes to the trustee, as for instance vested remainders and inheritances, legacies and devises, if the death of the ancestor or testator occurs before the adjudication of the heir, legatee or devisee.³³

In *re McKenna*, 15 A. B. R. 4, 137 Fed. 611 (D. C. N. Y.): "The facts in this case are somewhat peculiar. Isaac Bradt died at the city of Albany, N. Y., on the 29th day of December, 1902, at 8 o'clock and 45 minutes a. m., leaving a last will and testament, in and by which he left a general legacy of \$25,000 to said Edward J. McKenna, of the city of Troy, N. Y. Said Edward J. McKenna, said legatee, filed a voluntary petition in bankruptcy in the Northern District of New York on the same day, December 29th, 1902, at ten o'clock in the forenoon, and on the same day, at 2:30 o'clock p. m., he was duly adjudicated a bankrupt. His petition and schedules were verified December 27th, 1902; and the circumstances, sickness of Bradt, very frequent visits of McKenna to him, etc., are such that it is not unreasonable to think that McKenna knew he was a legatee in the will, and was seeking to obtain a discharge in bankruptcy prior to coming into such legacy, that he might enjoy it without impairment. * * * There is no question that, on the appointment of Andrew P. McKenna as trustee, the title to the legacy vested in him as such, and he was entitled to receive it."

29. In *re Twaddell*, 6 A. B. R. 539, 110 Fed. 145 (D. C. Del.); In *re Russell*, 13 A. B. R. 24 (Ref. Ohio); *Hesseltine v. Prince*, 2 A. B. R. 600, 95 Fed. 802 (D. C. Mass.).

30. In *re Russell*, 13 A. B. R. 24 (Ref. Ohio).

31. *Hesseltine v. Prince*, 2 A. B. R. 600, 95 Fed. 802 (D. C. Mass.).

32. In *re Marquette*, 4 A. B. R. 623, 103 Fed. 777 (D. C. Vt.).

33. Impliedly, In *re Roosa*, 9 A. B. R. 531, 119 Fed. 542 (D. C. Iowa); In *re Wood*, 3 A. B. R. 572, 95 Fed. 946 (D. C. N. Y.); In *re Schenberger*, 4 A. B. R. 487 (D. C. Ohio); In *re McHarry*, 7 A. B. R. 83, 111 Fed. 408 (C. C. A. Ills.); In *re Twaddell*, 6 A. B. R. 539, 110 Fed. 145 (D. C. Del.); In *re May*, 5 A. B. R. 1 (Ref. Minn., affirmed by D. C.); *Churchman's Appeal* (Pa.), 12 Atl. 600; In *re St. John*, 5 A. B. R. 190, 105 Fed. 234 (D. C. N. Y.); In *re Mosier*, 7 A. B. R. 268, 112 Fed. 138 (D. C. Vt.); *Osman v. Galbraith Admr.*, 9 A. B. R. 339 (Sup. Ct. Mich.).

As, for instance, reversionary interests, such as the reversionary interest of creditors in property set apart as a homestead upon the abandonment or other expiration of the homestead.

In *re Woodard*, 2 A. B. R. 339, 95 Fed. 260 (D. C. N. Car.): "It will be seen from these authorities that creditors have some rights, shadowy and deferred it may be, against debtors, even under the homestead provisions of the State constitution. They may obtain judgments and acquire liens—liens they may not live to realize, but which may benefit their heirs or estate when the exemption terminates under the law."

And the right of the bankrupt to receive cash at the end of the tontine period passes to the trustee, although, before that time, if he dies, his wife is sole beneficiary and there is no other cash surrender value.³⁴ And the interest, if vested, will pass, although the extent of the interest may be undetermined; such as annuities.³⁵ But it has been held, that annuities do not pass where alienation is restricted.³⁶ The undetermined interest of a bankrupt in a decedent's estate will pass;³⁷ even the distributive share in personalty where the decree, though entered subsequently to the adjudication of bankruptcy, takes effect as of a date prior thereto.³⁸

Growing crops in land before severance, cultivated by the bankrupt as a tenant farmer on shares, will pass.³⁹

And the interest will pass although it may be subject to a contingency; such as the contingency that the remainderman, to take, must survive the life tenant;⁴⁰ or that the interest be terminable upon death;⁴¹ such as life estates in real property.

SUBDIVISION "C."

PROPERTY HELD IN TRUST FOR BANKRUPT AND BY BANKRUPT AND IN-ALIENABLE PROPERTY.

§ 973. **Property Held in Trust for Bankrupt Passes.**—The beneficial interest of the bankrupt in property held in trust for him passes to his

34. In *re Welling*, 7 A. B. R. 340, 113 Fed. 189 (C. C. A. Ills.). Also, see post, subdivision "G," "Life Insurance Policies as Assets," § 1002, et seq.

35. *Brown v. Barker*, 8 A. B. R. 450 (Sup. Ct. N. Y., App. Div.), S. C., 74 N. Y. Sup. 43, wherein the court held, that the surplus income of a trust fund left by bankrupt's father for bankrupt's support, beyond the sum necessary for the bankrupt's support is an asset liable to claims of creditors and passes to the trustee as being property transferable and leviable upon. To same effect, In *re Tiffany*, 13 A. B. R. 310, 147 Fed. 314 (D. C. N. Y.). In *re Baudouline*, 3 A. B. R. 55, 96 Fed. 536 (D. C. N. Y., reversed, on jurisdictional grounds, in 3 A. B. R. 651, C. C. A. N. Y.).

36. *Munroe v. Dewey*, 4 A. B. R. 264 (Mass. Sup. Jud. Ct.).

37. In *re Mosier*, 7 A. B. R. 268, 112 Fed. 138 (D. C. Vt.); *Osman v. Galbraith Admr.*, 9 A. B. R. 339 (Sup. Ct. Mich.).

38. *McNaboe v. Marks*, 16 A. B. R. 767 (N. Y. Sup. Ct.).

39. In *re Barrow*, 3 A. B. R. 414, 98 Fed. 582 (D. C. Va.); compare, In *re Luckenbill*, 11 A. B. R. 455, 127 Fed. 984 (D. C. Pa.).

40. In *re Twaddell*, 6 A. B. R. 539, 110 Fed. 145 (D. C. Del.); contra, In *re Hoadley*, 3 A. B. R. 780 (D. C. N. Y.). In this case the distinction was drawn between contingency of person and contingency of event.

41. *Obiter*, In *re Force*, 4 A. B. R. 116 (Ref. Mass.).

trustee in bankruptcy.⁴² Thus, the beneficial interest of the bankrupt in property held in trust for the bankrupt and others, the beneficiaries to share profits and losses, passes to the trustee.⁴³ Likewise, property held by another on a resulting trust for the bankrupt, would pass to the trustee.⁴⁴

§ 974. Property Held by Bankrupt as Trustee of Resulting Trust, Not.—Property held by the bankrupt as trustee of a resulting trust does not pass.⁴⁵

§ 975. Spendthrift Trusts and Restrictions on Alienation.—As to the effectiveness of restrictions upon the alienation of property held in trust for spendthrifts, there have been various rulings, all of which are in conformity with the rules heretofore laid down.⁴⁶

Brown v. Barker, 8 A. B. R. 459 (Sup. Ct. N. Y. App. Div.): "The surplus income of this trust fund, if such surplus is established, is, beyond dispute, a species of property—an asset—which is liable to the claims of creditors. * * * Such claims are not limited for their satisfaction to any surplus which may

⁴². In re Jersey Island Packing Co., 14 A. B. R. 962, 138 Fed. 625 (C. C. A. Calif.).

⁴³. In re Alden, 16 A. B. R. 362 (Ref. Ohio).

⁴⁴. **Instance Held Not a Resulting Trust.**—Real estate bought with bankrupt's money but put in wife's name when the bankrupt solvent. In re Foss, 17 A. B. R. 439 (D. C. Me.): "Where, upon the purchase of property, the consideration is paid by one, and the legal title conveyed to another, a resulting trust is thereby raised, and the person named in the deed will hold the property as trustee of the party paying the consideration. The burden is on the party who alleges the trust."

But compare, *Evans v. Staalle*, 11 A. B. R. 182 (Minn.), where a judgment creditor, suing in the State Court after adjudication of the debtor, was permitted to appropriate property held in secret trust to his own judgment. Undoubtedly the trustee of the debtor had the title but evidently he never sought to assert.

⁴⁵. In re Davis, 7 A. B. R. 258 (D. C. Mass.); compare, where resulting trust held not to exist, *Merrill v. Hussey*, 16 A. B. R. 816, 64 Atl. (Me.) 819.

In re Coffin, 18 A. B. R. 127, 146 Fed. 171 (C. C. A. Conn., reversing 16 A. B. R. 687). In this case a corporation had borrowed money pro rata from all its stockholders and given a trust deed on its property to secure them. Afterwards having great confidence in the bankrupt, who was one of the stockholders, all the stockholders had the trustee deed the property to the bankrupt absolutely and thereafter by suit the title was quieted in the bankrupt. The court below held the decree was binding and that the bankruptcy trustee took title free from any trust; but the reviewing court reversed this holding and declared that the trust persisted notwithstanding the decree, since the trust relation had been subsequently recognized by the trustee.

⁴⁶. In re Baudouine, 3 A. B. R. 55, 95 Fed. 536 (D. C. N. Y., reversed on question of jurisdiction, in 3 A. B. R. 651, 101 Fed. 574, C. C. A. N. Y.); In re Tiffany, 13 A. B. R. 310, 138 Fed. 192 (D. C. N. Y.); *Munroe v. Dewey*, 4 A. B. R. 264 (Sup. Jud. Ct. Mass.); In re McKay, 16 A. B. R. 238 (D. C. N. Y.); *McNaboe v. Marks*, 16 A. B. R. 50, 135 Fed. 504 (C. C. A. N. Y.); *Butler v. Baudouine*, 16 A. B. R. 238, note 84 App. Div. (N. Y.) 215, affirmed in 177 N. Y. 530. As to validity of conditions restricting the passing of property to a trustee in bankruptcy, see note to In re Baudouine, 3 A. B. R. 56, (D. C. N. Y.). Excuse of creditor for failing to recover judgment, that bankruptcy court had enjoined him, held insufficient. *Brown v. Barker*, 8 A. B. R. 450 (Sup. Ct. N. Y. App. Div.); S. C., 74 N. Y. Sup. 43. However, it was sufficient because the Bankrupt Act specifically provides for precisely the restraining order granted in the case. See Bankr. Act, § 11.

Other Inalienable Property.—Indian lands where, until the expiration of a term of twenty-five years, the Indian could not sell or transfer the land nor could the land be levied on, In re Russie, 3 A. B. R. 6, 96 Fed. 603 (D. C. Ore.).

exist at a given date when proceedings are instituted, but their payment may be enforced out of the surplus arising in the future, as the income accrues and becomes payable. The right to such future surplus is not indefinite and uncertain, even though the surplus itself may be subject to the fluctuations and uncertainties of securities and of the continuance of the beneficiary's life. *Williams v. Thorn*, 70 N. Y. 270. It is not impossible to conceive of cases where, if the right to follow and secure for the benefit of creditors the surplus of such an income does not pass to the assignee in bankruptcy, it will be lost to creditors entirely, through the discharge of the bankrupt from his debts."

SUBDIVISION "D".

UNPAID STOCK SUBSCRIPTIONS.

§ 976. **Unpaid Stock Subscriptions Pass.**—Unpaid stock subscriptions in a bankrupt corporation pass to the trustee.⁴⁷

Allen v. Grant, 14 A. B. R. 349 (Sup. Ct. Ga.): "The trustee in bankruptcy of an insolvent corporation may sue for the recovery of unpaid subscription, not only where the subscription is payable in cash, but also where it is expressly made payable in specifics, fraudulently overvalued.

"A subscription to stock, payable in specifics, worth not more than 10 per cent. of the face of the shares, is a legal fraud upon subsequent creditors of the corporation, who may look to the authorized capital stock as a trust fund for the payment of their debts.

"A transferee, who takes such shares with knowledge that they have been improperly issued, as fully paid-up, becomes liable for the unpaid subscription.

"This liability can be enforced by the trustee in bankruptcy. For while he represents the corporation in a sense, he also represents the creditors."

§ 977. **Bankruptcy Court May Make "Call."**—And the bankruptcy court has jurisdiction in the bankruptcy proceedings themselves, to make the assessment prerequisite to the institution of suits to collect the unpaid stock subscriptions.⁴⁸

Sawyer v. Upton, 17 Wall. 620: "The trustee is the proper one to make the call."

Clevenger v. Moore, 12 A. B. R. 738 (N. J. Sup. Ct.): "It is contended that the refusal to nonsuit was error because the trustee made no assessment, but simply demanded the whole amount due upon the stock. The answer to this is that the trustee followed the direction of the order of the United States

47. In re Crystal Springs Bottling Co., 3 A. B. R. 194, 96 Fed. 945 (D. C. Vt.); inferentially, In re Miller Electrical Maintenance Co., 6 A. B. R. 701, 111 Fed. 515 (D. C. Pa.); In re Automobile & Motor Co., 15 A. B. R. 214 (D. C. N. Y.); inferentially, In re Morris Arc Lamp Co., 10 A. B. R. 569 (D. C. Pa.).

That a stockholder who is also a creditor may not offset his claim against his liability for unpaid stock subscription, see post, subject, "Set-Off and Counterclaim," ch. 30, div. 1, subd. "E," § 1185. In re Goodman Shoe Co., 3 A. B. R. 200, 96 Fed. 949 (D. C. Pa.).

48. In re Miller El. Maint. Co., 6 A. B. R. 701, 111 Fed. 515 (D. C. Penna.); *Hawkins v. Glenn*, 131 U. S. 328; In re Crystal Spring Bottling Co., 3 A. B. R. 194, 96 Fed. 945 (D. C. Vt.); inferentially, *Allen v. Grant*, 14 A. B. R. 349 (Sup. Ct. Ga.); inferentially, In re Morris Arc Lamp Co., 10 A. B. R. 569 (D. C. Pa.).

District Court, which had jurisdiction of the matter, which was to make the assessment for 'the whole amount remaining unpaid on said stock.' The decree recites that the defendant was duly notified of the proceeding. The propriety or validity of that assessment cannot be questioned collaterally."

But in most states it is likely the bankruptcy court would confine itself to directing the trustee to institute or maintain the ordinary statutory suits in the state court in the nature of equitable actions wherein all stockholders are brought into one suit, and the requisite assessment therein ordered.

One case holds the order directing the trustee to bring suit is a sufficient "call."

Allen v. Grant, 14 A. B. R. 349 (Sup. Ct. Ga.): "The order of the bankruptcy court directing the trustee to bring suit for the recovery of the unpaid subscriptions is sufficiently in the nature of a call or assessment to authorize the maintenance of a suit against the stockholders, as for unpaid subscriptions."

One case holds, but erroneously, that the Bankruptcy Court has jurisdiction to entertain such suits.⁴⁹ This is clearly contrary to the law, even as it stands since the Amendment of 1903.

§ 978. **Statutory Secondary Liability of Stockholders Not an Asset.**—But the statutory secondary liability of directors and stockholders is not an asset of the corporation.⁵⁰

SUBDIVISION "E".

LEASEHOLDS.

§ 979. **Bankrupt as Landlord.**—Of course, leaseholds where the bankrupt is the lessor pass to his trustee. The lessor's adjudication as bankrupt does not sever the relation of landlord and tenant.⁵¹

§ 980. **Bankrupt as Tenant.**—Leaseholds owned by the bankrupt as tenant at the time of the filing of the petition, and which contain no express prohibition upon the transfer of the title, pass to the trustee.

§ 981. **Tenant's Bankruptcy Not Ipso Facto Termination of Lease.**—The tenant's adjudication as a bankrupt does not ipso facto terminate the lease, nor put an end to his estate in the leased premises.⁵²

§ 982. **Trustee Not Bound to Accept Lease as Asset.**—The trustee need not accept the lease.⁵³

49. In re Crystal Springs Bottling Co., 3 A. B. R. 194, 96 Fed. 945 (D. C. Vt.).

50. In re Crystal Springs Bottling Co., 3 A. B. R. 194, 96 Fed. 945 (D. C. Vt.).

51. *Obiter*, In re Hays, 9 A. B. R. 114, 117 Fed. 879 (D. C. Ky.). *

52. See ante, § 653.

53. In re Ellis, 3 A. B. R. 564, 98 Fed. 967 (D. C. Mass.); *Bray v. Cobb*, 3 A. B. R. 788, 100 Fed. 270 (D. C. N. Car., reversed, on other grounds, in *Cobb v. Overman*, 6 A. B. R. 324, C. C. A.).

Watson v. Merrill, 14 A. B. R. 454, 136 Fed. 359 (C. C. A. Kas.): "The trustee in bankruptcy has the option to assume or renounce the leases and other executory contracts of the bankrupt, as he may deem for the best interest of the estate."

§ 983. **Entitled to Time to Accept or Reject.**—The trustee has a reasonable time within which to make up his mind whether he will accept or reject the lease.⁵⁴ This is so from the peculiar nature of a lease, it possessing as an incident the burden of a periodical charge for the payment over to the landlord of the rent issuing out of it. To accept the lease then might founder the entire estate. Accordingly, the trustee has a reasonable time after the adjudication in which to make his election. What constitutes a reasonable time varies of course with the facts of each case. And if the trustee does not assume the lease, some cases hold the bankrupt remains liable thereon.⁵⁵

At any rate, if he does not assume the lease, the bankrupt estate, it has been held in some cases, is not liable for rent thereafter.⁵⁶

§ 984. **Trustee's Right to Occupy Premises for Reasonable Period.**—The trustee may continue to occupy and use the premises for a reasonable period, sufficient to enable him to remove the bankrupt's property, such right being analogous to the similar right of a tenant of a contingent term upon termination of the term. He may stay there long enough to remove the property by selling it, if thereby the landlord is not prejudiced.

§ 985. **Whether Bound to Pay Rent Stipulated, or Only for Use and Occupation.**—The trustee does not thereby become bound to the lease, and will be liable for merely the reasonable rent for the use of the premises [subject to his right to occupy free of charge for an unexpired portion of a term for which the landlord may hold a provable claim, in accordance with the principles stated post, § 992] whilst so occupying them and will not become liable for the rent stated in the lease itself, for to make him liable for the stated rent would be to bind him to the lease.⁵⁷

Inferentially, *Bray v. Cobb*, 3 A. B. R. 788, 100 Fed. 270 (D. C. N. Car.): "Under such circumstances it would be chargeable to the estate, not as rent under bankrupt's contract but as costs and expenses of administering the same. * * * If he did so use the bank he or the estate would be chargeable with the rent for the time it was used." This case was reversed, but on other grounds, in *Cobb v. Overman*, 6 A. B. R. 324 (C. C. A.).

In re *Jefferson*, 2 A. B. R. 206, 93 Fed. 948 (D. C. Ky.): "The duties of

54. In re *Ells*, 3 A. B. R. 564, 98 Fed. 967 (D. C. Mass.).

55. In re *Ells*, 3 A. B. R. 564, 98 Fed. 967 (D. C. Mass.).

56. *Bray v. Cobb*, 3 A. B. R. 788, 100 Fed. 270 (D. C. N. Car., reversed in *Cobb v. Overman*, 6 A. B. R. 324, C. C. A.).

57. In re *Luckenbill*, 11 A. B. R. 455, 127 Fed. 984 (D. C. Pa.). Nevertheless, the rent stipulated in the lease should be accepted as the measure of the reasonable worth of the use and occupation, in the absence of clear showing of unreasonableness. See post, "Costs of Administration," § 2035.

the trustee of the bankrupt are clearly defined by § 47 of the act, and can in no way be construed as making him the tenant, nor as authorizing the estate to be a tenant of the landlord under the lease, however much the trustee may become such by express or implied agreement with the landlord for the short time he may be compelled to occupy the premises in the discharge of the duties of trustee. He should, of course, for that time pay rent, and it should be treated as part of the expense of administering the trust estate."

§ 986. Previous Forfeiture Not Nullified by Tenant's Bankruptcy.—The landlord's previous exercise of the right to forfeit the lease is not avoided by the tenant's bankruptcy.⁵⁸

§ 987. Covenants of Forfeiture for Assigning or Subletting, Not Violated by Bankruptcy.—The trustee will get the title, although the lease itself may contain conditions against subletting or assigning the leasehold or may contain the right of forfeiture or re-entry therefor. Such conditions refer to the voluntary acts of the lessee in subletting and assigning the lease; and, even if an assignment for the benefit of creditors might break the condition, bankruptcy itself certainly would not so operate, for the title in bankruptcy passes purely by operation of law and not by voluntary act, as it does in the case of a voluntary assignment. The trustee is vested with the title, but not by "assignment."⁵⁹

In re Bush, 11 A. B. R. 415, 126 Fed. 878 (D. C. R. I.): "The clause in question is not the equivalent of an express provision declaring the lease void in case of bankruptcy, and it is not applicable to assigns by operation of law, or to their immediate vendees."

Doe v. Bevan, 3 Maule & Selw. 353: "Lord Ellenborough said: 'The courts have construed it to mean voluntary assigns as contradistinguished from assigns by operation of law and further than that, that the immediate vendee from the assigns in law is not within the proviso; the reason of which is that the assignee in law cannot be incumbered with the engagements belonging to the property he takes, such as in this case the carrying on the bankrupt's trade in the public house, which is a strong instance. In such cases, therefore, the law must allow the assignee to divest himself of the property and convert it into a fund for the benefit of creditors.'

"Le Blanc, J., said: 'There can be no doubt that the lessee might have relieved himself from all inconvenience by expressly providing in the lease

^{58.} Lindeke v. Associates Realty Co., 17 A. B. R. 215, 146 Fed. 630 (C. C. A. Minn.). Covenant in long term lease, to build, on penalty of forfeiture; forfeiture declared before bankruptcy.

^{59.} In re Thiessen, 2 N. B. R. & R. 628; also, 625 (D. C. Neb., and Ref. Neb.); In re Gose, 3 N. B. R. & R. 840 (Ref. Ohio). Covenants against assignment and underletting contained in leases having the force of conditions are not favored by the courts. Gazley v. Williams, 17 A. B. R. 253 (C. C. A. Ohio).

This attitude of disfavor, however, does not permit resort to sophistical reasoning to read out of such a covenant that which it really contains. It simply requires that what is claimed to be within it shall be clearly and manifestly so and that if there is a felt doubt as to its being within it, that it be excluded therefrom. The cases go very far towards holding that the mere letter of the covenant is controlling. Gazley v. Williams, 17 A. B. R. 253 (C. C. A. Ohio).

Rights of landlord may be determined in advance of sale of lease. Gazley v. Williams, 17 A. B. R. 253 (C. C. A. Ohio).

that if the lessee should become bankrupt or shall deposit the lease with any one then the lease should be void.'

"And again: 'It is clear that there has been no assignment by the lessee himself; it is also clear that the lessee's becoming bankrupt is not a breach, but the assignees under the commission have assigned. They were bound to assign because they took only as trustees for the purpose of disposing of the property to the best advantage for the benefit of creditors; and they are compelled under the order of the court of chancery to sell it in discharge of the debt of Whitbread & Co.'

"Bayley, J., said: 'It has never been considered that the lessee's becoming bankrupt was an avoiding of the lease within this proviso; and if it is not, what act has the lessee done to avoid it? All that has followed upon the bankruptcy is not by his act, but by operation of the law transferring his property to his assignees. Then shall the assignees have capacity to take it and yet not to dispose of it; shall they take it only for their own benefit or be obliged to retain it in their hands to the prejudice of the creditors for whose benefit the law originally cast it upon them? Undoubtedly that can never be.'"

Impliedly, *In re Adams*, 14 A. B. R. 23, 143 Fed. 142 (D. C. Conn.): "The trustee takes the premises by operation of law, and the bankrupt has in no sense violated the provisions of the lease by his proceedings. He assigned nothing, transferred nothing, conveyed nothing."

This is so, even though a general assignment preceded the bankruptcy, for the trustee does not take under the assignment, but in denial of its validity.

In re Bush, 11 A. B. R. 417, 126 Fed. 878 (D. C. R. I.): "Counsel for the lessor concedes that, where an involuntary bankrupt is tenant under a lease containing a covenant against assignment, an adjudication in bankruptcy is not a breach, and that the lease passes to the trustee. He makes the distinction that the transfer is effected by operation of law, and not by the voluntary act of the bankrupt. But the title to this lease which the creditors seek to preserve is not a title arising under the voluntary act of the bankrupt—that is, the general assignment—but a title which, by operation of law, vests in the trustee despite the general assignment. To constitute a breach of covenant not to assign, a valid assignment carrying the legal estate is required. If the assignment is void as an act of bankruptcy, it will not constitute a breach."

§ 988. **Leasehold Liberated from Forfeiture Clause.**—Where the title to the leasehold thus passes by operation of law, it passes freed from the clause of forfeiture, and may thereafter be sold and assigned by the trustee and perhaps, also, by the purchaser who buys it from the trustee.⁶⁰

Compare, suggestively, although not directly in point, *Lindeke v. Associates Realty Co.*, 17 A. B. R. 227 (C. C. A. Minn.): "The purchaser of the leasehold interest under the sale by the trustees in bankruptcy would not be liable for any antecedent breach of the covenant to build; and if the claim for damages therefor were liquidated and allowed in the bankruptcy proceedings, in any view the purchaser would take the property unburdened of the building covenant."

Compare, *Gazlay v. Williams*, 17 A. B. R. 252 (C. C. A. Ohio): "The appellee

60. *Goodbehere v. Bevan*, 3 M. & S. 383; *obiter*, *Bemis v. Wilder*, 100 Mass. 446 (1868); *In re Bush*, 11 A. B. R. 417, 126 Fed. 878 (D. C. R. I.).

maintains, on several grounds, that a sale by him of the leasehold estate for the benefit of creditors will not work a forfeiture thereof. He contends that this case comes within the rule laid down in *Dumpor's Case*, 4 Coke 119b (1 Smith's Lead. Cases 15). That rule is that where a lease is upon a proviso that the lessee shall not alien without the special license of the lessors, if the license is once given, the condition is annulled, removed or destroyed, that is, has spent its force, so that it can have no effect on a subsequent alienation. Here the interest of Kueny, the original lessee, was sold to said Brown by the procurement of appellants. This, it is urged, exhausts the condition and brings the case within the rule stated."

§ 989. Bankruptcy Works Forfeiture, if Specifically Provided.—A distinct and unequivocal condition of the lease forfeiting the residue of the term, in case the lessee become a bankrupt, will cause a forfeiture, provided steps be taken to declare the forfeiture.⁶¹

§ 990. But if Specific Method Stipulated, Such Method Alone Effective.—But if the lease provides that the forfeiture shall be declared in a certain way, as, by re-entry, that method must be pursued, and if the landlord is prevented from enforcing his rights in the manner prescribed, the lease cannot be forfeited.⁶²

§ 991. Where Future Rent Already Paid, Leasehold Passes.—Where the future rent is already paid the leasehold of course passes at once.⁶³

§ 992. Receiver or Trustee Occupy Free, for Any Period for Which Landlord Holds Provable Claim.—Where the future rent is payable in advance and falls due before the bankruptcy, but is not paid, and the tenant has continued occupancy without the landlord having taken any steps to declare a forfeiture, the use of the premises for the period covered by the installment thus falling due, nevertheless, likewise passes to the trustee free of charge, the landlord simply having his provable claim against the estate for the rent thus due before bankruptcy.⁶⁴

61. Impliedly, *In re Ells*, 3 A. B. R. 564, 98 Fed. 967 (D. C. Mass.). But *quære*, *Wilson v. Penna. Trust Co.*, 8 A. B. R. 196, 114 Fed. 742 (C. C. A. Penna.): "Notwithstanding the ruling in *Platt v. Johnson*, 168 Pa. 47, 31 Atl. 935, 47 Am. St. Rep. 877, upholding as valid a provision in a lease that the entire rent for the balance of the term should become due if the lessee should become embarrassed, or make an assignment for the benefit of creditors, or be sold out by sheriff's sale, it may well be doubted whether the stipulation here making the whole rent for the whole term due and payable if the lessee 'shall become a bankrupt' is enforceable as against the provisions of the Bankrupt Act."

62. *In re Ells*, 3 A. B. R. 564, 98 Fed. 967 (D. C. Mass.).

63. *Obiter*, *In re Ells*, 3 A. B. R. 564, 98 Fed. 967 (D. C. Mass.).

64. *In re Mitchell*, 8 A. B. R. 324, 116 Fed. 87 (D. C. Cal.); compare, impliedly, *Wilson v. Penna. Trust Co.*, 8 A. B. R. 169, 114 Fed. 742 (C. C. A. Pa.). Re-entry clause gives no lien on proceeds of sale of leasehold: And the landlord has no lien for such over due rent upon the proceeds of the trustee's

But where all the remaining rent is to become due upon default or bankruptcy and where at the same time default and bankruptcy are stipulated to forfeit the lease, the landlord cannot insist upon his claim or lien for the future rent, and at the same time declare a forfeiture or make re-entry.

Wilson v. Penna. Trust Co., 8 A. B. R. 169, 114 Fed. 742 (C. C. A. Penna.): "Assuming the validity of the stipulation where the lessee is adjudged a bankrupt, these consequences would follow its enforcement. In the first place, under the Pennsylvania act of 1836 the landlord would be entitled to priority of payment out of the proceeds of sale of the tenant's goods upon the demised premises to the extent of one year's rent. *Longstreth v. Pennock*, 20 Wall. 575, 22 L. Ed. 451. Secondly, the rent for the entire residue of the term would be provable as an unpreferred debt, entitled only to a pro rata dividend, and the unexpired portion of the term would become an asset of the bankrupt's estate, to be disposed of by the trustee in bankruptcy for the benefit of the estate. The latter result, however, this claimant repudiated altogether. He sought a partial and one-sided enforcement of the stipulation. He attempted to secure a preference for one year's rent, and at the same time retain his interest as landlord unimpaired in the residue of the term."

§ 993. **Rents of Mortgaged Premises, Uncollected or Accruing after Bankruptcy.**—Rents of mortgaged property accruing after bankruptcy, also rents accruing beforehand but uncollected at the time of bankruptcy, or collected but still in the bankrupt's hands, all pass to the trustee of the bankrupt mortgagor, in the absence of any clause in the mortgage including the rents, or of any other contract giving the mortgagee the right thereto, unless and until the mortgagee has taken steps to sequester the rents by the appointment of a receiver, or otherwise, in the bankruptcy court.⁶⁵

sale of the leasehold by virtue of any mere re-entry clause in the lease itself. *In re Ruppel*, 3 A. B. R. 233, 97 Fed. 778 (D. C. Penna.).

Trustee of Bankrupt Tenant Cannot Perfect Landlord's Lien.—Trustee in bankruptcy of tenant cannot perfect lien in favor of landlord: he does not represent secured creditors except in the capacity of mere custodian. *Goldman v. Smith*, 2 A. B. R. 104 (Ref. Ky.).

Trustee has right to have crops under a lease on shares where tenant becomes bankrupt. *In re Luckenbill*, 11 A. B. R. 455, 127 Fed. 984 (D. C. Penna.); *In re Barrow*, 3 A. B. R. 414, 98 Fed. 582 (D. C. Va.).

⁶⁵. *In re Cass*, 6 A. B. R. 722 (Ref. Ohio); *In re Dole*, 7 A. B. R. 21, 110 Fed. 926 (D. C. Vt.); *Elmore v. Symonds*, 183 Mass. 321, 67 N. E. 314; impliedly, *In re Hollenfeltz*, 2 A. B. R. 499 (D. C. Iowa); *obiter*, *In re Force*, 4 A. B. R. 116 (Ref. Mass.); (1867) *In re Shedaker*, 4 N. B. Reg. 168; (1867) *Foster v. Rhodes*, 10 N. B. Reg. 523; (1867) *In re Bennett*, Fed. Cases 1,313, 12 N. B. Reg. 257. Draft drawn by landlord on agent for future rents to be collected by agent and discounted at bank has been held to be an equitable assignment of the rents and to be good against landlord's trustee in bankruptcy. *In re Oliver*, 13 A. B. R. 694, 132 Fed. 588 (D. C. Tex.).

Under a mortgage, which, after the usual provision giving the holder a right to a receiver of the rents and profits of the premises, provided "And the said rents and profit are hereby, in the event of any default or defaults in the payment of said principal or interest assigned to the holder of this mortgage," the holder is a mere pledgee of the rents, to which he does not become entitled until after his application for a receiver has been granted and the receiver has made demand. *In re Banner*, 18 A. B. R. 61, 149 Fed. 936 (D. C. N. Y.).

In *re Chase*, 13 A. B. R. 294, 124 Fed. 753 (D. C. Mass.): "Ordinarily the mortgagor is entitled to rents and profits accrued up to the time that the mortgagee enters or brings his right of entry or his bill to foreclosure, and this right inheres in a trustee in bankruptcy. * * * There may be exceptional cases where a court of bankruptcy, proceeding upon equitable considerations, will treat some informal attempt by the mortgagee to obtain possession of the mortgaged property as the equivalent of a bill in equity and the appointment of a receiver."

In *re Banner*, 18 A. B. R. 64, 149 Fed. 936 (D. C. N. Y.): "I therefore follow *Freedman's Sav. Co. v. Shepherd*, 127 U. S. at page 502, holding that it is competent for the parties to provide in the mortgage for the payment of rents and profits to the mortgagee while the mortgagor remains in possession. But when the mortgage contains no such provision, and even where the income is expressly pledged as security for the mortgage debt, with the right in the mortgagee to take possession upon the failure of the mortgagor to perform the conditions of the mortgage, the general rule is that the mortgagee is not entitled to the rents and profits of the mortgaged premises until he takes actual possession, or until possession is taken in his behalf by a receiver, or until in proper form he demands and is refused possession.' This I believe is the true view. That a mortgagee out of possession can, upon the instant of a default in mortgage interest, become to all intents a landlord of the mortgaged building, seems to me something not to be encouraged. The form of words used in this mortgage operated merely as a pledge of the rents, to which the pledgee does not become entitled until he asserts his right and in some legal form endeavors to reduce the pledge to possession. An application for a receivership, followed by due demand, is such an appropriate form; and this form was followed within a few days after the appointment of the State court receiver, to wit, on or about September 1, 1906."

SUBDIVISION "F".

CONTRACTS FOR BANKRUPT'S PERSONAL SERVICES; UNSCHEDULED AND CONCEALED PROPERTY; FIXTURES; ENCUMBERED PROPERTY AND OTHER PROPERTY PASSING AND NOT PASSING.

§ 994. **Uncompleted Contracts Involving Personal Skill or Confidence.**—Uncompleted contracts for personal services or for the exercise of skill, wherein trust and confidence are reposed or reliance had on skill, do not pass.⁶⁶

In *re McBride & Co.*, 12 A. B. R. 83, 132 Fed. 285 (Ref. N. Y.): "After a careful consideration of the terms of the contract and the evidence adduced, I am of the opinion that the claimant is entitled to the copyrights in question because I must find on the facts and law that the contract was a personal engagement between author and publisher, involving trust and confidence which cannot be assigned or delegated to another without the author's consent."

Jetter Brew. Co. v. Scollan, 15 A. B. R. 300 (Sup. Ct. N. Y. App.): "The assignability of a contract, in general, depends upon its nature and the character of the obligation assumed; and when the contract is one for services, or the delivery of manufactured goods requiring science or peculiar qualification

66. Compare, In *re McAdam*, 3 A. B. R. 417 (D. C. N. Y.).

the contract will not be held to be assignable without the consent of the party sought to be held thereby." This was a case of a contract for the purchase of goods made by a particular manufacturer, namely, an agreement to buy "landlord's beer."

Thus a contract of agency between an insurance company and its general agent does not pass.⁶⁷

Obiter, *In re Wright*, 18 A. B. R. 199, 151 Fed. 361 (D. C. N. Y.): "That the contract in question is declaratory of the relations of personal confidence between the bankrupt and the insurance company is undoubted, and that a contract which involves the capacity of either or both parties to perform the conditions imposed cannot be assigned, is well settled."

But commissions on renewal premiums accruing after the bankruptcy on policies written beforehand, will pass, because they are assignable.

In re Wright, 18 A. B. R. 199, 151 Fed. 361 (D. C. N. Y., reversing 16 A. B. R. 778): "The vital question in this case, however, depends upon another principle, to wit, whether the bankrupt, Wright, can assign his commissions on renewal premiums to accrue annually in the future or the right to compel the insurance company to pay the same when they accrue. Concededly, if the commissions in question are assignable by the bankrupt, or are subject to levy and sale pursuant to judgment and execution against him, they constitute 'property,' as that term is legally defined, and the trustee in bankruptcy is vested by operation of law with the title of the bankrupt. That payment of the commissions, according to the terms of the contract, depended upon the future payment of renewal premiums by policy holders, and in a sense were contingent, is not thought of material importance. Evidence was given to show that customarily about 75 per cent. of the renewal premiums were paid. Hence, notwithstanding the element of contingency, the amount of the commissions to become due is determinable with reasonable certainty. I am unable to conceive upon what basis the confidential character of the contract will be destroyed, if the commissions of renewal premiums were set aside for the benefit of the general creditors, or when payable should be turned over to the trustee instead of to the bankrupt. The contract of employment, as I view it, will be destroyed only in case the bankrupt fails to faithfully discharge his duties or violates a material covenant contained therein."

§ 995. **Personal Right to Purchase, Not Transferable.**—A personal right to purchase, not transferable, does not pass to creditors.⁶⁸

§ 996. **Property Not Scheduled, or Concealed Otherwise, Passes.**—Property belonging to the estate but not scheduled by the bankrupt will nevertheless pass;⁶⁹ likewise property concealed from the trustee until the estate is closed; its title does not revest in the bankrupt.⁷⁰

§ 997. **Property Sold on Conditional Sale with Power to Sell in Usual Course.**—Property sold on conditional sale to the bank-

67. *In re Wright*, 16 A. B. R. 778 (Ref. N. Y.). See post, § 1131.

68. *In re Hansen*, 5 A. B. R. 747, 107 Fed. 252 (D. C. Ore.).

69. *Rand v. Iowa Central Ry. Co.*, 12 A. B. R. 164 (Sup. Ct. N. Y. App. Div.).

70. *Fowler v. Jenks*, 11 A. B. R. 255 (Minn.).

rupt, with power in the bankrupt to sell the same again in the usual course of trade, passes to the bankrupt's trustee.⁷¹

§ 998. Property Belonging to Bankrupt by Marital or Parental Right.—Property belonging to the bankrupt by virtue of marital or parental rights passes to the trustee, as, for instance, the product of a wife's lands, in States where the husband is entitled thereto by virtue of his marital rights.⁷²

But the earnings of an emancipated minor child of the bankrupt do not pass.⁷³

§ 999. Encumbered Property Passes.—Property encumbered with liens passes to the trustee, subject to the liens according to their validity.

Thus, money due on building or paving contracts passes, subject to lien.⁷⁴ Likewise, real estate encumbered with liens passes.⁷⁵

§ 1000. Fixtures May Pass.—Fixtures may or may not pass, according to circumstances.⁷⁶

§ 1001. Stocks, Bonds, Commercial Paper, Mortgages, Merchandise, etc., Pass.—Stocks, bonds and other securities; also all kinds of merchandise, also, funds in bank; also, commercial paper owned by the bankrupt; also, mortgages, and, in short, any and all the numerous forms of transferable property or property that can be levied on at the time of the filing of the petition; they all pass to the trustee.

SUBDIVISION "G."

LIFE INSURANCE POLICIES AS ASSETS.

§ 1002. Life Insurance Policies as Assets.—Among the assets passing to the trustee in bankruptcy under class 5, § 70, as being property which, prior to the filing of the petition, the bankrupt could by some means have transferred, or which might have been levied upon and sold under judicial process against him, are life insurance policies, wherein the bankrupt or his estate is the beneficiary, either absolutely, conditionally or contingently, or wherein he has reserved the right to change the beneficiary at will. Such policies constitute property of the bankrupt, although the bankrupt's interest in them may be contingent and remote. They also constitute property

71. In re Howland, 6 A. B. R. 495, 109 Fed. 896 (D. C. N. Y.).

72. In re Rooney, 6 A. B. R. 478, 109 Fed. 601 (D. C. Vt.); compare, In re Marsh, 6 A. B. R. 537 (D. C. Vt.).

73. In re Dunavant, 3 A. B. R. 41, 96 Fed. 542 (D. C. N. Car.).

74. In re Cramond, 17 A. B. R. 22, 145 Fed. 966 (D. C. N. Y.).

75. In re Noel, 14 A. B. R. 715, 137 Fed. 694 (D. C. Md.).

See further, for this subject, the various subjects under the topic of "What Title Does the Trustee Take?" post, ch. XXX.

76. Compare, In re Smith, 9 A. B. R. 590, 121 Fed. 1014 (D. C. R. I.); compare. In re Clark & Co., 9 A. B. R. 252, 118 Fed. 358 (D. C. Pa.).

that he could, by some means, have transferred. Certain of such policies might even have been subjected to a creditor's claim by legal proceedings.

Thus, policies of life insurance reserving to the insured the right to change at pleasure the beneficiary, although made payable to the wife and not to the debtor's estate, nevertheless will pass to the insured's trustee in bankruptcy, for at any time the insured could "transfer" the beneficial interest in the policy to whomsoever he would, by changing the beneficiary.

Thus, the rule is that life insurance policies on the bankrupt's life which are not exempted by the state law and which are payable either absolutely, conditionally or contingently, in whole or in part, to the bankrupt himself or to his estate or personal representatives, or in which he has reserved the right to change the beneficiary, pass, to the extent of such absolute, conditional, partial or contingent interest, to the trustee in bankruptcy; but, if they have either by contract or by negotiation with the insurer a cash surrender value, they are redeemable by the bankrupt by the payment or securing of payment to the trustee of the cash surrender value within thirty days after the trustee is notified by the company of such value.⁷⁷

§ 1003. Policies Exempt by State Law Do Not Pass.—Policies exempt by State law do not pass, even if payable to the bankrupt or his estate and have cash surrender value and are not redeemed, the State exemption laws, by virtue of § 6 and § 70 (a) of the Bankruptcy Act, controlling all other sections of the act.⁷⁸

Pulsifer v. Hussey, 9 A. B. R. 657, 97 Me. 434: "By the laws of Maine * * * this insurance is exempt from the claims of creditors, also by the Bankruptcy Act of 1898.

"The Bankrupt Act of 1898 provides, in § 6, that the 'act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws.' And § 70 of the Bankrupt Act provides that the trustee of the bankrupt shall 'be vested by operation of law with the title of the bankrupt * * * except in so far as it is to property which is exempt,' to various enumerated kinds of property and to 'property which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him.' Held, that this clause must be construed in the light of the terms in the earlier part of the same section which excepts exempted property. Any other construction would annihilate all the exemptions especially provided for in the act."

Holden v. Stratton, 14 A. B. R. 94, 198 U. S. 202: "As we have said, § 6 of the Act adopts, for the purposes of the bankruptcy proceedings, the exemptions allowed by the laws of the several States. * * *

"It is beyond controversy that if the section just quoted stood alone, the policies in question would be exempt under the Bankrupt Act. The contention

⁷⁷ Bankr. Act, § 70 (a), 70 (a) (5).

⁷⁸ *Steele v. Buell*, 5 A. B. R. 165, 104 Fed. 968 (C. C. A. Iowa, reversing *In re Steele*, 3 A. B. R. 549); contra, *In re Scheld*, 5 A. B. R. 102, 104 Fed. 876 (C. C. A.); contra, *In re Lange*, 1 A. B. R. 189, 91 Fed. 361 (D. C. Iowa, reversing 1 A. B. R. 187). Instance, not exempt; semi-tontine policy payable to wife if bankrupt dies during tontine period, is not exempt to him in New York, until expiration of tontine period, *In re Phelps*, 15 A. B. R. 170 (Ref. N. Y.).

that they are not, arises from what is assumed to be a limitation imposed upon the terms of § 6 by a proviso found in § 70a of the act. * * *

"Considering the matter originally, it is, we think, apparent that § 6 is couched in unlimited terms, and is accompanied with no qualification whatever. Even a superficial analysis of § 70a demonstrates that that section deals not with exemptions but solely with the nature and character of property, title to which passes to the trustee in bankruptcy. The opening clause of the section declares that the trustee after his appointment shall be vested 'by operation of law with the title of the bankrupt, * * * except in so far as it is to property which is exempt,' and this is followed by an enumeration under six headings, of the various classes of property which pass to the trustee. Clearly, the words 'except in so far as it is property which is exempt,' make manifest that it was the intention to exclude from the enumeration, property exempt by the Act. This qualification necessarily controls all the enumerations, and, therefore, excludes exempt property from all the provisions contained in the respective enumerations. The meaning now sought to be given to the proviso, cannot in reason be affixed to it without holding that the words 'except in so far as it is the property which is exempt,' do not control and limit the proviso. But to say this is to read out of the section the dominant limitations which it contains, and, therefore, to segregate the proviso from its context and cause it to mean exactly the reverse of what, when read in connection with the context, it necessarily implies." Reversing *In re Holden*, 7 A. B. R. 615 (C. C. A. Wash.).

§ 1004. Payable Absolutely to Third Person Do Not Pass.—No title at all passes to policies payable absolutely to a wife or husband, or kindred of the insured bankrupt or to other third person.⁷⁹

Obiter, *Pulsifer v. Hussey*, 9 A. B. R. 657, 97 Me. 434: "Section 70 of the Bankrupt Act does not include policies payable to a wife or kindred of the assured, but only applies to policies payable to the assured or his personal representatives."

Nor where assigned by valid assignment.⁸⁰

§ 1005. Payable to Bankrupt, His Estate or Personal Representatives, Pass.—Policies payable to the bankrupt, his estate or personal representatives, and not exempt, pass to the trustee, subject simply to the bankrupt's right to redeem.⁸¹

⁷⁹. *In re Dews*, 2 A. B. R. 483 (D. C. R. I.); *In re Steele*, 3 A. B. R. 549, 93 Fed. 78 (D. C. Iowa, reversed, on other points, in 5 A. B. R. 165).

⁸⁰. *In re Steele*, 3 A. B. R. 549, 98 Fed. 78 (D. C. Iowa, reversed, on other points, in *Steele v. Buell*, 5 A. B. R. 165).

⁸¹. *In re Coleman*, 14 A. B. R. 461, 136 Fed. 818 (C. C. A. N. Y.); *VanKirk v. Slate Co.*, 15 A. B. R. 239, 140 Fed. 38 (D. C. N. Y.); *In re Slingluff*, 5 A. B. R. 76, 106 Fed. 154 (D. C. Md.).

See inferentially, *Meyers v. Josephson*, 10 A. B. R. 687, 124 Fed. 734 (C. C. A. Ga.), where the court intimates that the trustee might sell such policy for what it would bring, reversing *In re Josephson*, 9 A. B. R. 345, where the court in an obiter dictum had remarked that such a policy would go free to the bankrupt.

Contra, *Pulsifer v. Hussey*, 9 A. B. R. 657, 97 Me. 434, where the court says it is only cash surrender value that goes to the trustee and only such cash surrender value as the policy possesses by its very terms; that if it has no cash surrender value it remains the bankrupt's property. Also, contra, *In re McDonnell*, 4 A. B. R. 92, 101 Fed. 239 (D. C. Iowa). Also, contra, *In re Hernich*, 1 A. B. R. 713 (Ref. Md., rejected in *In re Boardman*, 4 A. B. R. 622, 103 Fed. 783 [D. C. Mass.]).

§ 1006. **If Payable Conditionally, Contingently or Partly to Bankrupt's Estate, as "Endowment" and "Tontine" Policies; Policies Assigned as Security, etc.**—If they are payable to the bankrupt or his estate conditionally, contingently or partly, such conditional, contingent or partial interest passes to the trustee.

In re Coleman, 14 A. B. R. 461, 236 Fed. 818 (C. C. A. N. Y.): "Section 70, subd. 5, contains a proviso which is intended to modify the right of the trustee to take title to policies by enabling the bankrupt to retain policies that have a cash surrender value by paying the amount thereof to the trustee. This is a privilege conferred upon the bankrupt respecting the class of policies that have an ascertainable cash value. In such case the rights of the parties are specifically stated. The value of such a policy is easily ascertainable, and the bankrupt is given an opportunity to pay the ascertained value and keep the policy. This peculiar favor to the bankrupt is a limitation upon the trustee's right, but the proviso is not to be regarded as the sole grant of power to the trustee to take policies not exempt. The trustee's capacity to take this and other property is found in the portion of the statute, whereby he is vested with the title to all 'property which, prior to the filing of the petition, he (bankrupt) could by any means have transferred or which might have been levied upon or sold under judicial process against him.' This is sufficiently comprehensive to carry to the trustee the policies in question."

Thus, as to policies payable to the wife or if the wife dies first, then to the bankrupt's estate, the bankrupt's contingent interest passes to the trustee.⁸² Thus, as to endowment policies payable to the bankrupt at the end of the endowment period or to his wife if death occurs before the expiration of the endowment period, the bankrupt's defeasible interest passes.⁸³

Likewise, "tontine" policies payable to the bankrupt, his executors, administrators or assigns on the date named, or if he die before then to his mother or wife or other relative, if living, or if not living then to his heirs, administrators or assigns, having cash surrender value, pass to the trustee, subject to the relative's rights, and subject, of course, to the bankrupt's own redemption rights.⁸⁴

Likewise, as to a *semi-tontine policy* payable to the wife in case of the bankrupt's death before the end of the tontine period, the bankrupt having the option to receive cash at the end of the tontine period if he survive, the interest of the bankrupt vests in the trustee.⁸⁵

In re Mertens, 12 A. B. R. 712, 131 Fed. 972 (D. C. N. Y.): "While courts and judges of great learning have differed as to the proper construction of this

⁸². In re Holden, 7 A. B. R. 615, 113 Fed. 141 (C. C. A. Wash., reversed, on other grounds, in Holden v. Stratton, 14 A. B. R. 94, 198 U. S. 202).

⁸³. In re Diack, 3 A. B. R. 723, 100 Fed. 770 (D. C. N. Y.); Clark v. Ins. Co., 16 A. B. R. 138, 143 Fed. 175 (U. S. C. C. Pa.).

⁸⁴. In re Boardman, 4 A. B. R. 620, 103 Fed. 783 (D. C. Mass.); impliedly Pulsifer v. Hussey, 9 A. B. R. 657, 97 Me. 434; Clark v. Ins. Co., 16 A. B. R. 140, 143 Fed. 175 (U. S. C. C. Pa.).

⁸⁵. In re Phelps, 15 A. B. R. 170 (Ref. N. Y.); In re Slingsluff, 5 A. B. R. 76, 106 Fed. 154 (D. C. Md.); In re Welling, 7 A. B. R. 345, 113 Fed. 189 (C. C. A. Ills.); impliedly, In re Becker, 5 A. B. R. 438, 106 Fed. 54 (D. C. N. Y.).

section, it seems clear to this court that the policies in question here, containing as they do provisions beyond the ordinary life insurance policy, and in the nature of a contract for the investment of earnings under the policy, constitute assets, and have passed to the trustee, unless the bankrupt has prevented such effect by his action. This depends wholly on whether or not these policies have a 'cash surrender value payable to the insured,' J. M. Mertens, 'his estate or personal representatives,' within the intent and meaning of § 70, above quoted."

Thus, policies in which the bankrupt or his estate has only a partial interest, as in cases of assignment of part, assignment as security, interest of a wife arising in equity by virtue of the payment of premiums, etc.⁸⁶,

Impliedly, *In re Diack*, 3 A. B. R. 723, 100 Fed. 770 (D. C. N. Y.): "It is immaterial here whether the lien of Mrs. Diack for the premiums paid by her be treated as a legal or as a merely equitable lien. In bankruptcy both alike are preserved. In my view Mrs. Diack, under the law of this State, from the moment the policy had any surrender value through the payment of premiums, became entitled by its terms to a contingent legal interest in it, which entitled her to pay the premiums upon it, if necessary, in order to prevent it from lapsing; and on a surrender of the policy, defeating its ultimate provisions, any such payments previously made by her would create in her favor an equitable lien or charge upon her husband's interest for the same proportion of those payments that her husband's interest in the surrender value of the policy bore to the whole surrender value."

Also, subject, of course, to the rights of any pledgee or assignee for other purpose.⁸⁷

§ 1007. Change of Beneficiary.—Policies payable to a wife or husband of the bankrupt or kindred or other person, wherein the insured reserves the right to change the beneficiary at will, pass to the insured's trustee in bankruptcy, precisely as if payable to the insured's estate. They amount to no more than a direction to pay to a certain one after death a policy that up to the time of death the bankrupt himself could have "transferred" at pleasure.⁸⁸

§ 1008. All Such Pass, Provided Interest of Bankrupt Have Actual Value.—All such policies will pass, provided the bankrupt's interest therein at the date of adjudication was of actual value, upon which the trustee might realize.⁸⁹

Clark v. Equitable Life Assurance Soc., 16 A. B. R. 137, 143 Fed. 175 (U. S. C. C. Pa.): "The policy in question was a tontine policy and probably has no cash surrender value, but, even if it had, the bankrupt never availed himself

⁸⁶. Impliedly, *In re Boardman*, 4 A. B. R. 620, 103 Fed. 783 (D. C. Mass.), impliedly, *Pulsifer v. Hussey*, 9 A. B. R. 657, 97 Me. 434.

⁸⁷. Compare, *Clark v. Ins. Co.*, 16 A. B. R. 138, 143 Fed. 175 (U. S. C. C. A. Pa.).

⁸⁸. *Foxhever v. Order of the Red Cross*, 2 Ohio C. C. Reports (N. S.) 394.

⁸⁹. *Gould v. N. Y. Life Ins. Co.*, 13 A. B. R. 233, 132 Fed. 927 (D. C. Ark.).

of the privilege given by the proviso, and the policy therefore passed to the trustee as assets of the estate. That policies of life insurance such as this, having an actual value, pass to the trustee, has been directly decided by several of the Federal courts."

Inferentially, *In re Phelps*, 15 A. B. R. 171 (Ref. N. Y.): "It is conceded that, while they have by their terms no technical cash surrender value, each of them has an actual cash surrender value. The bankrupt, at the time of the adjudication, therefore, had an assignable interest in these policies. On his adjudication (§ 70a) such interest passed to the trustee. It is now assets in the hands of the trustee."

And they pass even though no cash surrender value be provided for by the terms of the policy.

Obiter, *Gould v. N. Y. Life Ins. Co.*, 13 A. B. R. 237, 132 Fed. 927 (D. C. Ark.): "That Congress did not intend to prevent the vesting in the trustee of the title to life policies which have a cash value but have no surrender value clearly appears from the language used, for, had that been the intention of Congress, there would have been no trouble to express it in terms neither ambiguous nor subject to different constructions.

"Another reason why it is clearly apparent that Congress did not intend to prevent a trustee in bankruptcy from becoming vested with the title to policies which have a cash value, but no surrender value, is that it is a well-known fact that until within the last few years many of the leading life insurance companies did not issue policies which had a cash surrender value at any time before maturity, basing their refusal to do so upon the meritorious ground that the right of surrender would in many instances defeat the beneficent object of life insurance to provide a fund for the family of the assured after his death, as the fact that the money could be obtained at any time by a loan or a surrender of the policy would tempt the assured to avail himself of this privilege whenever his business interests required any moneys which he could not otherwise easily obtain. Many of the tontine policies, when first issued, not only made no provision for a cash surrender value, but contained a special provision for an entire forfeiture of the policy upon the failure of the assured to pay a single premium at maturity, although such premium was the last one to be paid before the maturity of the policy.

"If the contention of the learned counsel for the defendant is correct, such a policy, no matter how great its actual value, or how large a sum could be obtained by a sale thereof, would still remain the property of the bankrupt. It requires no extended argument to show that such a construction would be in conflict with the entire spirit of the Bankruptcy Act. The court is clearly of the opinion that the title to a life policy payable, as this was, to the assured's executors, administrators, or assigns, passes to the trustee upon the adjudication of bankruptcy, even if it had no surrender value, provided it has a real cash value, which could be realized either by sale by the trustee or otherwise."

§ 1009. Bankrupt Required to Execute Assignment to Effect Transfer.—And the bankrupt may be required to execute assignments or other papers to the trustee to enable the latter to realize upon the policies.⁹⁰

In re Coleman, 14 A. B. R. 461, 136 Fed. 818 (C. C. A. N. Y.): "The trustee is at liberty to sell the husband's interest in the Equitable policy, and the bank-

⁹⁰. *In re Diack*, 3 A. B. R. 723, 100 Fed. 770 (D. C. N. Y.).

rupt should execute an assignment of his interest to the trustee for the purpose of enabling the latter to give title on such sale."

In *re Phelps*, 15 A. B. R. 170 (Ref. N. Y.): "A bankrupt may not only be required to assign to the trustee his interest in such a policy but also may be required to execute a power of attorney to exercise such options at and after the expiration of the tontine period."

§ 1010. May Not Compel Third Party, Interested, to Accept Paid-Up Policy, nor to Apply for Cash Surrender Value.—But in cases where a partial or contingent interest is held by a third person such third person cannot be compelled to accept a paid-up policy, nor to suffer it to lapse, nor to apply for its cash surrender value.⁹¹

§ 1011. Trustee Not to Wait for Maturity, but to Sell Interest for Present Worth.—The trustee, generally, should not wait for the maturity of the policy, but should sell the interest, whatever it is, passing to creditors, for what it will bring.⁹²

§ 1012. If of No Actual Value, at Date of Adjudication, Will Not Pass.—But if it have no actual value at all, at the date of adjudication, upon which the trustee could realize, then it will remain the bankrupt's property; and will not pass.⁹³

Gould v. N. Y. Life Ins. Co., 13 A. B. R. 233, 132 Fed. 927 (D. C. Ark.): "But, if the policy has no actual cash value, does the title vest in the trustee? That this policy had no real cash value is apparent from the agreed statement of facts. The policy had been in force only one year. The first premium had not yet been paid, although the policy, having been delivered, was in full force. The assured was, at the time of his death, only 30 years of age, and in good health. The annual premium for the next 19 years was \$254.85. Unless the second annual premium was paid on or before the 16th day of June, 1904, the policy would become absolutely worthless on the 16th day of July, 1904. The trustee made no efforts to pay the premium, and it is hardly necessary to state that, had he applied to the court for directions, the court would not only not have authorized him to pay the premium on the policy, but would have directed him to surrender it. It was the unfortunate suicide of the bankrupt

91. In *re Diack*, 3 A. B. R. 723, 100 Fed. 770 (D. C. N. Y.).

92. But compare, In *re Diack*, 3 A. B. R. 723, 100 Fed. 770 (D. C. N. Y.). But compare, In *re Coleman*, 14 A. B. R. 461, 136 Fed. 818 (C. C. A. N. Y.). And compare, analogously, In *re Gutterson*, 14 A. B. R. 495 (D. C. Mass.): "Doubtless the referee may refuse to order the sale of a speculative claim, where the sale is sought merely to annoy the bankrupt, and where the gain to the bankrupt estate will be merely nominal. In the case at bar the referee has found that there is a purchaser who will give a substantial sum for the proposed transfer. * * * Under these circumstances neither the referee nor the judge is called upon to make further study of the will or the law applicable thereto."

93. In *re Blount*, 16 A. B. R. 97, 106, 142 Fed. 263 (D. C. Ark.).

A life insurance policy payable to spouse and without cash surrender value, once surrendered to the bankrupt and by him thereafter maintained, cannot, upon his subsequent death be reclaimed by the trustee. In *re Josephson*, 9 A. B. R. 345 (D. C. Ga.); *Meyer v. Josephson*, 10 A. B. R. 657 (C. C. A. Ga., affirming In *re Josephson*, 9 A. B. R. 345).

less than a month before the policy became absolutely void which made it a valuable asset.

"The general rule is that personalty which has no salable value, such as books of account, private manuscripts, family pictures, and heirlooms, are not subject to levy and sale under execution; for the object of an execution, as is that of bankruptcy proceedings, is to realize something substantial for the benefit of creditors, and not to harass the debtor. If nothing could be realized either by a surrender or a sale of the policy, there was nothing to pass to the trustee. * * * The mere chance that the bankrupt might die, or, as in this case, commit suicide, within the short time the policy was to remain in force, is not a privilege which the law will protect. It would be a mere wager on the life of an unfortunate debtor, and for this reason against public policy. * * * As the policy at the time of the bankrupt's adjudication was practically of no value, for it could not have been surrendered for a cash consideration, nor, in the opinion of the court, could anything have been realized if offered for sale—and that the trustee was of that opinion is evidenced by the fact that he made no efforts to sell the same, or even have it appraised as property of the bankrupt—there was nothing to pass to the trustee except the right to speculate on the bankrupt's life for a short time; and neither the Bankruptcy Act nor any other statute authorize this."

In *re Buelow*, 3 A. B. R. 389, 98 Fed. 86 (D. C. Wash.): "They have no cash surrender value, and no value for any purpose except as they may become valuable at the time of the death of the insured, provided the premiums shall be kept paid. Therefore they are not assets of the bankrupt estate." This case was distinguished in *In re Coleman*, 14 A. B. R. 464 (C. C. A. N. Y.).

Even if the bankrupt dies before the estate is closed.⁹⁴

But if it have no cash surrender value at the date of adjudication, but a few months later and without further payment would have a paid up value and could be used as collateral to a loan, it has a substantial value as property and the trustee is entitled to the benefit of it.⁹⁵

§ 1013. Whether Trustee to Pay Premiums.—The trustee or receiver, it has been held, cannot pay premiums out of the bankrupt's assets to keep life insurance policies alive.⁹⁶

Contra, that he may, In *re Mertens*, 12 A. B. R. 712, 131 Fed. 972 (D. C. N. Y.): "It is also urged that a trustee in bankruptcy has no power to pay premium and preserve a policy in force or mature it for the benefit of the estate or creditors. * * * This court dissents in toto. * * *

"Suppose a policy payable to the insured (a bankrupt), or his executors, administrators or personal representatives, lacks but one payment of premium to mature it and add thousands of dollars to the estate, is the trustee, acting under the direction of the court, powerless to make the payment and add so materially to the assets of the estate? The court would not permit a long

⁹⁴ *Gould v. N. Y. Life Ins. Co.*, 13 A. B. R. 233, 132 Fed. 927 (D. C. Ark.).

⁹⁵ In *re Coleman*, 14 A. B. R. 461, 136 Fed. 818 (C. C. A. N. Y.).

⁹⁶ In *re Josephson*, 9 A. B. R. 350, 121 Fed. 142 (D. C. Ga., affirmed in *Meyer v. Josephson*, 10 A. B. R. 687, 124 Fed. 734, C. C. A. Ga.); compare, *obiter*, where policy had only run one year, *Gould v. N. Y. Life Ins. Co.*, 13 A. B. R. 233, 132 Fed. 927 (D. C. Ark.); also, contra, that he may, In *re Phelps*, 15 A. B. R. 170, 174 (Ref. N. Y.).

delay in the settlement of a bankrupt's estate, or allow the trustee to speculate on the life of the insured, but it would permit the doing of those acts clearly in the interest of the creditors. Take, for instance, this very policy, No. 274,445. It appears from the evidence that at the date of the adjudication, September 15, 1903, the company would have paid only \$5,905.65 as an alleged surrender value had the policy then lapsed and been surrendered. September 8, 1903, the receiver paid the last premium necessary to mature the policy to the end of the 20 years of tontine period. By making that payment it became a certainty that if Mertens died before March 8, 1904, the policy would be worth \$11,318.40, and it is worth that. Hence, the payment by the receiver of \$293, and a holding on for about six months, has added to the value of that one policy \$5,412.75, a sum that either goes to the estate for creditors or to the bankrupt. This court is decidedly of the opinion that the receiver had authority to make that payment and hold on to the policy, and that it was his duty so to do."

It would seem to be purely a matter of discretion, however. In some cases it would be manifestly proper for the trustee to pay premiums; in other cases, as for instance, where the policy is only a year old and the insured in apparent good health, it would not be proper.

§ 1014. Cash Surrender Value and Redemption of Policy.—If the policy thus payable to one's estate or self or otherwise passing to the trustee, has a cash surrender value, then the bankrupt may redeem it by paying or securing to the trustee the cash surrender value within thirty days after it has been ascertained and stated to the trustee by the insurance company.⁹⁷

And upon redemption being accomplished, only the cash surrender value will go to the trustee.⁹⁸

In *re Josephson*, 9 A. B. R. 345, 121 Fed. 142 (D. C. Ga.): "By § 70 (a) (5) of the Bankruptcy Act of 1898, Congress expressed the purpose that after the payment of the cash surrender value of a policy or where there is no cash surrender value, the bankrupt may be entitled to hold, own and carry such policy free from the claims of creditors."

As to whether the duty is upon the trustee or the bankrupt, in the first instance, to ask for the statement of the cash surrender value from the insurance company, there is some doubt.⁹⁹

If the bankrupt does not exercise the option, the policy passes to the trustee.¹⁰⁰

§ 1015. Only Policies Having Cash Surrender Value Redeemable.—Only such policies as have cash surrender value are redeemable, and if

97. Bankr. Act, § 70 (a) (5).

98. *Obiter*, *Pulsifer v. Hussey*, 9 A. B. R. 659, 97 Me. 434.

99. Compare, inferentially, *VanKirk v. Slate Co.*, 15 A. B. R. 239, 140 Fed. 38 (D. C. N. Y.).

100. *Clark v. Ins. Co.*, 16 A. B. R. 140 (U. S. C. C. Pa.). And see cases cited elsewhere in this subdivision.

a policy have no cash surrender value, it passes to the trustee free from any right of the bankrupt to redeem.¹⁰¹

Obiter, *Gould v. N. Y. Life Ins. Co.*, 13 A. B. R. 236, 132 Fed. 927 (D. C. Ark.): "Were it not for the proviso to subdivision 5, the bankrupt would not be entitled to any privilege whatever in relation to his life policies. It is only by virtue of the proviso that he is given the option of becoming the purchaser of the policies upon payment by him of the cash surrender value, and of that he must avail himself within 30 days after the value has been ascertained. The proviso does not control the vesting of the title to the bankrupt's estate. It merely modifies it as to one item, viz.: life policies which have a cash surrender value. * * * it is doubtful whether any other policy than that which has a cash surrender value is subject to redemption by the bankrupt."

In re Mertens, 12 A. B. R. 712, 131 Fed. 972 (D. C. N. Y.): "While courts and judges of great learning have differed as to the proper construction of this section, it seems clear to this court that the policies in question here, containing as they do provisions beyond the ordinary life insurance policy, and in the nature of a contract for the investment of earnings under the policy, constitute assets, and have passed to the trustee, unless the bankrupt has prevented such effect by his action. This depends wholly on whether or not these policies have a 'cash surrender value payable to the insured,' J. M. Mertens, 'his estate or personal representatives,' within the intent and meaning of § 70, above quoted."

Obiter, *Pulsifer v. Hussey*, 9 A. B. R. 659, 97 Me. 434: "But for it, in states where life policies are not exempted, and no beneficiary is named, the entire interest in the insurance would pass to the trustee."

Clark v. Equit. Life Ass. Soc., 16 A. B. R. 137, 143 Fed. 175. XXXV Ins. Law Journ. 257 (U. S. C. C. Pa. E. D. 1906): "The policy in question was a tontine policy and probably has no cash surrender value, but, even if it had, the bankrupt never availed himself of the privilege given by the proviso (proviso to clause 5 of § 70 of the Bankrupt Act, 1898) and the policy therefore passed to the trustee as assets of the estate."

Van Kirk v. Slate Co., 15 A. B. R. 239, 140 Fed. 38 (D. C. N. Y.): "The proviso * * * does not include those policies in which the right to surrender is not provided for therein: they pass to and vest in the trustee as of the date of adjudication."

Holden v. Stratton, 14 A. B. R. 94, 198 U. S. 214: "As § 70a deals only with property which, not being exempt, passes to the trustee, the mission of the proviso was, in the interest of the perpetuation of policies of life insurance, to provide a rule by which were such policies passed to the trustee because they were not exempt if they had a surrender value their future operation could be preserved by vesting the bankrupt with the privilege of paying such surrender value, whereby the policy would be withdrawn out of the category of

101. Some of the cases seem to indicate inferentially that if there be no cash surrender value either expressly or by custom or negotiation, the policy will remain the bankrupt's. *In re Phelps*, 15 A. B. R. 170 (Ref. N. Y.); *In re Josephson*, 9 A. B. R. 350, 121 Fed. 142 (D. C. Ga., affirmed in *Meyer v. Josephson*, 10 A. B. R. 987, 124 Fed. 734); (perhaps also) *Pulsifer v. Hussey*, 9 A. B. R. 659, 97 Me. 434. Such construction would be incorrect: the opposite is rather the rule. *In re Wellington*, 7 A. B. R. 345, 113 Fed. 189 (C. C. A. Ills.); *In re Slingluff*, 5 A. B. R. 76, 106 Fed. 154 (D. C. Md.); *In re Steele*, 3 A. B. R. 549, 98 Fed. 78 (D. C. Iowa, reversed, on other grounds, in *Steele v. Buell*, 5 A. B. R. 165, 104 Fed. 968); contra, *In re Josephson*, 9 A. B. R. 345, 121 Fed. 142 (D. C. Ga.).

an asset of the estate. That is to say, the purpose of the proviso was to confer a benefit upon the insured bankrupt by limiting the character of the interest in a nonexempt life insurance policy which should pass to the trustee, and not to cause such a policy when exempt to become an asset of the estate."

§ 1016. Cash Surrender Value Not Expressly Provided for in Policy.—The surrender value need not be an express contract right of surrender; the right of redemption would exist where the insurer recognizes, in practice, a cash surrender value although it be not so provided by the express terms of the policy.¹⁰²

Hiscock v. Mertens, 17 A. B. R. 483, 205 U. S. 202 (affirming *In re Mertens*, 15 A. B. R. 701, 142 Fed. 445, which in turn reversed 12 A. B. R. 712): "We are hence confronted with the problem whether the obiter of *Holden v. Stratton* shall be pronounced to be the proper construction of § 70 of the Bankrupt Act. We may remark at the commencement that that obiter was not inconsiderately uttered, nor can it be said that it was inconsequent to the considerations there involved. * * * There is no expression in either of the cases (*In re McKenney* and *In re Newlands*) that the cash surrender value depended upon contract as distinct from the usage of companies. And § 70 expresses no distinction. At the time of its enactment there were policies which stated a surrender value, and a practice which conceded such value if not stated. If a distinction had been intended to be made it would have been expressed. Able courts, it is true, have decided otherwise, but we are unable to adopt their view. It was an actual benefit for which the statute provided, and not the manner in which it should be evidenced. And we do not think it rested upon chance concession. It rested upon the interest of the companies and a practice to which no exception has been shown. And that a provision enacted for the benefit of debtors should recognize an interest so substantial and which had such assurance was perfectly natural. What possible difference could it make whether the surrender value was stipulated in a policy or universally recognized by the companies. In either case the purpose of the statute would be subserved, which was to secure to the trustee the sum of such value and to enable the bankrupt to continue to hold, own and carry such policy free from the claims of the creditors participating in the distribution of the estate under the bankruptcy proceedings."

Obiter, *Holden v. Stratton*, 14 A. B. R. 94, 198 U. S. 214: "There has been some contrariety of opinion expressed by the lower Federal courts as to the exact meaning of the words 'cash surrender value' as employed in the proviso, some courts holding that it means a surrender and other courts holding that the words embrace policies, even though a stipulation in respect to surrender value is not contained therein, where the policy possesses a cash surrender of the policy. It is to be observed that this latter construction harmonizes with the practice under the Act of 1867, *In re Newland*, 6 Ben. 342; *In re McKinney*, 15 Fed. 535, and tends to elucidate and carry out the purpose con-

¹⁰². *In re Mertens*, 15 A. B. R. 701, 142 Fed. 445 (C. C. A. N. Y., reversing 12 A. B. R. 712 and affirmed sub nom. *Hiscock v. Mertens*, 17 A. B. R. 483, 205 U. S. 202; *In re Coleman*, 14 A. B. R. 461, 136 Fed. 818 (C. C. A. N. Y.); *In re Phelps*, 15 A. B. R. 170 (Ref. N. Y.); contra, *In re Mertens*, 12 A. B. R. 712, 131 Fed. 972 (D. C. N. Y., reversed sub nom. *Hiscock v. Mertens*, 17 A. B. R. 483, 205 U. S. 202); contra, *Pulsifer v. Hussey*, 9 A. B. R. 659, 97 Me. 434; contra, *In re Welling*, 7 A. B. R. 344, 113 Fed. 189 (C. C. A. Ills.); contra, *Van Kirk v. Slate Co.*, 15 A. B. R. 239, 140 Fed. 38 (D. C. N. Y.).

templated by the proviso as we have construed it. However, whatever influence that construction may have, as the question is not necessarily here involved, we do not expressly decide it."

Obiter, Gould v. N. Y. Life Ins. Co., 13 A. B. R. 236, 132 Fed. 927 (D. C. Ark.): "But, in view of the fact that this proviso was enacted solely for the benefit of the unfortunate debtor, and the further fact that the payment by him of the full value of the policy—that is, the payment of all that the trustee could realize by a surrender or sale of the policy—gives the creditors all that they can possibly receive, many of the courts have construed this proviso liberally by applying it to all life policies, whether they have a surrender value or not, if there is a cash value to them which can be obtained by the trustee from a sale of the policy. Such a liberal view can do no harm to the creditors, while, on the other hand, it may prove very beneficial to the bankrupt, who thereby is enabled to continue his life policy at the lower rate, based upon the age when it was first taken out, instead of paying the increased rate necessarily charged at an advanced age, and also enables him to retain a policy even if the state of his present health would prevent him from securing a new policy."

In re Boardmen, 4 A. B. R. 622, 103 Fed. 783 (D. C. Mass.): "In this case I agree with the referee. The policy has a cash surrender value within the intent of the statute. The fact that this value is not stated in the policy is immaterial. If in the ordinary course of business the bankrupt can obtain cash from the company by a surrender of the policy, his creditors are entitled to the cash."

Possibly even though the policy have no cash value by contract nor by recognition obtainable from the company itself, the court, being a court of equity, might follow the analogy of the law and fix, by evidence or otherwise, the cash value of the policy and permit the bankrupt to redeem the policy on payment or securing payment of it to the trustee.¹⁰³

§ 1017. Death of Bankrupt before Redemption Accomplished.—If the bankrupt die before the cash surrender value has been stated to the trustee (or before the expiration of the 30 days after the cash surrender value has been stated to the trustee) then the bankrupt's legal representative succeeds to his right to redeem the policy and its proceeds by payment to the trustee of the cash surrender value.¹⁰⁴

In such cases, the legal representatives will not forfeit the right by failure strictly to pay the redemption money within the thirty days.¹⁰⁵

Van Kirk v. Slate Co., 15 A. B. R. 239, 140 Fed. 38 (D. C. N. Y.): "This policy has never passed to the trustee in bankruptcy as assets of the estate he represents, for the reason that the insurance company issuing the policy has never stated to the trustee the cash surrender value thereof. Therefore the bankrupt in his lifetime was not, and the administrators of his estate since his

^{103.} Inferentially, *Hiscock v. Mertens*, 17 A. B. R. 483, 205 U. S. 202. Compare suggestion, *obiter*, *Holden v. Stratton*, 14 A. B. R. 94, 198 U. S. 214.

^{104.} *Van Kirk v. Slate Co.*, 15 A. B. R. 239, 140 Fed. 38 (D. C. N. Y.).

^{105.} **Instance, Three Cornered Case.**—Pledgee of the policy; legal representatives of the deceased bankrupt and the trustee in bankruptcy; pledgee has the first right; trustee has right to cash surrender value; residue goes to the legal representatives. *Van Kirk v. Slate Co.*, 15 A. B. R. 239, 140 Fed. 38 (D. C. N. Y.).

death have not been, called upon or required to render or pay or secure to the trustee the amount of such cash surrender value. I find no evidence or concession establishing that Hughes or his administrators have waived or lost the right to take and hold this policy on paying or securing to the trustee the cash surrender value thereof. I find no evidence or concession establishing as a fact that the trustee has surrendered the rights of the estate in such policy. It is true that he paid no attention to it until after the death of Hughes, but his neglect, if there was any neglect, did not operate to change title or effect the rights of the estate represented by him. The interest of the trustee in that policy on his appointment was \$2,219, and it has never grown to any greater interest. The value to the policy to Hughes, beyond the cash surrender value, was uncertain and contingent. Had Hughes died the day after the adjudication, the right to take and hold the policy on paying the cash surrender value on the day of adjudication would have vested in the administrators of Hughes when appointed. This right to take and hold such a policy is not personal to the bankrupt—not a right that is extinguished by his death, but one that survives to his executors or administrators.”

§ 1018. Bankrupt as Beneficiary on Life of Another.—Where the bankrupt is the beneficiary under a policy on the life of another, his or her interest may or may not pass to the trustee, depending on the terms of the policy.¹⁰⁶

DIVISION 6.

RIGHTS OF ACTION UPON CONTRACTS AND FOR DETENTION OR INJURY TO PROPERTY.

§ 1019. Rights of Action on Contracts and for Injury, etc., to Property Pass.—The title to all rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, the bankrupt's property passes to the trustee.¹⁰⁷

^{106.} *Carr v. Myers*, 15 A. B. R. 116, 211 Pa. St. 349; instance, *In re Blalock*, 9 A. B. R. 269, 118 Fed. 679 (D. C. S. C.). Husband and wife both in bankruptcy, policies of insurance on life of one to the benefit of the other pass to trustee since they represent all the interests. *In re Holden*, 7 A. B. R. 615, 113 Fed. 142 (C. C. A. Wash., reversed, on other grounds, in *Holden v. Stratton*, 14 A. B. R. 94, 198 U. S. 202).

^{107.} And the bankrupt does not retain title thereto by failing to schedule such rights. *Rand v. Iowa Central Ry. Co.*, 12 A. B. R. 164 (N. Y. Sup. Ct., App. Div.); *First Nat. Bk. v. Lasater*, 13 A. B. R. 698, 196 U. S. 115.

Where the bankrupt is the beneficiary in a policy on the life of another the terms of the contract must be looked to, to determine whether any interest exists which may pass to the trustee. *Carr v. Myers*, 15 A. B. R. 116, 211 Pa. St. 349.

The amount recovered in an action for death by wrongful act is an asset passing to the trustee of a bankrupt beneficiary. *In re Burnstine*, 12 A. B. R. 597, 131 Fed. 828 (D. C. Mich.).

Unpaid assessment for stock subscription, even though assessed by court and not by the directors, passes to the trustee. *Clevenger v. Moore*, 12 A. B. R. 738 (N. J. Sup. Ct.).

Instance passing. Claim for usurious interest. *First Nat. Bk. v. Lasater*, 13 A. B. R. 698, 196 U. S. 115.

Damages for a landlord's negligence in allowing water to get into leased

Such choses in action are assignable and transferable without question, and thus might come under class 5.

Thus, promissory notes and other commercial paper pass to the trustee.¹⁰⁸

And the trustee may disregard the note and sue on the original consideration precisely as the bankrupt might have done.¹⁰⁹

The statutes and decisions of the state may enlarge class 6 but could hardly restrict it. That is to say, if the law of some state should hold a right of action for slander to be assignable then it might pass to the trustee in bankruptcy, under the general rule embodied in class 5 of the act, namely, property capable of being transferred; although, all the time it is not mentioned in class 6. However, on the other hand, if the law of some state should hold that the right of action for injury to property is not assignable, nevertheless it would pass as being within the express provisions of class 6. If such a case were found for specifically classifying the kinds of property, as is done in § 70 (a).¹¹⁰

§ 1020. But Not Torts for Injury to Person.—A right of action for slander or libel or malicious prosecution will not pass to the trustee, for it does not come under class 6 nor does it come under the general rule, namely, property which was capable of being transferred by the bankrupt. Such rights of action are not assignable nor can they be subjected by legal process.¹¹¹

premises passes to the trustee of the tenant. *Obiter*, *In re Becher Bros.*, 15 A. B. R. 228, 139 Fed. 366 (D. C. Pa.).

Instance passing, notwithstanding agreement, without new consideration to accept payment of notes in personal services and support. *In re Powers*, 1 A. B. R. 433 (Ref. Vt.).

Neither claim for alimony nor homestead awarded to bankrupt wife after adjudication of alimony, is property passing to the trustee. *In re Le Claire*, 10 A. B. R. 753, 124 Fed. 654 (D. C. Iowa).

108. Instance, *In re Jackson*, 2 A. B. R. 50, 94 Fed. 797 (D. C. Vt.).

109. *In re Jackson*, 2 A. B. R. 50, 94 Fed. 797 (D. C. Vt.).

110. In Nebraska an interest in a pending suit for a tort seems to be assignable whilst the right of action for the tort itself is not assignable; therefore such an interest would pass to the trustee as "property" under class 5 rather than as a right of action under class 6.

See *Cleland v. Anderson*, 11 A. B. R. 605 (Nebraska Sup. Ct.), reversing on rehearing 10 A. B. R. 429, the court holding: "A right of action for tort is not 'property' within the meaning of the National Bankruptcy Act; and even though an action is pending thereon such right does not pass to the trustee in bankruptcy."

"An action for conspiracy whereby plaintiff was driven out of business as a dealer in lumber is an action in tort and does not arise 'from the unlawful taking or detention of or injury to his property' within the meaning of the Federal Bankruptcy Act."

The argument of the Court on rehearing is that since class 5 provides for "property" and class 6 for "rights of action," rights of action cannot, in the meaning of the Bankruptcy Act, be included within the class, "property," as to do so would violate the canons of statutory construction; and that therefore all rights of action that pass to the trustee are mentioned in class 6.

111. *In re Haensell*, 1 A. B. R. 286, 91 Fed. 355 (D. C. Calif.).

§ 1021. Nor for Personal Services Involving Trust and Confidence.

—Rights of action upon contracts for personal services involving trust and confidence are not assignable nor does subjection thereof by legal process convey any rights,¹¹² even where the party is a corporation.¹¹³

But an agreement to accept personal services and support in payment of notes, without new consideration, will not defeat the passing of title to the trustee.¹¹⁴

DIVISION 7.

EXEMPTIONS.

§ 1022. Exempt Property Does Not Pass.—Property exempted to debtors of the bankrupt's class at the time of the filing of the bankruptcy petition, by the laws of the state where the bankrupt has had his domicile for the greater portion of the six months preceding such filing, does not pass to the trustee and may not be administered in bankruptcy if claimed as exempt; but upon due claim being made, is to be set apart to the bankrupt in the form and manner prescribed by the bankruptcy act.¹¹⁵

112. See ante, "Contracts for Bankrupt's Personal Services," subdiv. "F", § 994. In re D. H. McBride & Co., 12 A. B. R. 81 (Ref. N. Y.).

113. In re D. H. McBride & Co., 12 A. B. R. 81 (Ref. N. Y.).

114. In re Powers, 1 A. B. R. 432 (Ref. Vt.).

115. Bankr. Act, § 6: "This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition."

Bankr. Act, § 8 (7).

Bankr. Act, § 47 (a) (11): "Set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment."

Gen. Order, No. 17, Form, Schedule B-5; *Lockwood v. Exchange Bk.*, 10 A. B. R. 110, 190 U. S. 294; *Holden v. Stratton*, 14 A. B. R. 94, 198 U. S. 202; *Page v. Edmunds*, 9 A. B. R. 281, 187 U. S. 596; *Lipman v. Stein*, 14 A. B. R. 30, 134 Fed. 235 (C. C. A. Pa.); In re Wells, 5 A. B. R. 310, 105 Fed. 762 (D. C. Ark.); In re Grimes, 2 A. B. R. 735, 96 Fed. 529 (D. C. N. Car.); In re Hills, 2 A. B. R. 798, 96 Fed. 185 (D. C. Conn.); In re Durham, 4 A. B. R. 762, 104 Fed. 231 (D. C. Ark.); In re Jackson, 8 A. B. R. 594, 116 Fed. 46 (D. C. Pa.); In re Camp, 1 A. B. R. 168, 91 Fed. 745 (D. C. Ga.); In re Seabolt, 8 A. B. R. 57, 113 Fed. 766 (D. C. N. Car.); *Ingram v. Wilson*, 11 A. B. R. 192, 125 Fed. 913 (C. C. A. Iowa); *Bell v. Dawson Grocery Co.*, 12 A. B. R. 161 (Sup. Ct. Ga.); In re Little, 6 A. B. R. 681, 110 Fed. 621 (D. C. Iowa); In re Hatch, 4 A. B. R. 350, 102 Fed. 280 (D. C. Iowa); *Woodruff v. Cheeves*, 5 A. B. R. 303, 105 Fed. 601 (C. C. A. Ga.); *obiter*, In re Lucius, 10 A. B. R. 653, 124 Fed. 455 (D. C. Ala.); *McGahan v. Anderson*, 7 A. B. R. 643, 113 Fed. 115 (C. C. A. S. C.); In re Mayer, 6 A. B. R. 121, 108 Fed. 599 (C. C. A. Wis.); *Cannon v. Dexter Broom & Mattress Co.*, 9 A. B. R. 725, 120 Fed. 657 (C. C. A. S. C.); *Smalley v. Laugenour*, 13 A. B. R. 692, 196 U. S. 93; In re Groves, 6 A. B. R. 728 (Ref. Ohio); In re McClintock, 13 A. B. R. 606 (Ref. Ohio); In re Duffy, 9 A. B. R. 358, 118 Fed. 926 (D. C. Pa.); In re Ogilvie, 5 A. B. R. 374 (Ref. Ga.); *McCarty v. Coffin*, 18 A. B. R. 152, 150 Fed. 307 (C. C. A. Tex.); In re Meriweather, 5 A. B. R. 436, 107 Fed. 102 (D. C. Ark.); In re Woodward, 2 A. B. R. 692, 95 Fed. 955 (D. C. N. Car.); In re Mullen, 15 A. B. R. 275 (D. C. Me.); In re Ellithorpe, 7 A. B. R. 18, 111 Fed. 163 (D. C. N. Y.); In re Kane, 11 A. B. R. 534, 127 Fed. 552 (C. C. A. Ills.); In re Falconer, 6 A. B. R. 558, 110 Fed. 111 (C. C. A. Ark.); In re Wilson, 10 A. B. R. 625 (C. C. A. Calif.); *Powers Dry Goods Co. v. Nelson*, 7 A. B. R. 506 (Sup. Ct. N. Dak.); In re Wood, 17 A. B. R. 93, 147 Fed. 877 (D. C. Wis.); In re Black, 4 A. B. R. 777, 104 Fed. 28 (D. C. Pa.).

Steele v. Buel, 5 A. B. R. 165, 104 Fed. 968 (C. C. A. Iowa): "The only right or title the trustee has to any of the bankrupt's property is acquired under this section. It vests the title of the property in the trustee, 'except in so far as it is to property which is exempt.' How is it to be known what 'is exempt?' There is but one source of information on that subject, and that is the State law adopted by § 6, and the legal effect of this exception is precisely the same as if it read, 'except property which is exempt under the State law.' This exception must be read into every other clause and provision of the section. The fifth clause of this section shows conclusively that the construction of the proviso contended for by the trustee is wholly inadmissible."

Obiter, Richardson v. Woodward, 5 A. B. R. 96, 104 Fed. 873 (C. C. A. Va.): "The intention was to adopt the State laws governing exemptions. Hence, the courts of bankruptcy will look to, and be governed by, the constitutions, statutes and decisions of the several States and Territories, in deciding who is entitled to exemptions, and the amount and species of property to be exempt. A bankrupt is entitled to the same exemptions as if proceeded against as a debtor under the State law, and none other. 'Shall not affect' means shall not enlarge or diminish. In determining these exemptions the bankrupt courts will follow the construction given the State laws by the highest courts of the State the statute of which is involved. The decisions to this effect are numerous and uniform."

§ 1023. Not Unconstitutional for Lack of "Uniformity" as to Exemptions.—The Bankruptcy Act is not unconstitutional for lack of the uniformity required by § 8 of article 1 of the Constitution of the United States, by reason of the adoption of the exemptions prescribed by the several State laws.¹¹⁵

Hanover Nat'l Bk. v. Moyses, 8 A. B. R. 1, 186 U. S. 181: "The system is, in the constitutional sense, uniform throughout the United States, when the trustee takes in each State whatever would have been available to the creditors if the Bankruptcy Law had not been passed."

In re Deckert, 2 Hughes 183: "The power to except from the operation of the law, property liable to execution under the exemption laws of the several States, as they were actually enforced, was at one time questioned upon the ground that it was a violation of the constitutional requirement of uniformity, but it has thus far been sustained, for the reason that it was made a rule of the law to subject to the payment of debts under its operation only such property as could by judicial process be made available for the same purpose. This is not unjust, as every debt is contracted with reference to the rights of the parties thereto under existing exemption laws, and no creditor can reasonably complain if he gets his full share of all that the law, for the time being, places at the disposal of creditors. One of the effects of a bankrupt law is that of a general execution issued in favor of all the creditors of the bankrupt law is reaching all his property subject to levy, and applying it to the payment of all his debts according to their respective priorities. It is quite proper, therefore, to confine its operation to such property as other legal process could reach. A rule which operates to this effect throughout the United States is uniform within the meaning of that term, as used in the Constitution."

In re Rouse, Hazard & Co., 1 A. B. R. 240, 91 Fed. 96 (C. C. A. Wis.): "It is probably true that Congress could constitutionally in the Bankrupt Act recognize the varying systems of the several States with respect to exemptions and with respect to priority of payment of debts."

115. See ante, § 11.

Thus, the adoption of the exemption laws of the several states is no more violative of the constitutional requirement of uniformity than is the acceptance of the varying limitations upon the kinds and titles of property passing to the trustee in the several states. So long as, in each State, the trustee acquires whatever rights creditors there possess, the law is uniform within the meaning of the Constitution. Indeed, were exemptions the same in bankruptcy throughout the United States, the law would not be uniform, for in some States creditors would receive more under the bankruptcy law than under State law and in other States would receive less, under precisely the same condition of facts.

§ 1024. No Title to Exempt Property Passes.—No title to exempt property passes to the trustee at all.¹¹⁶

Lockwood v. Exchange Bk., 10 A. B. R. 107, 190 U. S. 294: "We think that the terms of the Bankruptcy Act of 1898 above set out, as clearly evidence of the intention of Congress that the title to the property of a bankrupt generally exempted by State laws should remain in the bankrupt and not pass to his representative in bankruptcy, as did the provisions of the Act of 1867, considered in *In re Bass*."

In re Wells, 5 A. B. R. 308 (D. C. Ark.): "Wells selected and claimed this very property as exempt, and it was set apart to him by the trustee as such. The title to this property did not therefore pass to the trustee. It never became vested in him. By the very terms of the Bankruptcy Act the title remained in Wells, or, at least, did not pass to the trustee. It did pass to the possession of the trustee for a specific purpose—that of preparing a complete inventory of the bankrupt's estate, and to set apart the exemptions according to the provisions of the forty-seventh section of the act, with the estimated value of each article (Rule 17 of Supreme Court of General Orders in Bankruptcy). But the title to the exempt property did not change."

In re Hill, 2 A. B. R. 798, 96 Fed. 285 (D. C. Conn.): "All this is no answer to the fact that exempt property is never in the Court of Bankruptcy. The act

116. Bankr. Act, § 70 (a): "The trustee * * * shall be vested by operation of law with the title of the bankrupt * * * except in so far as it is to property which is exempted."

Obiter, *In re Royce Dry Goods Co.*, 13 A. B. R. 268, 133 Fed. 100 (D. C. Mo.); *In re Grimes*, 2 A. B. R. 735, 96 Fed. 529 (D. C. N. Car.); *In re Durham*, 4 A. B. R. 760, 104 Fed. 231 (D. C. Ark.); *In re Jackson*, 8 A. B. R. 594, 116 Fed. 46 (D. C. Ark.); *In re Hatch*, 4 A. B. R. 350, 102 Fed. 280 (D. C. Iowa); *In re Friedrich*, 3 A. B. R. 803, 100 Fed. 284 (C. C. A. Wis.); *In re Black*, 4 A. B. R. 777, 104 Fed. 28 (D. C. Pa.); *In re LeVay*, 11 A. B. R. 116, 125 Fed. 913 (D. C. Pa.); *In re Camp*, 1 A. B. R. 165, 91 Fed. 745 (D. C. Ga.); *In re Little*, 6 A. B. R. 688, 110 Fed. 621 (D. C. Iowa); *Powers Dry Goods Co. v. Nelson*, 7 A. B. R. 506 (Sup. Ct. N. Dak.); *In re Castleberry*, 16 A. B. R. 160 (D. C. Ga.); *In re Seabolt*, 8 A. B. R. 57, 113 Fed. 766 (D. C. N. Car.); *Ingram v. Wilson*, 11 A. B. R. 192, 125 Fed. 913 (C. C. A. Iowa); *Bell v. Dawson Grocery Co.*, 12 A. B. R. 161 (Sup. Ct. Ga.); compare, *In re Mayer*, 6 A. B. R. 117, 108 Fed. 599 (C. C. A. Wis.), that the trustee has title "sub modo." Under law of 1867, *In re Bass*, 3 Woods 384, 2 Fed. Cases 1004.

While the trustee gets no title to exempt property yet the reversionary interest in the property upon the abandonment or other loss of it as a homestead, is an asset of the estate passing to the trustee, who may sell it. *In re Woodward*, 2 A. B. R. 339 (D. C. N. Car.); *In re Mayer*, 6 A. B. R. 131 (C. C. A. Wis.). But compare, *In re Camp*, 1 A. B. R. 168 (D. C. Ga.).

provides that the title to all property, except such as is exempt, vests in the trustee in bankruptcy. Exempt property never becomes assets in the Bankrupt Court for administration. The title never passes. Only a qualified right of possession is in the trustee. As to property which is exempt, relating back to the adjudication, title remains in the bankrupt, and it is only to be set apart, and otherwise the trustee can exercise no right, and owes no duty. It never gets into the Court of Bankruptcy. Consequently, as to these questions—the effect of waiver notes and the right of creditors holding such obligations—there is no jurisdiction whatever in the Bankrupt Court. If it should undertake to deal with the questions suggested by counsel, it would be dealing with property over which the act provides that the Bankrupt Court could have no jurisdiction and control.”

In *re Boyd*, 10 A. B. R. 342, 120 Fed. 999 (D. C. Iowa): “No title to exempt property passes to the trustee, and, if property is exempt as against the creditors generally, it cannot be well held that a title thereto vests in the trustee simply because a single creditor may have the right to subject the property to the payment of his claim. This right is not a title to the property, nor a lien thereon, but is simply a right or privilege personal to the creditor owning the claim for the unpaid purchase price, which certainly does not vest in the trustee, and therefore the same should be presented by the creditor in his own name.”

It is not that the bankrupt is allowed his maintenance out of the fund belonging to the creditors, as was provided in the old Roman Law of *Cessio Bonorum* and in the English Bankruptcy Acts and as appears to be the rule under some of the State Insolvency Statutes today (See *In re Anderson*, 6 A. B. R. 555, D. C. Mass., and *In re Lynch*, 4 A. B. R. 262, D. C. Ga.), where the bankrupt was allowed a certain per cent. of his assets for his own maintenance. This is not the theory of the present national bankruptcy act at all. The bankrupt's exemptions are not a priority claim to be paid out of the creditors' funds like the claims of workmen, clerks or servants. From the beginning no title passes at all to exempt property; it was and is and will continue to be the bankrupt's own property and the trustee never takes nor holds any interest in the property whatsoever, except a reversionary interest on abandonment. His only right is as trustee for both the bankrupt and the creditors to hold the property of both until that belonging to the one can be separated and set aside from that belonging to the others.

Indeed, the present Bankruptcy Act seems to confer on the bankrupt, by negation of the trustee's title thereto, an absolute title to exempt property even in States where exemptions partake more of the nature of allowances out of the estate or perhaps of mere rights to use the property during the existence of the family relation and occupancy of the property.¹¹⁷

In *re Camp*, 1 A. B. R. 168, 91 Fed. 745 (D. C. Ga.): “According to the decisions of the Supreme Court of Georgia, property exempted in bankruptcy has a very different status from that of property set apart and allowed by the ordinary of the county as a homestead. In the former case, that of exemption in bankruptcy, the bankrupt gets an absolute title; he may immediately sell it, or he may, according to its character, mortgage or pledge it; on the other hand, the title to a homestead under the State law, is in the head of the family

117. In *re Lynch*, 4 A. B. R. 262, 101 Fed. 579 (D. C. Ga.).

for the benefit of the family; his title is nominal during the existence of the family, the beneficial interest being in it, so that there is very little reason in Georgia, especially, for any action of the State officials when the title vests absolutely in the bankrupt by virtue of the exemption in the bankruptcy proceedings."

In *re Ogilvie*, 5 A. B. A. 380 (Ref. Ga.): " * * * the Supreme Court of this State has decided that a homestead in bankruptcy constitutes a different estate than one allowed by State law. * * * The estate obtained in bankruptcy is a fee simple, subject, however, to be levied upon and sold for claims superior to the homestead of older date, and also liable to be seized and sold for subsequent debts of bankrupt."

However, compare, *Fenley v. Poor*, 10 A. B. R. 378, 121 Fed. 739 (C. C. A. Ky.): "In construing the exemption statute, the Court of Appeals of Kentucky, in the case of *Gaines v. Casey*, 10 Bush 92, draws a distinction between the homestead exemption and the legal title to the fee, and holds that the right to a homestead may be waived by mortgaging it, and that such security would terminate whenever the debtor ceased to be a housekeeper or removed from the premises, although if the mortgage was of the fee, it could not be thus affected. This construction would leave the fee, which is separate and distinct from the homestead exemption, assignable, even under the contention of the appellees. But the definition in the Bankruptcy Act refers to the nature of the property, and, if it is such as to be assignable under the act, the fact that it includes exemptions under the State laws in force at the time of the filing of the petition could not affect its nature and make it nonassignable. The act provides that the bankrupt shall make claim under oath to his exemptions and file the same in triplicate, and also makes it the duty of the trustee to set apart the bankrupt's exemptions and report the items and estimated value to the court, and makes it the duty of the judge to determine all claims of bankrupts to their exemptions. These provisions clearly indicate that the whole estate of the bankrupt is assigned, under the law, to the trustee, and that then the claim of the bankrupt is to be made for his exemptions, which are to be set apart by the trustee and determined by the court. The fact that the debtor has a homestead right in a tract of land does not change the nature of the property and make it nonassignable. In *re Sisler* (D. C.), 2 Am. B. R. 760, 96 Fed. 402. The homestead right may be abandoned, or, if there be no objection or application on the part of the bankrupt to have the homestead set apart to him, the property may be sold, and the proceeds distributed among his creditors. *Collier on Bankruptcy* (4th Ed.), pp. 80, 81, 82, and cases in notes. The property is of a nature to pass to the trustee, and after it passes it may be either set apart to the bankrupt or converted into money. There are cases in which real estate of greater value than is allowed by the statute as exempt, in which the bankrupt has a homestead right, is converted into money, and the amount of the exemption is paid to the bankrupt, and the balance distributed among his creditors. In *re Oderkirk* (D. C.), 4 Am. B. R. 617, 103 Fed. 779. When the property is sold by the trustee, or is set apart as exempt, the trustee has no further interest in or control of it; but the security of the mortgagee is not affected thereby, and he is no less a secured creditor because the property covered by his mortgage has been set apart as exempt. In *re Little* (D. C.), 6 Am. B. R. 681, 110 Fed. 621. The claim should not have been allowed as an unsecured claim. It could only participate in the dividends after the value of the security is deducted from the amount of the debt."

Also, compare remarks in *Roden Grocery Co. v. Bacon*, 13 A. B. R. 251 (C. C. A. Ala.).

Nevertheless, as to homestead exemptions where the absolute ownership of the homestead is not exempted to the bankrupt but only during occupancy, the question is still perplexing, since there always remains a non-exempt reversionary interest likely to become a full title on abandonment of the homestead.¹¹⁸

§ 1025. Date of Adjudication Fixes Right to Exemptions.—The date of the adjudication in bankruptcy fixes the status as to exemptions.¹¹⁹

In *re* Seabolt, 8 A. B. R. 60, 113 Fed. 766 (D. C. Ga.): "The right to the exemption accrued to the debtor when the creditors instituted proceedings in bankruptcy to subject his property to the payment of his debts, and upon the appointment of a trustee in bankruptcy the title of the property reserved by the law as the debtor's exemption did not vest in such trustee, but remained in the debtor, awaiting the mere legal formality of having it appraised and set apart to him."

Inferentially, In *re* Oleson, 7 A. B. R. 22, 110 Fed. 796 (D. C. Iowa): "The right to hold the land as exempt is not questioned, and, if it be true that it was and is exempt, I can see no ground for holding that the rental therefor contracted for and accruing after the adjudication belongs to the creditors."

"It is also charged that the chattel mortgage to the father is void as to creditors, being given without consideration."

But compare, inferentially, *Smalley v. Laugenour*, 13 A. B. R. 692, 196 U. S. 93: "And the court held that the order of the District Judge of the United States for the District of Washington, sitting in bankruptcy, awarding the property to Laugenour as property exempt from the claims of his creditors, and which related back to the time of the filing of the petition in bankruptcy, which was prior to the date of the attempted sale, was a judgment conclusive as between the parties that the property was so exempt at that date." This case is not contra, however, for the date of the filing of the petition coincided with that of the adjudication, it being a case of voluntary bankruptcy.

If the bankrupt then was entitled to the exemptions he claimed, the property remains his property, free from the claims of creditors, notwithstanding he may no longer be entitled to exemptions at the time the trustee is ready to set apart exempt property. The date of the adjudication is the line of cleavage.¹²⁰ That date severs his old estate from his new estate, his old creditors from his new ones. Since the exempt property is taken

^{118.} In *re* Mayer, 6 A. B. R. 117 (C. C. A. Wis.); *Finley v. Poor*, 10 A. B. R. 378, 121 Fed. 739 (C. C. A. Ky.).

^{119.} In *re* Fletcher, 16 A. B. R. 491 (Ref. Ohio); inferentially, In *re* Elmira Steel Co., 5 A. B. R. 487 (Ref. N. Y.), although in this case the court is not considering the matter of exemptions; and though also, the court seems to fix the date of the filing of the petition as the date of cleavage. Inferentially, In *re* McKenzie, 13 A. B. R. 229, 132 Fed. 986 (D. C. Ark.).

But compare, inferentially, In *re* Fly, 6 A. B. R. 550, 110 Fed. 141 (D. C. Calif.), where the court rightly decided that the change of occupation to a class entitled to different exemptions from those of the class to which the debtor belonged at the date of adjudication would nevertheless give the debtor the exemptions to which he would have been entitled at the date of adjudication; but seemingly bases the ruling on a different ground from that that the date of the adjudication fixes the status.

^{120.} In *re* McKenzie. 13 A. B. R. 229. 132 Fed. 986 (D. C. Ark.).

away from the old estate, and the last moment of the growth or life of the old estate is the moment the debtor is adjudged bankrupt, it follows that that moment is the moment which fixes the status of the property. Thus, if then not exempt, the subsequent marriage of the bankrupt will not render it exempt.

In *re Fletcher*, 16 A. B. R. 491 (Ref. Ohio): "All he gains, earns or acquires subsequent to the filing of his petition is absolutely free from the claims of his prior creditors. The commencement of bankruptcy proceedings marks the division of his old financial condition and his new financial condition. He is supposed to give up everything and to be freed of his debts, and it is not in the spirit of the bankruptcy law to allow him subsequent to the commencement of bankruptcy proceedings to change his status so as to claim any greater rights out of the property than he possessed at the time he commenced the proceedings.

"The very fact that the bankrupt is required to make his claim in the schedules filed with his petition, indicates that the framers of the Bankruptcy Law intended that the bankrupt's exemptions, if he intended to claim any, must be claimed as of the time he filed his petition. At the time *Fletcher* filed his petition, he was not entitled to any exemptions, and he can not do anything subsequent to that time to change his relation to his property."

And if then exempt, absolutely exempt, the subsequent death of the bankrupt's wife or loss of his family will not cause it to revert to his trustee.

Likewise, his subsequent death, before the exemptions are set apart to him, will not defeat the exemptions nor cause the exempt property to fall into the general estate; the exemptions will pass to the representatives of the deceased bankrupt free from the claims of the old creditors.¹²¹

It is a question, as noted in the preceding paragraph, whether, upon the subsequent abandonment of the homestead, after it has been adjudicated that the same should be set apart to the bankrupt as exempt, the title still remains in the bankrupt or reverts to the trustee. It might seem that perhaps the Bankruptcy Act gives the bankrupt absolute title to exempt property even where, under state law, it is exempt only so long as used as a homestead, this being based on the apparent denial, in § 70 (a), to the trustee of any title to exempt property; yet, perhaps the better reasoning is that the homestead is not exempt absolutely but only during user and that there always remains a reversionary interest in the trustee which, perhaps indeed, the trustee might sell as an asset of the estate at any time.¹²²

¹²¹. In *re Seabolt*, 8 A. B. R. 57, 113 Fed. 766 (D. C. N. Car.); contra, In *re Parschen*, 9 A. B. R. 389, 119 Fed. 976 (D. C. Ohio).

¹²². In *re Mayer*, 6 A. B. R. 117, 108 Fed. 599 (C. C. A. Wis., Jenkins, C. J., dissenting): In this case it was held that, after a court of bankruptcy had adjudicated and determined the property which should be set apart to the bankrupt as a homestead under the laws of the State of Wisconsin and there was nothing left to do but to determine the line of boundary of said homestead at the most, and the bankrupt, in order to avoid the consequences of an order adjudging him in contempt had fled the country, that under such circumstances the property set apart as a homestead had been abandoned by the bankrupt, and passed to the trustee, and became property which he might administer as part of the bankrupt estate, and that the court of bankruptcy still had jurisdiction to deal with such property.

SUBDIVISION "A".

JURISDICTION OF THE BANKRUPTCY COURT OVER EXEMPT PROPERTY.

§ 1026. **Bankruptcy Court's Jurisdiction over Exemptions Exclusive.**—The bankruptcy court has jurisdiction, and the jurisdiction is exclusive, to determine the claims of bankrupts to their exemptions.

Section 2, subd. 11, of the Bankruptcy Act confers the express authority upon courts of bankruptcy to "determine all claims of bankrupts to their exemptions;" and this jurisdiction is exclusive—the State courts cannot pass upon them, although it is true the State laws set the bounds and limits of the right to the exemptions—the exclusive forum where these rights are to be determined is the court of bankruptcy.¹²³

In *re Lucius*, 10 A. B. R. 653, 124 Fed. 455 (D. C. Ala.): "The bankrupt court has jurisdiction to determine all claims of bankrupts to their exemptions, and has exclusive jurisdiction to determine such claims."

McGahan v. Anderson, 7 A. B. R. 641, 113 Fed. 115 (C. C. A. S. C.): "The bankrupt court, as a necessity, must alone deal with the exemptions of the bankrupt. If any other tribunal was to intervene to determine this question, it would be the exercise of a jurisdiction, which might result in a conflict of authority, and deprive the bankrupt court of its rightful power to speedily determine all questions of law and right arising under the Bankrupt Act, which was clearly the intention of Congress when it enacted the law."

§ 1027. **Trustee Entitled to Possession Long Enough to Set Apart.**

—The trustee has the right to the possession of the property long enough to set it apart.¹²⁴

§ 1028. **Court May Enjoin Interference.**—And if it is in his possession, the bankruptcy court may enjoin the State Court's officers, or at any rate the parties in the state court, from interfering with the trustee's custody until the property has been thus set apart by him.¹²⁵

^{123.} In *re Overstreet*, 2 A. B. R. 486 (Ref. Ark.).

^{124.} In *re McClintock*, 13 A. B. R. 606 (Ref. Ohio, affirmed by D. C.). Compare, In *re Mayer*, 6 A. B. R. 117 (C. C. A. Wis.), that the trustee has title thereto "sub modo." Also, compare, In *re McCartney*, 6 A. B. R. 366 (D. C. Wis.), where the bankruptcy court granted leave to a garnishee to pay into the custody of the bankruptcy court exempt wages garnisheed.

^{125.} In *re Beals*, 8 A. B. R. 639, 116 Fed. 530 (D. C. Ind.); inferentially, In *re Tune*, 8 A. B. R. 285, 115 Fed. 906 (D. C. Ala.). But even in that event the lien of the levy made by the State Court's officers will probably remain good on the property in the trustee's hands and be restored to full vigor as soon as he has set apart the property as exempt.

Where the garnishee is aware of the fact that the property or credits in his hands are exempt, it is his duty to disclose such fact in his answer, where the defendant is not served with notice or notice is given only by publication; otherwise payment by him into court or a judgment charging him as garnishee will not relieve him from subsequent liability to the bankrupt. In *re Beals*, 8 A. B. R. 639, 116 Fed. 530 (D. C. Ind.).

Leave has been granted in one case to a garnishee (who had been ordered by the State court to pay into the State court) to turn over exempt wages to the bankruptcy court. In *re McCartney*, 6 A. B. R. 366, 109 Fed. 629 (D. C. Wis.).

The referee could not enjoin the State court's officers, the effect being to stay proceedings of a court or officer as to which the referee has no jurisdiction. In *re Siebert*, 13 A. B. R. 348, 133 Fed. 781 (D. C. N. J.).

§ 1029. **But Will Not Necessarily Order Surrender.**—But the bankruptcy court may not summarily order the delivery of the property over to the trustee, if it is not already in his possession.¹²⁶

§ 1030. **Nor Authorize Trustee to Intervene in Attachment Case to Obtain Possession.**—And it has been held that the trustee has no right to intervene in an attachment case for the purpose of obtaining possession of the attached property.¹²⁷

§ 1031. **After Obtaining Possession, No Amendment of Claim of Exemptions to Defeat Lienholders as to Whom Property Not Exempt.**—After the trustee has obtained possession of property not claimed as exempt, on the plea that the lien thereon is void as to creditors, the bankrupt should not be permitted to come in and claim it as exempt and thus assert the creditors' rights to enable him to defraud the lienholder out of property to which, as between the bankrupt and the lienholder, the lienholder is entitled.¹²⁸

§ 1032. **Bankruptcy Court May Not Administer, but Only Determine and Set Apart Exemptions.**—The bankruptcy court is without power to administer exempt property, save and except merely to determine it to be exempt and to set it apart as such; and the bankruptcy court will not undertake to determine the validity, extent nor priority of liens thereon or rights therein.

As soon as the trustee has properly set off the bankrupt's property, all the trustee's rights, even that of mere custody, cease, and after the trustee's report has been finally approved, the bankruptcy court is without control over the property and without power to determine any rights thereto.¹²⁹

126. *Sharp v. Woolslare*, 12 A. B. R. 396 (Superior Ct. Penna.); *Jewett Bros. v. Huffman*, 13 A. B. R. 738 (Sup. Ct. N. Dak.); compare, *In re Hatch*, 4 A. B. R. 350, 102 Fed. 280 (D. C. Iowa).

127. *Jewett Bros. v. Hoffman*, 13 A. B. R. 738 (Sup. Ct. N. Dak.).

128. See remark to a similar effect, *In re J. C. Winship Co.*, 9 A. B. R. 638, 120 Fed. 93 (C. C. A. Ills.).

129. *Powers Dry Goods Co. v. Nelson*, 7 A. B. R. 506 (Sup. Ct. N. Dak.); inferentially, *In re Bolinger*, 6 A. B. R. 171, 108 Fed. 374 (D. C. Penn.); *Sharp v. Woolslare*, 12 A. B. R. 396 (Superior Ct. Penn.).

In re Brumbaugh, 12 A. B. R. 204, 128 Fed. 971 (D. C. Penn.), where the court held, in substance, that the only question to be determined upon a bankrupt's claim for exemptions is whether he is entitled thereto as against general creditors, and that it was therefore no ground for opposing a bankrupt's application therefor that in the State courts he would not be able to maintain his claim to the property set apart as exempt against a judgment for breach of promise to marry recovered prior to his adjudication.

In re Camp, 1 A. B. R. 165, 91 Fed. 745 (D. C. N. Car.); *In re Hills*, 2 A. B. R. 798, 96 Fed. 185 (D. C. Ga.); *Ingram v. Wilson*, 11 A. B. R. 192, 125 Fed. 913 (C. C. A. Iowa); *In re LeVay*, 11 A. B. R. 116, 125 Fed. 990 (D. C. Pa.); impliedly, *In re Wells*, 5 A. B. R. 311, 105 Fed. 762 (D. C. Ark.); obiter, *In re Royce Dry Goods Co.*, 13 A. B. R. 268, 133 Fed. 100 (D. C. Mo.); *In re Bender*, 17 A. B. R. 895 (Ref. Ohio); *In re Ogilvie*, 5 A. B. R. 374 (Ref. Ga.); *In re Hop-*

Lockwood v. Exch. Bk., 10 A. B. R. 112, 190 U. S. 294: "The fact that the Act of 1898 confers upon the court of bankruptcy authority to control exempt property in order to set it aside, and thus exclude it from the assets of the bankrupt estate to be administered, affords no just ground for holding that the court of bankruptcy must administer and distribute, as included in the assets of the estate, the very property which the act in unambiguous language declares shall not pass from the bankrupt or become part of the bankruptcy assets. The two provisions of the statute must be construed together and both be given effect. Moreover, the want of power in the court of bankruptcy to administer exempt property is besides shown by the context of the act, since throughout its text exempt property is contrasted with property not exempt, the latter alone constituting assets of the bankrupt estate subject to administration. The Act of 1898, instead of manifesting the purpose of Congress to adopt a different rule from that which was applied, as we have seen with reference to the Act of 1867, on the contrary exhibits the intention to perpetuate the rule, since the provision of the statute to which we have referred in reason is consonant only with that hypothesis."

In *re Little*, 6 A. B. R. 681, 110 Fed. 621 (D. C. Iowa): "By the action of the trustee, confirmed by the referee, the exemptions claimed by the bankrupt were allowed, and the particular property was set apart to him, and passed into his possession and control. When thus separated from the general estate, the exempt property ceased to be in the possession of the trustee or of the court, and under the provisions of § 70, the trustee took no title thereto. Under these circumstances the referee rightly ruled that the court of bankruptcy would not entertain jurisdiction over the exempt property at the request of the claimant bank. When the application on behalf of the bank was filed, the exempt property had passed from the possession of the court in bankruptcy. The trustee had no title thereto, and the creditors at large had no equity therein."

In *re Jackson*, 8 A. B. R. 594, 116 Fed. 46 (D. C. Pa.): "We have nothing further to do with it than to see that the trustee sets it aside, and to dispose of such questions as may arise incident to that process. After the property exempted has been separated and delivered, its subsequent fate does not concern us. If some one of the bankrupt's creditors has already obtained, or should afterwards obtain, a lien upon it, it is not for this court to interfere with his right."

In *re Grimes*, 2 A. B. R. 730, 96 Fed. 529 (D. C. N. Car.): "After the exempt property has been designated and set apart to the bankrupts by the trustee, it has been administered, and has passed out of the possession and control of the Bankruptcy Court. The trustee has no further concern with it, nor has the court any jurisdiction to defend such property from adverse claims or liens that may or may not be distinguished by the bankruptcy proceedings. It will not entertain a proceeding to enforce a lien upon such property."

In *re Hatch*, 4 A. B. R. 349, 102 Fed. 280 (D. C. Iowa): "The actual possession of the property is held by the bankrupt, and since the same was segregated from the estate, and assigned to the bankrupt as exempt, it has ceased

kins, 1 A. B. R. 209 (Ref. Ala.); In *re Black*, 4 A. B. R. 776, 104 Fed. 28 (D. C. Pa.); In *re Moore*, 7 A. B. R. 285, 112 Fed. 289 (D. C. Ala.); *Roden Grocery Co. v. Bacon*, 13 A. B. R. 253, 133 Fed. 515 (C. C. A. Ala.); In *re Swords*, 7 A. B. R. 436, 112 Fed. 661 (D. C. Ga.). Apparently contra, In *re Sloan*, 14 A. B. R. 435, 135 Fed. 873 (D. C. Pa.), but in this case right of exemption was lost by assigning it. Instance, contra, *Burrow v. Grand Lodge*, 13 A. B. R. 542, 133 Fed. 708 (C. C. A. Tex.); instance, contra, In *re Stout*, 6 A. B. R. 505 (D. C. Mo.); contra, In *re Garden*, 1 A. B. R. 582, 93 Fed. 423 (D. C. Ala., overruled by In *re Moore*, 7 A. B. R. 285, 112 Fed. 289).

to be within either the actual or constructive possession of the court of bankruptcy."

In *re Durham*, 4 A. B. R. 762, 104 Fed. 231 (D. C. Ark.): "* * * he is only entitled to the possession thereof for the purpose of ascertaining * * * whether the value of the property does not exceed that allowed as exempt by the laws of the State. As soon as that is ascertained it is the duty of the trustee to deliver it to the bankrupt."

McKenney & Cheney, 11 A. B. R. 54, 118 Ga. 387: "Under the Bankruptcy Act of 1898 the bankrupt court is without authority or power to administer property set aside as exempt under the Constitution of this State."

Bell v. Dawson Grocery Co., 12 A. B. R. 161, 120 Ga. 628: "It is now well settled both in this and the Federal Courts that the trustee in bankruptcy has no power nor control over the exempted property after it has been set apart to the applicant. The title never passes to him, but remains in the bankrupt. The trustee can set apart the exemption and pass upon such objections as may be made by creditors to his so doing. But he cannot administer the property exempted, nor determine the rights of creditors asserting waivers against it."

In *re Hartsell & Son*, 15 A. B. R. 177 (D. C. Ala.): "It has been uniformly ruled of late, that the court of bankruptcy has nothing to do with exempt property except to ascertain whether it be exempt, and then to set it aside. It has no authority to enforce even an admitted lien upon the exempt property. Setting aside the property as exempt does not affect the rights of the lienholder, nor does it in any wise prevent a creditor, whose claim is not avoided by the discharge in bankruptcy, from proceeding against the property in the hands of the bankrupt, just as though he had not been adjudged a bankrupt."

In *re Lucius*, 10 A. B. R. 654, 124 Fed. 455 (D. C. Ala.): "When the exemption has been set apart by the trustee, and he has reported it to the court for its approval, and when approved and the bankrupt's right to it has been finally determined, the property embraced in the exemption ceases to be a part of the assets to be administered by the court in connection with the bankrupt's estate, and the bankrupt court would have no jurisdiction to entertain a plenary suit in equity by a creditor of the bankrupt to reach and subject to his claim such exempt property."

Woodruff v. Cheeves, 5 A. B. R. 303, 105 Fed. 601 (C. C. A. Ga.): "It seems clear to us that this language of the statute leaves no room for argument to show that the exempt property constitutes no part of the estate in bankruptcy subject to administration by the trustee or the court of bankruptcy."

[1867] In *re Bass*, 3 Woods 382: "In other words, it is made as clear, as anything can be, that such exempted property constitutes no part of the assets in bankruptcy. The agreement of the bankrupt in any particular case to waive the right to the exemption makes no difference. He may own other debts in regard to which no such agreement has been made. But whether so or not, it is not for the bankrupt court to inquire. The exemption is created by the State law, and the assignee acquires no title to the exempt property. If the creditor has a claim against it he must prosecute that claim in a court which has jurisdiction over the property, which the bankrupt court has not."

In *re Castleberry*, 16 A. B. R. 160 (D. C. Ga.): "It is thoroughly settled now that the bankrupt court will not undertake to enforce debts claimed to be good against the homestead exemption."

Some decisions, while conceding that the bankruptcy court has no jurisdiction to administer exempt property, hold that the rule is not violated when the bankruptcy court undertakes to administer the property in its

custody otherwise exempt, for the benefit of those creditors who hold waivers of exemption or as to whom the property is not exempt, as in States where there are no exemptions against claims for purchase price, for torts or for necessities; the reasoning being in substance that, as to such creditors, the court is *not* administering exempt property, and the court being in possession of the res is competent to determine conflicting claims and interests therein and should not refuse to do so, especially since the creditor is barred by the bankruptcy from asserting his rights by levy in the customary manner.

Among such decisions are the following:¹³⁰

In *re Gordon*, 8 A. B. R. 255, 115 Fed. 445 (D. C. Vt.): "This is not contrary to the cases cited by the bankrupt, that hold waivers of, or liens upon, exemptions to be outside the jurisdiction of the courts of bankruptcy, for here what is reached is not within the exemption. *Woodruff v. Cheeves*, 5 Am. B. R. 296, 105 Fed. 601. Bankruptcy courts have nothing to do with exemptions but to set them out. Here, as to these prior claims, there is no exemption in this homestead to set out."

In *re Sisler*, 2 A. B. R. 768, 96 Fed. 402 (D. C. Va.): "These decisions sustain the position of the creditor in this case that his debt, containing a waiver of the homestead exemption, can be enforced in this court against the property claimed by the bankrupt as exempt under the provisions of the homestead law. The court can find no reason for denying the right of the creditor to have the property surrendered by the bankrupt subjected to the payment of his debt. We have seen that this property is not exempt. The debt proved by the creditor is not a lien on this property, and therefore cannot follow it after the discharge of the bankrupt, and be enforced in a State Court. The discharge of the bankrupt could be pleaded in a State Court as a complete bar to its recovery."

In *re Bragg*, 2 N. B. N. & R. 84 (Ref. Ala.): "The whole argument is based on the assumption of the very fact to be decided, viz: Is the property claimed by the bankrupt, exempt to him? Certainly, if the property claimed by the bankrupt is not exempt to him as against any creditor, then it should not be set apart to him against the protest of such creditor, merely because it is exempt as against other creditors."

In *re Boyd*, 10 A. B. R. 339, 120 Fed. 999 (D. C. Iowa): "It is not questioned that, if the property had been fully paid for, it would be exempt from the claims of creditors under the provisions of § 4008 of the Code of Iowa, but by § 4015 of the Code it is declared that 'none of the exemptions prescribed in this chapter shall be allowed against an execution issued for the purchase money of property claimed to be exempt, and on which such execution is levied,' and the question for consideration is whether effect can be given to this section of the Code in cases of bankruptcy. According to the statements of counsel, the ruling of the referee was based upon the thought that the benefit of § 4015 was available only to one who had secured a judgment for the unpaid purchase price, and had caused an execution for the collection of the judgment to be levied upon the property. Section 6 of the Bankrupt Act (Act July 1, 1898, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3424]), declares, in substance, that the act shall not affect the allowance to bankrupts of the ex-

¹³⁰. In *re Richardson*, 11 A. B. R. 379 (Ref. Ala.); impliedly, In *re Campbell*, 10 A. B. R. 730, 124 Fed. 417 (D. C. Va.).

emptions prescribed by the law of the State wherein the bankrupt has his domicile. It certainly was not the intent of this section to enlarge the exemptions available to the bankrupt under the law of the State. It is clear that, if the bankrupt had not invoked the benefit of the Bankrupt Act, the property he now claims to be exempt to him would have been liable to be subjected to the payment of the unpaid portions of the purchase price. True, the mode which the creditors would have been compelled to pursue in order to subject the property to the payment of their claims would be to obtain judgment, and cause a levy of execution on the property; but the substance of the right secured by § 4015 of the Code of Iowa is that no property can be held exempt against the debt due for the purchase price, although this right can only be enforced in the State court through the form of a judgment and levy of execution. By instituting the proceedings in bankruptcy, the debtor has brought this property into the custody and under the control of this court, acting as a court in equity. The bankrupt now asks the court to make an order setting apart this specific property to him as exempt under the law of the State. The creditors, B. R. Evans and D. A. Lyon, pray the court for an order declaring the property not exempt as against their claims, and directing the sale thereof for their benefit.

"It is a familiar rule that, when property comes under the control and custody of the court, all parties claiming interests or rights therein or thereto will be permitted to assert such rights before the court having custody of the property. It is equally well settled that in such cases regard will be paid and protection be granted to the substance of the right asserted, even though the court may not be able to adopt and follow the form of the remedy which, under the statutes of the State, would be alone open to the claimant if the property was not in the custody of the court. Thus, in *Krippendorf v. Hyde*, 110 U. S. 276, 280, 28 L. Ed. 145, it was said:

"The only legal remedy which can be said to be adequate for the purpose of protecting and preserving his right to the possession of his property was an action in replevin. Of this remedy at law in the State court, he was deprived by the fact that the proceedings in attachment were pending in a court of the United States, because the property attached, being in the hands of the marshal, is regarded as in the custody of the court. This was the point decided in *Freeman v. Howe*, 24 How. 450 (16 L. Ed. 749), the doctrine of which must be considered as fully and finally established in this court. * * * For if we affirm, as that decision does, the exclusive right of the Circuit Court in such a case to maintain the custody of property seized and held under its process by its officers, and thus to take from owners the ordinary means of redress by suits for restitution in State courts, where any one may sue, without regard to citizenship, it is but common justice to furnish them with an equal and adequate remedy in the court itself which maintains control of the property; and, as this may not be done by original suits on account of the nature of the jurisdiction as limited by differences of citizenship, it can only be accomplished by the exercise of the inherent and equitable powers of the court in auxiliary proceedings incidental to the cause in which the property is held, so as to give to the claimant, from whose possession it has been taken, the opportunity to assert and enforce his right. And this jurisdiction is well defined by Mr. Justice Nelson, in the statement quoted, as arising out of the inherent power of every court of justice to control its own process so as to prevent and redress wrong. * * * So the equitable powers of the courts of law over their own process to prevent abuse, oppression, and injustice are inherent and equally extensive and efficient, as is also their power to protect their own jurisdiction and officers

in the possession of property that is in the custody of the law; and when, in the exercise of that power, it becomes necessary to forbid to strangers to the action the resort to the ordinary remedies of the law for the restoration of property in that situation, as happens when otherwise conflicts of jurisdiction must arise between courts of the United States and of the several States, the very circumstances appear which give the party a title to an equitable remedy because he is deprived of a plain and adequate remedy at law.'

"Thus is declared the principle that is decisive of the question under consideration. The bankrupt, by instituting proceedings in bankruptcy, placed his property within the custody and control of this court. He now asks the court to set apart to him as exempt certain articles of personal property. Two of his creditors appear, and show to the court that the articles in question were sold by them on credit to the bankrupt, and have not been paid for, and that under the State law the articles remain liable for the unpaid portions of the purchase price. The bankrupt answers thereto that under the State statute the only remedy open to the creditors by which they can enforce their rights against the property is by obtaining judgments and levying executions on the property. To this it is replied that the bankrupt, by his own act in filing his petition in bankruptcy and procuring the adjudication in bankruptcy, has put it out of the power of the creditors to obtain judgments at law against him, and, the property being within the custody of the court, the only remedy now open to them is to invoke the protection of this court. Under these circumstances, it is not open to the bankrupt, while admitting—as he is compelled to do—that the State statute does not exempt this property from liability for the unpaid purchase price thereof, to assert that by bringing the property into the custody of this court and obtaining the adjudication in bankruptcy, he has defeated the rights of the creditors by barring them from following the remedy provided for in the State statute. To justify this court in setting aside this property to the bankrupt as exempt, it must appear that it is exempt under the provisions of the law of Iowa. Under that law the creditors could subject the property to the payment of their claims, the method of so doing being the procuring judgments at law against the debtor and the levy of executions on the property. This method of enforcing the rights of the creditors has been barred to them by the act of the debtor in procuring himself to be adjudged a bankrupt, and in placing the property within the control of this court; but, as held in the cited case of *Krippendorf v. Hyde*, that is the very reason why this court is in duty bound to furnish an equivalent remedy, which can be readily done by ordering the trustee to sell the articles claimed as exempt, and, after paying the costs of sale, to apply the balance left to the payment of the claims of the named creditors, B. R. Evans and D. A. Lyon, any surplus left to be paid to the bankrupt, as these articles are exempt, under the State statute, from the claims of the general creditors.

"Upon the question of the proper mode of presenting questions of this character, it seems clear that they should be presented by the party specially interested, rather than by the trustee. As against the general creditors, the property is exempt, and the bankrupt is entitled to have the same assigned to him as exempt, except as against the claim of the person from whom the property was purchased on credit. If such creditor does not, in proper time and while the property is in the custody of the court, assert his claim, and invoke the protection of the court, it will be assumed that he waives his right, and, if the property is set apart as exempt, and is delivered to the bankrupt, so that in fact it passes from the custody of the court, it is difficult to see upon what theory the court can afterwards assert a jurisdiction over the same.

"No title to exempt property passes to the trustee, and, if property is exempt as against the creditors generally, it cannot be well held that a title thereto vests in the trustee simply because a single creditor may have the right to subject the property to the payment of his claim. This right is not a title to the property, nor a lien thereon, but is simply a right or privilege personal to the creditor owning the claim for the unpaid purchase price, which certainly does not vest in the trustee, and therefore the same should be presented by the creditor in his own name."

It is possible that there has been a failure to observe the dual capacity of the trustee in bankruptcy; that he is not only a party litigant acting in behalf of general creditors by virtue of the title conferred upon him by § 70 (a) of the Act, but is also the officer of the court, custodian, holding all property in his possession subject to the determination of the rights of the parties therein, holding property to which the creditors have not title or have only qualified title equally as well as that to which they have absolute title, so holding it until the court shall have determined the various rights to it and liens upon it in favor of the different claimants.¹³¹

Probably the courts having once so thoroughly committed themselves to the construction that the statutory provision, § 70 (a), reserving title to exempt property to the bankrupt, means that the trustee has no control over exempt property even in his capacity as a mere ministerial officer, except to set it apart, it is fruitless to discuss the ground work of these rulings. Yet were the question to be considered *de novo*, it would seem that the bankruptcy court ought to administer the exempt property equally as well as the nonexempt property, having actual custody thereof, and that the fact that the trustee *as a party litigant*—the trustee for general creditors—has no title to exempt property, ought not to be construed to prevent him from retaining control over it *as the officer of the court*, nor to prevent the rights of the various parties therein being determined by the bankruptcy court.

Nevertheless, the law is settled differently, and seems to be, in brief, that the sole question to be determined by the bankruptcy court is whether or not the property is exempt against creditors in general. If it be so exempt, then it is to be set apart, and further administration of it refused, notwithstanding that, as to some creditors, it might not be exempt.¹³²

§ 1033. But Not to Deliver to Bankrupt Simply because Claimed Exempt, if Third Party Claims Ownership.—The rule denying jurisdiction over exempt property would not permit the court to give property, once in its custody, belonging to another over to an irresponsible bankrupt simply because the latter claims it as exempt. And if the bankrupt claims; as exempt, property in the hands of the trustee to which a third party also lays claim of ownership or of right of possession, the bankruptcy

131. See ante, § 896.

132. In re Brumbaugh, 12 A. B. R. 204, 128 Fed. 971 (D. C. Penn.).

court must determine between the two applicants and deliver the property to the person entitled thereto.¹³³

Remark, *In re Antigo Screen Door Co.*, 10 A. B. R. 359, 362, 123 Fed. 249 (C. C. A. Wis.): "We take it that any court, whether one of equity, common law, admiralty or bankruptcy, having in its treasury a fund touching which there is a dispute, may, by virtue of its inherent powers, determine the right to the fund thus in its possession. Jurisdiction in that respect is an incident of every court."

In *re Boyd*, 10 A. B. R. 337, 120 Fed. 999 (D. C. Iowa), quoted in preceding section.

Possibly, also, the bankruptcy court would have such jurisdiction where the third party claims even as a lienholder, especially if the bankrupt has not specified the articles he demands as exempt and none have yet been set apart to him.¹³⁴

In a certain sense indeed, it is true that the jurisdiction of the bankruptcy court to determine the rights of bankrupts to their exemptions, which is an exclusive jurisdiction (ante, § 1026), carries with it an implied right to determine all questions of ownership including those of the qualified ownership of lienholders; and on principle it is hard to distinguish between the conceded right and duty of the bankruptcy court to turn the property over to an adverse claimant asserting absolute ownership and to turn over to a lienholder the amount of his qualified ownership.¹³⁵

§ 1034. **Waiver of Exemptions in Notes.**—Where the bankrupt has waived exemptions in judgment notes, as he may validly do in certain States, the bankruptcy court cannot administer the exempt property for the benefit of those holding such judgment notes, although as to the holders of such notes exemptions have been waived.¹³⁶

^{133.} Compare, as to same principle: *In re J. C. Winship Co.*, 9 A. B. R. 641, 120 Fed. 93 (C. C. A. Ills.); *Havens & Geddes Co. v. Pierek*, 9 A. B. R. 571, 120 Fed. 244 (C. C. A. Ills.); *In re Lemmon & Gale Co.*, 7 A. B. R. 291 (C. C. A. Tenn.); *In re McCallum*, 7 A. B. R. 596, 113 Fed. 393 (D. C. Penn.); instance, *In re Hennis*, 17 A. B. R. 889 (Ref. N. Car.).

^{134.} *In re Lucius*, 10 A. B. R. 653, 124 Fed. 455 (D. C. Ala.); compare, *In re Hennis*, 17 A. B. R. 889 (Ref. N. Car.).

^{135.} Compare result of reasoning in *Lucius v. Cawthorne-Coleman Co.*, 13 A. B. R. 696, 196 U. S. 149, where the Supreme Court apparently found the question of the validity of exemption claims might involve the determination of the right of the creditors holding exemption waivers and similar claims.

^{136.} *Lockwood v. Exchange Bk.*, 10 A. B. R. 112, 190 U. S. 294, quoted supra; *Bell v. Dawson Grocery Co.*, 12 A. B. R. 161, 120 Ga. 628; *Roden Grocery Co. v. Bacon*, 13 A. B. R. 253, 133 Fed. 515 (C. C. A. Ala.); *Woodruff v. Cheeves*, 5 A. B. R. 303, 105 Fed. 601 (C. C. A. Ga.); *In re Camp*, 1 A. B. R. 165, 91 Fed. 745 (D. C. N. Car.); *In re Swords*, 7 A. B. R. 436, 112 Fed. 661 (D. C. Ga.); *In re Hills*, 2 A. B. R. 798, 96 Fed. 185 (D. C. Ga.); *In re Ogilvie*, 5 A. B. R. 374 (Ref. Ga.); *In re Brown*, 1 A. B. R. 256 (D. C. Pa.); *In re Hopkins*, 1 A. B. R. 209 (Ref. Ala.); contra, *In re Richardson*, 11 A. B. R. 379 (Ref. Ala.); compare, *In re Schechter*, 9 A. B. R. 729 (D. C. Colo.); contra, *In re Sisler*, 2 A. B. R. 768, 96 Fed. 402 (D. C. Va.); contra, *In re Garden*, 1 A. B. R. 582, 93 Fed. 423 (D. C. Ala., reversed in *In re Moore*, 7 A. B. R. 285); contra, *In re Renda*, 17 A. B. R. 522, 149 Fed. 614 (D. C. Pa.).

In *re Moore*, 7 A. B. R. 285, 112 Fed. 289 (D. C. Ala.): "It has been argued that the waiver estopped the bankrupt from claiming the exemption, and that the court of bankruptcy should summarily enforce the estoppel by turning over the exempt property to the creditor who holds the waiver notes. * * * The bankrupt has the right to stand on the law of the land. The law of the land is that the waiver cannot be enforced against him, save after judgment and execution in the mode provided by statute. When he claims exemptions against a mere naked waiver, he neither denies the waiver nor seeks to escape from the legal consequence which the law attaches to the waiver when made. He is merely demanding that the naked waiver shall not have effect beyond the limits which the law assigns it, as long as it remains a mere waiver. When he claims exemptions, and to that extent opposes the waiver, his defense against it is not that he did not make the waiver, nor that the waiver, if it had ripened into a judgment in the statutory mode, ought not to prevail over the right of exemption. His position, admitting all this and the making of the waiver, is that his right of exemption can be defeated only by a judgment and execution conforming in all respects to the statute, and in existence at the time the exemption is claimed. The allowance of his contention that a mere waiver, not reduced to judgment, cannot prevail over the right of exemption, will not defeat any just expectation raised by the taking of the note with the waiver, since the law of the land of its own force incorporated, as a term of the contract made by the waiver, that the right of exemption should not be defeated by such waiver, unless it was enforced by judgment and execution conforming to the statute. The bankrupt has never agreed, by the making of the waiver, that it should be enforced against him or his property, save by due process of law, which in this instance requires that there be judgment and execution before the waiver can be fastened upon the property."

In *re Black*, 4 A. B. R. 776 (D. C. Pa.): "The fact that one of the creditors of the bankrupt's estate holds notes in which the debtor has, by contract, waived the benefit of such exemption law, does not affect the latter's right to the statutory exemption from the bankrupt estate. This contract right of exemption waiver, personal to the creditor, has never been enforced by him; and the fact that such an unexercised right existed in favor of a certain creditor cannot serve to vest this court, sitting as a court of bankruptcy, with jurisdiction and control over exempt property which Congress has expressly excepted from its jurisdiction."

Contra, In *re Bragg*, 2 N. B. N. & R. 84 (Ref. Ala.): "Suppose all the creditors held waiver notes, could it be said that the bankrupt was entitled to any exemptions?"

And the rule is the same where actual levy has been made before the bankruptcy.¹³⁷

¹³⁷ The claim must have been reduced to judgment, in Alabama, in mode prescribed by statute, and extent of exemption claim ascertained, else waiver is not available. In *re Moore*, 7 A. B. R. 285, 112 Fed. 289 (D. C. Ala.); In *re Hopkins*, 1 A. B. R. 209 (Ref. Ala.). Compare, to same effect, in Pennsylvania, inferentially, In *re Black*, 4 A. B. R. 776, 104 Fed. 28 (D. C. Pa.).

Homestead exemptions will be denied in Virginia where the benefit of the exemption would wholly inure to the creditors holding such exemption waivers and not to the bankrupt's family. In *re Garner*, 8 A. B. R. 263, 115 Fed. 200 (D. C. Va.). Compare, to similar effect, *Morgan v. King*, 7 A. B. R. 176, 111 Fed. 730 (C. C. A. W. Va.).

Statutory exemptions cannot, but constitutional exemptions can, be waived

§ 1035. **Property Not Exempt as to "Necessaries," "Manual Work and Labor," "Unpaid Purchase Price" or Judgments for Torts.**—Where, by the law of the State, the property is exempt as to certain creditors and not as to others—as for instance, wages in States where wages are exempt as to all creditors, except that a certain per cent. thereof are not exempt as to creditors for necessities; and for another instance, where there are no homestead exemptions against claims for manual work and labor; and for still another instance, a levy for the unpaid purchase price of goods in States where there is no exemption from levy in an article, upon a judgment for its unpaid purchase price; and for still another instance, where property is not exempt from levy for a tort—a mooted question arises when the property is in the custody of the court, as to whether or not the bankruptcy court retains it for administration for the benefit of those creditors as to whom it is by law not exempt; some courts having held that the property being in the custody of the court, that court may not shirk the responsibility of turning it over to the rightful party, especially since the creditor is prevented from levying upon it whilst it is in such custody and holding that the court in so doing is not administering exempt property, for as to such creditors, it is not exempt property.¹³⁸

Some of the courts have gone simply to the extent of holding that it should not be set apart to the bankrupt, but should be held for the benefit of creditors as to whom it is not exempt.

McGahan v. Anderson, 7 A. B. R. 641, 113 Fed. 119 (C. C. A. S. C.): "This action of the referee was not approved by the court, the court holding that only

in advance by the debtor in Georgia. *In re Reinhart*, 12 A. B. R. 78, 129 Fed. 510 (D. C. Ga.).

Even if no discharge be applied for or granted and the statutory time for obtaining discharge has elapsed, yet the bankruptcy court will have no jurisdiction. *In re Swords*, 7 A. B. R. 436, 112 Fed. 661 (D. C. Ga.).

Waiver of Exemptions in Leases.—The same rule prevails as to waiver of exemptions in leases: if distraint is made before adjudication the lien of the distraint is good and exemptions cannot be claimed in the property distrained exempt as to any surplus over the rent due. *In re Hoover*, 7 A. B. R. 330, 113 Fed. 136 (D. C. Penn.).

Even if no distraint is made the same rule would prevail if the rent were also a priority claim. *In re Sloan*, 14 A. B. R. 435, 135 Fed. 873 (D. C. Penn.).

Is Holder of Exemption Waiver Note a "Secured Creditor?"—It has been held that the holder of a note containing waiver of exemptions is a "secured" creditor, the value of whose security must be deducted before allowance of his claim. *In re Meredith*, 16 A. B. R. 331 (D. C. Ga.).

138. *Cannon v. Dexter Broom & Mattress Co.*, 9 A. B. R. 724, 120 Fed. 657 (C. C. A. S. C.); *In re Campbell*, 10 A. B. R. 723, 124 Fed. 417 (D. C. Va.); *In re Boyd*, 10 A. B. R. 339, 120 Fed. 999 (D. C. Iowa), quoted in full above. Inferentially, *In re Schechter*, 9 A. B. R. 729 (D. C. Colo.), in which case the court refused to allow the bankrupt to claim property not paid for but apparently did not give it over to the creditor who had sold it to the bankrupt but left it in the general estate. *In re Bragg*, 2 N. B. N. & R. 84 (Ref. Ala.), quoted, supra; inferentially, *In re Stout*, 6 A. B. R. 505 (D. C. Mo.); *In re Gordon*, 8 A. B. R. 255, 115 Fed. 445 (D. C. Vt.), quoted, supra; *In re Sisler*, 2 A. B. R. 768, 96 Fed. 402 (D. C. Va.), quoted, supra; obiter, *In re Durham*, 4 A. B. R. 760, 104 Fed. 231 (D. C. Ark.); obiter, *In re Wilkes*, 7 A. B. R. 574, 112 Fed. 975 (D. C. Ark.). See discussion, ante, § 1032, et seq.

the \$75 of the \$500 could be set aside, and overruled the action of the referee in setting aside the \$425 in cash as a personal exemption. In this conclusion of the court below we concur, for the reason that under the provisions of the constitution of the State of South Carolina, money derived from the sale of merchandise on which purchase money is still due cannot be set aside as an exemption, and it would be unjust to the creditors to do so."

In *re Renda*, 17 A. B. R. 522, 149 Fed. 614 (D. C. Pa.): "* * * but is met by wages claims, against which there is no exemption under the state law; a claim of the landlord for two months' rent amounting to \$300, on a lease waiving exemption; and an attachment execution from the Common Pleas on a judgment with waiver, in which the receiver was served as garnishee."

"* * * But having to come into the court to get it, the rights of others who also lay claim to the fund may properly be considered and there is no occasion to send them elsewhere for relief. The case is not like that where goods are set apart to the bankrupt under his exemption, over which, thereafter the bankrupt court has no jurisdiction, and liens upon which are therefore to be enforced in the State courts. *Lockwood v. Exchange Bank*, 190 U. S. 294, 10 Am. B. R. 107. The bankrupt assented to the sale by the receiver by which the fund was produced, and the money being in the latter's hands the court has now to say how it is to be disposed of, necessarily passing upon conflicting claims. In *re Rodgers*, 11 Am. B. R. 79. If the opposite course were pursued in the present instance, it would work manifest injustice. The bankrupt could put the money into his pocket, and those in whose favor he has waived his right to it would be without redress; and that too, in the case of the landlord, in the face of the fact, that if he had not been restrained by the court from enforcing the distress which he had made, he would have realized his money."

"* * * Disposition will therefore be made of it as follows:

Fund for distribution	\$607.07
Costs:	
Filing fees to be returned to petitioning creditors...	\$30.00
Depositing by same with referee	15.00
	<hr/>
	\$45.00
Additional fees due referee	22.85
To attorney of petitioning creditors	35.00
To attorney of bankrupt	25.00
	<hr/>
	\$127.85
Wages due:	
William Simmons	\$18.75
James Malloy	54.00
	<hr/>
	\$72.75
Rent due:	
Landlord, two months	\$300.00
Balance to bankrupt on his \$300 exemption claim.....	106.47
	<hr/>
	\$607.07."

Others have gone further and held that the same rule should prevail even

though no levy has been made on the exempt property;¹³⁹ and that the burden of separating the unpaid-for goods from those paid for rests on the bankrupt.¹⁴⁰

However, even where the ruling is that it should not be set apart, the seller does not appear to have any priority in its proceeds over other creditors.¹⁴¹

In *re Campbell*, 10 A. B. R. 723, 124 Fed. 417 (D. C. Va.): "It is true that under the State law, considered alone, the homestead can be claimed in unpaid-for property as against the claim of everyone except that of the vendor. But the Bankrupt Act, so to speak, consolidates the demands of all the creditors. What is gained for one is gained pro rata for all. The other creditors are in some sense the assignees in part of the claims of the vendor creditors. So far as the bankrupt is concerned, the result is the same whether the objection be made by a vendor creditor or by some other creditor. And since the other creditors have an interest in the matter, the failure or the refusal of the vendor creditor to file objections to an allowance of homestead should not be allowed to prejudice the rights of the other creditors. It follows that the exceptions in the case at bar would not be vitally defective even if they showed that the exceptants were not the vendors of any of the articles set apart by the trustee. The burden of proof having rested on the bankrupt, and as he offered no evidence tending to show that the articles claimed had been paid for, the referee rightly held that he was not entitled to the exemption."

This rule seems unreasonable, as it is only as to him that it is not exempt, as to which compare the analogous doctrine of *In re Cannon*, 10 A. B. R. 64, 121 Fed. 582 (D. C. S. C.), where the court in setting aside for nonrecord a chattel mortgage void as to subsequent creditors only, divided the fund first among the subsequent creditors and not among all alike.

But the weight of authority since the Supreme Court's announcement of its opinion in the *Lockwood* case, is that the bankruptcy court could not so retain it for administration; and indeed the contrary rule would, on reason, conflict with the well-established rules prevailing in regard to judgment notes containing waivers of exemptions and in regard to liens on exempt property.¹⁴²

139. In *re Campbell*, 10 A. B. R. 723, 124 Fed. 417 (D. C. Va.); In *re Schechter*, 9 A. B. R. 729 (D. C. Colo.); inferentially, In *re Tobias*, 4 A. B. R. 555, 103 Fed. 68 (D. C. Va.); In *re Sloan*, 14 A. B. R. 435, 135 Fed. 873 (D. C. Pa.). But in this case the exemption right was abandoned by assignment. Inferentially, In *re Renda*, 17 A. B. R. 522, 149 Fed. 614 (D. C. Pa.).

140. In *re Tobias*, 4 A. B. R. 555, 103 Fed. 68 (D. C. Va.); In *re Campbell*, 10 A. B. R. 723, 124 Fed. 417 (D. C. Va.); In *re Schechter*, 9 A. B. R. 729 (D. C. Colo.).

141. *Cannon v. Dexter Broom & Mattress Co.*, 9 A. B. R. 724, 120 Fed. 657 (C. A. S. C.); contra, In *re Boyd*, 10 A. B. R. 339, 120 Fed. 999 (D. C. Iowa), quoted in full above.

142. Inferentially, In *re Bolinger*, 6 A. B. R. 171, 108 Fed. 374 (D. C. Pa.); In *re Durham*, 4 A. B. R. 760, 104 Fed. 231 (D. C. Ark.); In *re Butler*, 9 A. B. R. 539, 120 Fed. 100 (D. C. Ga.); In *re Wells*, 5 A. B. R. 308, 105 Fed. 762 (D. C. Ark.); In *re Castleberry*, 16 A. B. R. 160, 133 Fed. 821 (D. C. Ga.); inferentially. *Graham v. Richardson*, 8 A. B. R. 700 (Sup. Ct. Ga.).

In *re Brumbaugh*, 12 A. B. R. 204, 128 Fed. 971 (D. C. Penn.): "It is undoubtedly true, under the law of Pennsylvania by which the exemption is given, that it cannot be claimed in cases of tort, but only of contract * * * (but) it affords no ground for opposing the bankrupt's exemption in the present instance, that he would not be able to maintain a claim for it against the judgment of Miss Keim (for breach of promise of marriage). If that be legally true of it, she has simply to issue execution and seize the property set apart to him and the State courts will then determine her rights. But they must be worked out there and not here, the only question which now concerns us being, whether the bankrupt as against general creditors is entitled to his exemption, as to which there can be no doubt."

Ingram v. Wilson, 11 A. B. R. 192, 125 Fed. 913 (C. C. A. Iowa): "In the case in hand, the property which is involved was generally exempt under the laws of the State of Iowa, the same being the bankrupt's homestead. By virtue of those laws (Code Iowa, 1897, § 2976) it could only be sold on execution 'for debts contracted prior to its acquisition,' and even for such debts it could not be sold except 'to supply a deficiency remaining after exhausting the other property of the debtor liable to execution.' No creditor of the bankrupt other than Wilson had, as it seems, any interest in the homestead, inasmuch as the facts which he alleged as a basis for the order only showed a right personal to himself to have this property subjected to the payment of his claim after all the other property of the bankrupt had been exhausted. This right, existing only in favor of one creditor, did not cause the title of the homestead to vest in the trustee in bankruptcy, nor did it confer any greater authority upon the bankrupt court to administer upon it by ordering its sale and the distribution of its proceeds than where, as in the case cited, a single creditor had acquired the right to sell exempt property by force of a private contract which had been entered into in accordance with the laws of the State of Georgia."

At any rate, where the property has once been turned over to the bankrupt.¹⁴⁴

§ 1036. Sales of Merchandise in Bulk, whether Bankrupt Entitled to Exemptions Out of Unpaid Purchase Price, until Creditors Paid.—Nevertheless, it has been held in cases of sales of merchandise in bulk where the statute requires notice to creditors, etc., as prerequisites to the validity of the sale, that the bankrupt will not be allowed exemptions from the purchase price until the creditors have been paid in full.

In *re O'Connor*, 16 A. B. R. 785 (D. C. Wash): "The bankrupt claims as exempt part of the unpaid purchase price of a stock of merchandise which he sold in bulk previous to the initiation of bankruptcy proceedings. The effect of the statute is to charge the purchase price with a trust in favor of the vendor's creditors, by making the vendee responsible for the application of the money to the payment of their claims. It follows as a legal consequence that the right of the vendor to receive any part of the money is postponed until all of his creditors have been paid in full, and when the fund is insufficient to pay his debts in full he must be deemed to have retained no interest in the matter other than the right of a party to a contract to enforce performance.

144. In *re Little*, 6 A. B. R. 686, 110 Fed. 621 (D. C. Iowa).

In such a case performance means payment to the vendor's creditors pro rata. The transaction is inconsistent with any right of the vendor to claim the money under the exemption law adversely to creditors, because the statutory obligation of the vendee is necessarily incorporated into the contract, and the vendor must be deemed to have assented to the application of the purchase money, as the statute has prescribed. Such assent on his part waived any right which he might otherwise have asserted to select the purchase money in lieu of other property which would be exempt from attachment or execution for debt. The statute does not merely charge the purchase money with a trust in favor of creditors in substitution for their rights to enforce payment of debts due, by levying upon the goods in the hands of their debtor, but in unrestricted terms it imposes an absolute obligation upon the vendee to see to the application of the whole of the purchase money, if necessary to pay all the debts of the vendor."

§ 1037. Exempt Property Not in Possession or Already Set Off Not to Be Retaken, for Benefit of Parties as to Whom Not Exempt, nor of Lienholders.—Where the bankruptcy court has not the possession of such property, or, having had the possession, has set the property apart and delivered it to the bankrupt as exempt, the trustee must not retake possession of it in order to administer for the benefit of certain creditors as to whom it may not be exempt, as for instance, in states where property is not exempt as against a levy for the unpaid purchase price thereof,¹⁴⁵ nor to administer it for the benefit of lienholders.¹⁴⁶

Obiter, In re Boyd, 10 A. B. R. 337, 120 Fed. 999 (D. C. Iowa): "If such creditor does not, in proper time and while the property is in the custody of the court, assert his claim, and invoke the protection of the court, it will be assumed that he waives his right, and, if the property is set apart as exempt, and is delivered to the bankrupt, so that in fact it passes from the custody of the court, it is difficult to see upon what theory the court can afterwards assert a jurisdiction over the same."

SUBDIVISION "B."

KINDS AND AMOUNTS OF PROPERTY EXEMPTED; PERSONS ENTITLED; AND LAW GOVERNING SAME.

§ 1038. State Law of Domicile Governs.—The state exemption law of the state where the bankrupt has had his domicile during the greater

¹⁴⁵. In re Seydel, 9 A. B. R. 255, 118 Fed. 207 (D. C. Iowa); In re Little, 6 A. B. R. 681, 110 Fed. 621 (D. C. Iowa); inferentially, In re Hatch, 4 A. B. R. 349, 102 Fed. 280 (D. C. Iowa).

In Georgia there is no exemption against a levy under a judgment for the purchase price of the property, but otherwise where the seller has not reduced his claim to judgment; held, the bankruptcy court will not, in the latter case, deny the bankrupt's exemption in the property. In re Butler, 9 A. B. R. 539, 120 Fed. 100 (D. C. Ga.). Compare, as to waiver of exemptions in Alabama, similar rule, In re Moore, 7 A. B. R. 285 (D. C. Ala.). In South Carolina a different rule prevails. *McGahan v. Anderson*, 7 A. B. R. 642, 113 Fed. 115 (C. C. A. S. C., reversing In re Anderson, 4 A. B. R. 640).

¹⁴⁶. In re Little, 6 A. B. R. 686, 110 Fed. 621 (D. C. Iowa); In re Hatch, 4 A. B. R. 349, 102 Fed. 280 (D. C. Iowa); In re Bender, 17 A. B. R. 896 (Ref. Ohio).

portion of the six months preceding the filing of the bankruptcy petition fixes the exemption rights in the bankruptcy proceedings.¹⁴⁷

It is possible that a debtor may go into bankruptcy in one State and have his exemption rights determined by the laws of another State; for he may have his residence or principal place of business in one state and thus be entitled to go into bankruptcy there and yet have his domicile in another state. It is the law of the State of his domicile alone that fixes his exemption rights.¹⁴⁸

§ 1039. Whether Court of Bankrupt's Domicile May Set Apart Homestead in Real Estate in Another State Having Different Homestead Laws.—But it is a question whether the bankruptcy court of one district of the bankrupt's domicile may set apart a homestead to the bankrupt in real estate located in another State where the homestead laws are different. Such power has been denied.¹⁴⁹

§ 1040. State Law Governs Kind and Amount and Person Entitled.—The State law governs the kind and the amount of property allowed as exempt; the persons entitled thereto and the acts that will forfeit the right.

§ 1041. State Law Governs.—The State law governs as to exemptions in bankruptcy.¹⁵⁰

147. Bankr. Act, § 6. Instance, *In re Schulz*, 14 A. B. R. 319, 135 Fed. 228 (D. C. Ore.); *McCarty v. Coffin*, 18 A. B. R. 152, 150 Fed. 307 (C. C. A. Tex.); *Duncan v. Ferguson-McKinney Co.*, 18 A. B. R. 155 (C. C. A. Tex.).

148. The burden of proving a change of domicile is on the one asserting the change. *In re Grimes*, 2 A. B. R. 160, 94 Fed. 800 (D. C. N. Car.); compare, to same effect, *In re Wixelbaum*, 3 A. B. R. 267, 97 Fed. 562 (D. C. N. Y.); compare, to same effect, *In re Berner*, 3 A. B. R. 325 (Ref. Ohio); compare, to same effect, *In re Clisdell*, 2 A. B. R. 424 (D. C. N. Y.).

As to distinction between "residence" and "domicile," as applied to the allowance of exemptions in bankruptcy, see § 33, footnote, *In re Dinglehoeff Bros.*, 6 A. B. R. 242 (D. C. N. Car.); *In re Owings*, 15 A. B. R. 473, 140 Fed. 739 (D. C. N. Car.). Also, see ante, cognate subject of jurisdiction of the bankruptcy court over insolvent debtors as dependent on residence or domicile, § 30, et seq.

149. *In re Owings*, 15 A. B. R. 472, 140 Fed. 739 (D. C. N. Car.).

150. *Steele v. Buell*, 5 A. B. R. 165, 104 Fed. 968 (C. C. A. Iowa); *Lipman v. Stein*, 14 A. B. R. 30, 134 Fed. 235 (C. C. A. Pa., affirming *In re Bessie Stein*, 12 A. B. R. 384, 130 Fed. 629); *In re Groves*, 6 A. B. R. 728 (Ref. Ohio); *In re McClintock*, 13 A. B. R. 606 (Ref. Ohio); *In re Duffy*, 9 A. B. R. 358, 118 Fed. 926 (D. C. Penn.); *In re Staunton*, 9 A. B. R. 79 (D. C. Penn.); *In re Ogilvie*, 5 A. B. R. 374 (D. C. Ga.); *In re Meriweather*, 5 A. B. R. 436, 107 Fed. 102 (D. C. Ark.); *In re Camp*, 1 A. B. R. 165, 91 Fed. 745 (D. C. N. Car.); *In re Woodward*, 2 A. B. R. 692, 95 Fed. 955 (D. C. N. Car.); *In re Durham*, 4 A. B. R. 760, 2 N. B. N. 1101, 104 Fed. 231 (D. C. Ark.); *Holden v. Stratton*, 14 A. B. R. 94, 198 U. S. 702; *In re Mullen*, 15 A. B. R. 275, 140 Fed. 206 (D. C. Me.); *In re Ellithorpe*, 7 A. B. R. 18, 111 Fed. 163 (D. C. N. Y.); *In re Haskin*, 6 A. B. R. 485, 109 Fed. 789 (D. C. Pa.); *Duncan v. Ferguson-McKinney Co.*, 18 A. B. R. 155, 150 Fed. 269 (C. C. A. Tex.); *McCarty v. Coffin*, 18 A. B. R. 152, 150 Fed. 307

Smalley v. Laugenour, 13 A. B. R. 692, 196 U. S. 93: "The rights of a bankrupt to property as exempt are those given him by the State statute, and if such exempt property is not subject to levy and sale under those statutes, then it cannot be made to respond under the Act of Congress."

In *re Sullivan*, 17 A. B. R. 578, 148 Fed. 815 (C. C. A. Iowa, affirming 16 A. B. R. 87): "If the Supreme Court of Iowa, in construing its statute of exemption has decided that the crops grown on the homestead are, for that reason alone, exempt from liability to creditors of the owner of the homestead, we must follow that interpretation and hold likewise."

In *re Manning*, 7 A. B. R. 571, 112 Fed. 948 (D. C. Pa.): "* * * and what the law of the State does not give cannot be set aside by the trustee."

In *re Wunder*, 13 A. B. R. 701, 133 Fed. 821 (D. C. Pa.): "A bankrupt is entitled to the same exemption as if proceeded against under the State law and to none other."

In *re Stevenson & King*, 2 A. B. R. 230, 93 Fed. 789 (D. C. N. Car.): "It contemplates that the Bankruptcy Law shall not affect the exemptions as allowed under the State law and construed by the courts of the State. Hence the State decisions are paramount in cases like the one at bar."

§ 1042. **As Construed by Highest State Tribunal.**—The bankruptcy court is bound by the construction put upon exemption laws by the highest courts of the State.¹⁵¹

But not by obiter dicta.¹⁵²

§ 1043. **But Where Decisions Not Authoritative or Conflicting, Bankruptcy Court Construes.**—But where there are no State decisions, or where there is a conflict of construction, the court of bankruptcy will give it a construction to carry out the purport and intention of the Bankruptcy Act.

Richardson v. Woodward, 5 A. B. R. 96, 104 Fed. 873 (C. C. A. Va.): "But where there is no construction of a State law by the State courts, or there is

(C. C. A. Tex.); (1867) *Goodall v. Tuttle*, Fed. Cases 5,533, 7 N. B. Reg. 193; In *re Wood*, 17 A. B. R. 93, 147 Fed. 877 (D. C. Wis.); In *re Stone*, 8 A. B. R. 416, 116 Fed. 35 (D. C. Ark., affirmed sub nom. In *re Irvin*, 9 A. B. R. 689, 120 Fed. 733); impliedly, In *re Irvin*, 9 A. B. R. 689 (C. C. A. Ark.); In *re Moore*, 7 A. B. R. 285, 112 Fed. 289 (D. C. Ala.). But this case states the rule too broadly. Obiter, *Richardson v. Woodward*, 5 A. B. R. 96, 104 Fed. 873 (C. C. A. Va.).

Amendment of Exemption Laws.—Amendment of wages exemption law does not affect right to exemptions in wages earned before the amendment, In *re Holden*, 12 A. B. R. 96, 127 Fed. 980 (D. C. Wash.).

Statutory Prerequisites of Filing Deed or Declaration of Homestead.—In some States it is requisite to the right of homestead that the debtor file a deed or declaration of homestead. In such States such preliminary deed is also requisite to perfect the exemption right in the bankrupt. But delay in filing it until after bankruptcy will not forfeit it, In *re Fisher*, 15 A. B. R. 652 (D. C. Va.).

151. *Holden v. Stratton*, 14 A. B. R. 94, 198 U. S. 202; In *re Stone*, 8 A. B. R. 416, 116 Fed. 35 (D. C. Ark.); *Richardson v. Woodward*, 5 A. B. R. 96, 104 Fed. 873 (C. C. A. Va.); In *re Stevenson & King*, 2 A. B. R. 230, 93 Fed. 789 (D. C. N. Car.); In *re Woodward*, 2 A. B. R. 692, 95 Fed. 955 (D. C. N. Car.); In *re Mullen*, 15 A. B. R. 275, 140 Fed. 206 (D. C. Me.); In *re Meriweather*, 5 A. B. R. 436, 107 Fed. 102 (D. C. Ark.); In *re Wood*, 17 A. B. R. 93, 147 Fed. 877 (D. C. Wis.); In *re Sullivan*, 17 A. B. R. 578, 148 Fed. 115 (C. C. A. Iowa).

152. In *Sullivan*, 17 A. B. R. 578, 148 Fed. 115 (C. C. A. Iowa).

a conflict of construction, and a proper case is presented, involving a construction of State constitutions or statutes, the court of bankruptcy will, as other courts of the United States do, give it a construction to carry out the purport and intent of the act of Congress; and § 2, subdivision 11, provides that the courts of bankruptcy shall determine all the claims of bankrupts to their exemptions."

The State decisions will be followed where they are interpretations of the State exemption law, but not where they are mere declarations of general law, mere definitions of property.¹⁵³

§ 1044. May Select in Kind, Regardless of Impairment of Remainder.—Where the State law gives the debtor the right to select his exemptions in kind, he may do so as bankrupt, even though his property consists of a stock of goods which cannot be divided without greatly impairing the value, or even rendering practically worthless the balance left.¹⁵⁴

§ 1045. Whether Wife May Claim Exemptions Where Bankrupt Husband Neglects.—The State law determines what bankrupts may claim exemptions, and in States where the wife may claim exemptions on failure of the husband to do so, the question arises whether she may not claim exemptions in bankruptcy under the same circumstances. Although there appears to be no decision directly in point, yet she is probably entitled to make the claim in some manner.¹⁵⁵

§ 1046. Converting Nonexempt Property into Exempt, on Eve of Bankruptcy.—The conversion of nonexempt property into exempt property, within the four months preceding bankruptcy, while insolvent or even on the eve of bankruptcy, is not invalid, and will not, in general, bar the bankrupt from claiming the latter as exempt.¹⁵⁶

§ 1047. Instances of Exemptions Allowed and Disallowed in Bankruptcy in Accordance with State Law.—Many instances are to be found in the decisions, of exemptions allowed and disallowed in accordance with State law; some of which are referred to in the footnotes hereto.¹⁵⁷

153. *Page v. Edmunds*, 9 A. B. R. 277, 187 U. S. 596.

154. *In re Grimes*, 2 A. B. R. 730, 96 Fed. 529 (D. C. N. Car.).

155. See post, § 1062.

156. *Huenergardt v. Brittain Dry Goods Co.*, 8 A. B. R. 341, 116 Fed. 31 (C. C. A. Kas.); *In re Wilson*, 10 A. B. R. 525, 123 Fed. 20 (C. C. A. Calif.); *In re Irvin*, 9 A. B. R. 689 (C. C. A. Ark., affirming *In re Stone*, 8 A. B. R. 416, 116 Fed. 35); *In re Wood*, 17 A. B. R. 93 (D. C. Wis.); *Contra*, *In re Boston*, 3 A. B. R. 388 (D. C. Neb.).

157. *California*.—"Tools and implements necessary for carrying on his trade," are not in all cases limited to those the bankrupt personally uses, but may include those used by others necessarily assisting him. *In re Peterson*, 2 A. B. R. 630, 95 Fed. 417 (D. C. Calif.).

Wisconsin.—A mortgagee of property that might have been claimed as exempt but is not so claimed, may not make the claim himself so as to validate

SUBDIVISION "C".

CLAIMING OF EXEMPTIONS.

§ 1048. **But Time and Manner of Claiming and Setting Apart Exemptions Fixed by Act Itself.**—While it is true that the

his mortgage which otherwise would be void as to creditors because of its being a preference. In re Schuller, 6 A. B. R. 278, 108 Fed. 591 (D. C. Wis.).

Virginia.—Failure to record with recorder of deeds, debtor's declaration of claim of homestead exemptions in accordance with State law, not cured by making "claim" in bankruptcy in accordance with bankruptcy law and forms. In re Gardner, 8 A. B. R. 263 (D. C. Va.); In re Tobias, 4 A. B. R. 555, 103 Fed. 68 (D. C. Va.), wherein the court held that such a recording **fixes the right** and is more than a mere "claiming" of the right. But delay in filing the declaration until after bankruptcy is not fatal. In re Fisher, 15 A. B. R. 652 (D. C. Va.).

Virginia.—Failure to specifically describe the items of a stock of goods claimed as exempt, in Virginia, is insufficient compliance with State law. In re Wilson, 6 A. B. R. 287, 108 Fed. 197 (D. C. Va.).

Massachusetts.—Where article claimed as exempt is of excessive value, the trustee may take it for creditors upon giving the bankrupt money to buy one of proper value, so it is held in Massachusetts. In re Collier, 7 A. B. R. 131, 111 Fed. 503 (D. C. Mass.). This would not probably be a safe precedent to follow elsewhere for it would seem that the article either is or is not exempt, and if not exempt the trustee need not concern himself with the procuring of an exempt substitute, and if exempt he has no right to it. And compare, In re Manning, 7 A. B. R. 571, 112 Fed. 948 (D. C. Penn.). " * * and what the law of the State does not give, cannot be set aside by the trustee."

Iowa, Wisconsin and Oregon.—The exemption applies to all incidents of the property; as, rents accruing after adjudication. In re Oleson, 7 A. B. R. 22, 110 Fed. 796 (D. C. Iowa). But compare, In re Hoag, 3 A. B. R. 290, 97 Fed. 543 (D. C. Wis.). Also, compare, In re Daubner, 3 A. B. R. 368, 96 Fed. 805 (D. C. Ore.). But does not apply to crops growing on the homestead in Oregon, see, In re Daubner, 3 A. B. R. 368, 96 Fed. 805 (D. C. Ore.); nor in Wisconsin, see In re Hoag, 3 A. B. R. 290, 97 Fed. 543 (D. C. Wis.); nor in Iowa, see In re Sullivan, 16 A. B. R. 87, 142 Fed. 620 (D. C. Iowa), and also, In re Sullivan, 17 A. B. R. 578 (C. C. A. Iowa, affirming 16 A. B. R. 87).

Vermont.—Exemptions. In re Libby, 4 A. B. R. 615, 103 Fed. 776 (D. C. Vt.); In re Marquette, 4 A. B. R. 623, 103 Fed. 777 (D. C. Vt.), which was a case of homestead in estate by curtesy.

Texas.—Husband and wife may not effectually encumber homestead. *Burrow v. Grand Lodge*, 13 A. B. R. 542, 133 Fed. 33 (C. C. A. Tex.).

Iowa.—Cream separator exempt. In re Hemstreet, 14 A. B. R. 825, 139 Fed. 958 (D. C. Iowa).

Washington.—Homestead exemptions. In re Buelow, 3 A. B. R. 389, 98 Fed. 86 (D. C. Wash.).

Iowa.—Homestead exemptions of divorced bankrupt. In re Pope, 3 A. B. R. 525, 98 Fed. 722 (D. C. Iowa).

Michigan.—Actual use of homestead, not mere intention to use it as such, requisite. In re Hatch, 2 A. B. R. 36 (Ref. Mich.).

Kansas.—Homestead exemptions. In re Parker, 1 A. B. R. 708 (Ref. Kas.).

Wisconsin.—Exemptions in partnership assets allowed by consent of other partners if no individual estate. In re Nelson, 2 A. B. R. 556 (D. C. Wis.); In re Friedrich, 3 A. B. R. 801, 100 Fed. 284 (C. C. A. Wis.).

North Carolina—Exemptions in Partnership Property in North Carolina.—In North Carolina, one of two or more partners may have a portion of the partnership effects set apart to him, as his personal exemption, with the consent of the other partner or partners, and the partnership creditors cannot object to this exemption. In re Grimes, 2 A. B. R. 160, 94 Fed. 800 (D. C. N. Car.); In re Stevenson & King, 2 A. B. R. 230, 93 Fed. 789 (D. C. N. Car.); In re Duguid, 3 A. B. R. 794 (D. C. N. Car.); In re Wilson, 4 A. B. R. 260, 101 Fed. 571 (D. C. N. Car.); In re Camp, 1 A. B. R. 165, 91 Fed. 745 (D. C. N. Car.); In re Seabolt, 8 A. B. R. 57, 113 Fed. 766 (D. C. N. Car.).

But no exemption will be allowed a partner unless his partnership share will

state law fixes the kind and the amount of the exemptions and the person

at least equal the exemption. In *re* Camp, 1 A. B. R. 165, 91 Fed. 745 (D. C. N. Car.).

Consent of both is shown if both sign partnership petition in bankruptcy. In *re* Stevenson & King, 2 A. B. R. 230, 93 Fed. 745 (D. C. N. Car.). A surviving partner may have his personal exemption from partnership effects with the consent of the administrator of the deceased partner, In *re* Seabolt, 8 A. B. R. 57, 113 Fed. 766 (D. C. N. Car.).

But in allowing a personal property exemption out of firm assets, even if both parties consent, it must appear that the members of the firm have no individual personal property exemption exclusive of firm assets; if they have such exemption it cannot be allowed from the firm assets, In *re* Steed and Curtis, 6 A. B. R. 73, 107 Fed. 682 (D. C. N. Car.).

And after a partner has declared he has retired from the firm and is only working as clerk, he will be denied exemptions from the firm assets. In *re* Fowler & Co., 16 A. B. R. 580, 145 Fed. 270 (D. C. N. Car.).

Vermont, Maryland, New Jersey, Pennsylvania, South Dakota and Arkansas.—No exemptions in partnership property as against claim of partnership creditors. In *re* Mosier, 7 A. B. R. 268, 112 Fed. 138 (D. C. Vt.); In *re* Meriweather, 5 A. B. R. 435, 107 Fed. 102 (D. C. Ark.); In *re* Head & Smith, 7 A. B. R. 556, 114 Fed. 489 (D. C. Ark.); In *re* Beauchamp, 4 A. B. R. 151, 101 Fed. 106 (D. C. Md.); In *re* Demarest, 6 A. B. R. 232, 110 Fed. 638 (D. C. N. J.); In *re* Prince & Walter, 12 A. B. R. 675, 131 Fed. 546 (D. C. Pa.); In *re* Novak, 18 A. B. R. 236, 150 Fed. 602 (D. C. S. Dak.).

Sale of homestead encumbered with liens in **Colorado** and allowance of \$2000.00 from equity of redemption. In *re* Nye, 13 A. B. R. 142, 133 Fed. 33 (C. C. A. Colo.).

Instance, **Oregon**, homestead exemption out of equity of redemption on foreclosure. In *re* Barrett, 16 A. B. R. 46 (D. C. Ore.).

Supplementing statutory specific exemptions in **Georgia** by value of those articles not in possession that might have been claimed. In *re* Reinhart, 12 A. B. R. 78, 129 Fed. 510 (D. C. Ga.). But compare, In *re* Manning, 7 A. B. R. 571, 112 Fed. 948 (D. C. Penn.): “* * * and what the law of the State does not give, cannot be set apart by the trustee.”

Second allowance of homestead, after exhaustion of first, not allowable in Georgia, though several years apart. In *re* Jeffers, 17 A. B. R. 368 (Ref. Ga.).

Mining claim exemption in California. In *re* Diller, 4 A. B. R. 45, 100 Fed. 931 (D. C. Calif.).

Membership in Chamber of Commerce not exempt in **Wisconsin**. In *re* Neimann, 10 A. B. R. 739, 124 Fed. 738 (D. C. Wis.).

No Double Exemption.—Where bankrupt has had set off to him a homestead of forty acres and crops sufficient for a year's support as the Statute prescribes, he may not have the remainder of the crops growing on the homestead on the plea that it is part of the realty. In *re* Hoag, 3 A. B. R. 290, 97 Fed. 543 (D. C. Wis.).

Where the State statute gives exemptions only as to property subject to levy of execution or attachment, property not subject to levy, such as a liquor license, is not exempt. In *re* Myers, 4 A. B. R. 536, 102 Fed. 869 (D. C. Pa.).

But where **fraudulently conveyed property is reconveyed to the bankrupt before bankruptcy** he is entitled to his exemptions therein. In *re* Thompson, 9 A. B. R. 283, 112 Fed. 924 (D. C. Ga.).

Even though the reconveyance be made pending a suit in the State court to set aside fraudulent conveyance. In *re* Allen & Co., 13 A. B. R. 518, 134 Fed. 620 (D. C. Va.).

No homestead in **South Carolina** unless at the time the same was acquired the debtor was in a solvent condition and able to satisfy all claims against him, and the debtor has the burden of proof of these facts and must prove them clearly and conclusively. No exemption in South Carolina in a homestead purchased or built in part with the proceeds of goods unpaid for. *McGahan v. Anderson*, 7 A. B. R. 641, 113 Fed. 115 (C. C. A. S. C.).

Vermont.—None in tenement house owned by bankrupt but not occupied by him or his family except one room for storage. In *re* Dawley, 2 A. B. R. 496, 94 Fed. 795 (D. C. Vt.).

Texas.—No business homestead in rural residence. *Burrow v. Grand Lodge*, 13 A. B. R. 542, 133 Fed. 708 (C. C. A. Tex.).

Rhode Island.—Watch and chain of moderate value habitually worn are

entitled thereto, yet the time and manner of claiming them and of setting

necessary wearing apparel in Rhode Island. In re Caswell, 6 A. B. R. 718 (Ref. R. I.). Also in Alabama, *Sellers v. Bell*, 2 A. B. R. 529, 94 Fed. 801 (C. C. A. Ala.). This case arose on discharge, however. Also in Wisconsin, In re Jones, 3 A. B. R. 259, 97 Fed. 773 (D. C. Wis.).

Massachusetts.—Watch of one who keeps time of workmen for employer is exempt as a tool or implement of trade except as to any excess over appropriate value, in Massachusetts. In re Collier, 7 A. B. R. 131, 111 Fed. 503 (D. C. Mass.). But see In re Turnbull, 5 A. B. R. 549, 106 Fed. 666 (Mass., affirming 5 A. B. R. 231), that it is not generally speaking "necessary" wearing apparel.

Vermont.—But watch and chain of a barber are not exempt, in Vermont, either as "wearing apparel" or as "tools of trade" where he has a clock in his barber shop. In re Everleth, 12 A. B. R. 236, 129 Fed. 620 (D. C. Vt.).

Wisconsin.—Watch, gold, carried on person is wearing apparel and exempt in Wisconsin. In re Jones, 3 A. B. R. 259, 97 Fed. 773 (D. C. Wis.).

Ohio.—"Wearing apparel," in Ohio, gold watch and chain, of moderate value, habitually worn, exempt; but diamond ring, not. In re Henry, 14 A. B. R. 363 (Ref. Ohio).

Texas.—Diamond shirt stud worth \$250 is exempt as wearing apparel if customarily used to fasten shirt together. In re Smith, 3 A. B. R. 140, 96 Fed. 832 (D. C. Tex.).

Vermont.—"Team" exemption in Vermont. In re Grady, 14 A. B. R. 738, 138 Fed. 935 (D. C. Vt.).

Vermont.—Team horse intended for use but not actually yet in use exempt. In re Alfred, 1 A. B. R. 243 (Ref. Vt.).

New York.—"Tools and implements" of baker, in New York, exempt. In re Osborn, 5 A. B. R. 111, 104 Fed. 780 (D. C. N. Y.).

"Suitable tools" of candy maker in Vermont. In re Trombly, 16 A. B. R. 599 (Ref. Vt.).

"Tool of trade"—in Maine the canoe of a registered guide, but not his rifle, is exempt. In re Mullen, 15 A. B. R. 275, 140 Fed. 206 (D. C. Me.).

Kansas.—"Necessary tools and implements and \$400 of stock in trade" to "any mechanic, miner or other person" does not include druggist. In re Lynde, 17 A. B. R. 906 (Ref. Kas.).

Wisconsin.—Masonic regalia exempt in Wisconsin as "wearing apparel" although only occasionally worn. In re Jones, 3 A. B. R. 259, 97 Fed. 773 (D. C. Wis.).

Vermont.—Masonic regalia; only part exempt in Vermont is the hat. The belt and sword are not exempt. In re Everleth, 12 A. B. R. 236, 129 Fed. 620 (D. C. Vt.).

Vermont.—Pension money in bankrupt's hands at time of filing petition, not changed in its nature in any way, is exempt. In re Bean, 4 A. B. R. 53, 100 Fed. 262 (D. C. Vt.).

New York.—Real estate purchased partly with pension money in New York, but out of which has been withdrawn by mortgage more than the amount of pension money invested, the real estate not being necessary for pensioner's support, held not to be exempt. In re Ellithorpe, 7 A. B. R. 18, 111 Fed. 163 (D. C. N. Y., affirming 5 A. B. R. 681).

Missouri.—Homestead purchased with pension money, not itself exempt under U. S. Rev. Stat. 4747. In re Stout, 6 A. B. R. 505, 109 Fed. 794 (D. C. Mo.).

Homestead in Kentucky.—In re Carmichael, 5 A. B. R. 551, 108 Fed. 789 (D. C. Ky.); In re Downing, 15 A. B. R. 423, 139 Fed. 590 (D. C. Ky.), though acquired within four months by marriage with adulteress. In re Sale, 16 A. B. R. 235, 143 Fed. 310 (C. C. A. Ky.). None to husband where wife has life tenancy and he the remainder in fee upon her death.

Meaning of "Town" in Arkansas.—Exemption law. In re Overstreet, 2 A. B. R. 486 (Ref. Ark.).

Pennsylvania.—No exemption in liquor license in Pennsylvania because such license is not subject to levy of execution or attachment (being reachable presumably, but only by other remedies). In re Myers, 4 A. B. R. 536, 102 Fed. 869 (D. C. Pa.).

Washington.—Priority payment to workman (under laws of Washington not exceeding \$100) for services performed within sixty days preceding the appointment of a receiver or levy of execution upon the property of his employer,

them apart are fixed by the provisions of the bankruptcy act itself wherever

is exempt to the workman upon his afterwards going into bankruptcy. In re Holden, 12 A. B. R. 96, 127 Fed. 980 (D. C. Wash.).

Exemptions in South Carolina.—In re McCutchen, 4 A. B. R. 81, 100 Fed. 779 (D. C. S. Car.).

Virginia.—Exemptions are allowed in shifting stock of goods in Virginia but the articles must be described. In re Wilson, 6 A. B. R. 287, 108 Fed. 197 (D. C. Va.).

New York.—Waiver of exemptions. Failure to protest at time exempt property was sold on execution prior to bankruptcy is no waiver where subsequently the property is surrendered to the trustee in bankruptcy. In re Osborn, 5 A. B. R. 111, 104 Fed. 780 (D. C. N. Y.).

Virginia.—No exemptions in Virginia in property where fraudulent conveyance set aside. Exemptions in reconveyed property previously fraudulently transferred in Virginia, pending suit in State Court to set aside conveyance, not yet gone to decree, not contrary to Virginia Statute, since conveyance not yet "set aside." In re Allen & Co., 13 A. B. R. 518, 134 Fed. 620 (D. C. Va.).

Georgia.—No power to waive statutory exemptions in advance in Georgia, but power to waive constitutional exemptions. In re Reinhart, 12 A. B. R. 78, 129 Fed. 510 (D. C. Ga.).

Georgia.—Unmarried woman supporting aged grandfather entitled. In re Jackson, 18 A. B. R. 216 (Ref. Ga.).

Washington.—No exemptions in the quasi partnership property of husband and wife in Washington. In re Herbold, 14 A. B. R. 116 (D. C. Wash.).

Alabama.—Waiver of exemptions not available in Alabama until claim reduced to judgment, ascertaining extent of exemption waiver in mode prescribed by statute. In re Moore, 7 A. B. R. 285, 112 Fed. 289 (D. C. Ala., overruling In re Garden, 1 A. B. R. 582 (93 Fed. 423)).

Missouri.—Abandonment of homestead in Missouri. In re Lynch, 1 A. B. R. 245 (Ref. Mo.).

No abandonment of homestead by temporary leasing of it for a year. In re Pope, 3 A. B. R. 525, 98 Fed. 722 (D. C. Iowa).

Abandonment of Business Homestead in Texas.—In re Harrington, 3 A. B. R. 639, 99 Fed. 390 (D. C. Tex.); In re Flannagan, 9 A. B. R. 140 (D. C. Tex.); McCarty v. Coffin, 18 A. B. R. 148, 150 Fed. 307 (C. C. A. Tex.); Duncan v. Ferguson-McKinney Co., 18 A. B. R. 155, 150 Fed. 269 (C. C. A. Tex.).

Abandonment of Homestead.—None where intention to return: none where removal was to another State for purpose of earning money to establish business in place of his homestead that would enable the debtor permanently to maintain his family; and so notwithstanding petition in bankruptcy alleged residence for greater portion of six months in the State to which he had removed. In re Schulz, 14 A. B. R. 317, 135 Fed. 228 (D. C. Ore.); In re Thompson, 15 A. B. R. 283, 140 Fed. 251 (D. C. Wash.).

Change of Homestead.—Where the State law authorizes a change of homestead, a new homestead, to the extent in value of the former one, is exempt from liability for debts not enforceable against the former homestead, although incurred before the change of homestead was made. In re Johnson, 9 A. B. R. 257 (D. C. Iowa).

Application of proceeds of sale of former homestead. Ibid.

Changing one's homestead within the four months period to one more valuable or eligible is perfectly legitimate if done in good faith. Huenergardt v. Brittain Dry Goods Co., 8 A. B. R. 341, 116 Fed. 31 (C. C. A. Kas.).

"Laborer" under California Statute.—In re Hindman, 5 A. B. R. 20, 104 Fed. 331 (C. C. A. Calif.).

"Householder" in Rhode Island.—Married woman may not claim exemptions as such where her husband is in fact the head and support of the family. In re Jamieson, 6 A. B. R. 601 (D. C. R. I.).

"Head of a family" in Arkansas includes unmarried man supporting widowed mother and sixteen year old brother. In re Morrison, 6 A. B. R. 488, 110 Fed. 734 (D. C. Ark.).

"Head of Family" in Washington.—No "double-headed head of family;" bankrupt wife living with husband who is earning good wages; presumably the husband and not the wife is the "head." In re Herbold, 14 A. B. R. 118 (D. C. Wash.).

"Head of family" in Virginia and South Carolina includes married woman

the bankruptcy act speaks at all.¹⁵⁸

Lipman v. Stein, 14 A. B. R. 30, 134 Fed. 235 (C. C. A. Pa., affirming *In re Stein*, 12 A. B. R. 384): "That a bankrupt's right to exemption must be deduced from the state law is unquestionable; but it is no less true that, where the right exists, it is to be asserted in the manner which the Bankruptcy Act itself prescribes."

In re LeVay, 11 A. B. R. 114, 125 Fed. 990 (D. C. Pa.): "But while it is no doubt true that the right of the bankrupt to his exemption depends on the State law by which it is primarily given, the analogies derived from the prac-

owning property and doing business as a feme sole, although living with husband. *Richardson v. Woodward*, 5 A. B. R. 94, 104 Fed. 873 (C. C. A. Va.); *In re McCutchen*, 4 A. B. R. 81, 100 Fed. 779 (D. C. S. C.).

An individual doing business under a fictitious name resembling a corporate name is nevertheless entitled to exemptions. *In re Carpenter*, 6 A. B. R. 465, 109 Fed. 558 (C. C. A. Fla.).

Children still living together on land occupied by their parents before death as a family homestead are entitled still to claim it as the homestead of the "family," in Iowa, although the parents have been dead twelve or thirteen years. *In re Rafferty*, 7 A. B. R. 415 (D. C. Iowa).

Homestead of an unborn child in North Carolina is to be allowed from lands of which the father dies seized, exempt from father's debts. *In re Seabolt*, 8 A. B. R. 57, 113 Fed. 766 (D. C. Ga.).

Homestead in land occupied by bankrupt as tenant by curtesy, in Wisconsin. *In re Kaufmann*, 16 A. B. R. 118, 142 Fed. 898 (D. C. Wis.).

Wife living with husband on land owned by her is the "head of a family" and entitled to exemptions therein as a homestead, when she becomes bankrupt. *In re Hastings*, 7 A. B. R. 362 (Ref. Mo.). But compare, *In re Jamieson*, 6 A. B. R. 601 (D. C. R. I.).

Divorced man with minor son entitled to homestead in Ohio. *In re Rhodes*, 6 A. B. R. 173, 109 Fed. 117 (D. C. Ohio).

Wearing apparel of single woman exempt in New York. *In re Stokes*, 4 A. B. R. 560 (Ref. N. Y.).

"Professional tools" include "undertakers'" outfits in Maryland. *Steiner v. Marshall*, 15 A. B. R. 486, 140 Fed. 710 (C. C. A. Md.).

Failure "to act in perfect good faith," in Georgia. *In re West*, 8 A. B. R. 564, 116 Fed. 767 (D. C. Ga.). Also, *In re Waxelbaum*, 4 A. B. R. 120, 101 Fed. 228 (D. C. Ga.). Also, *In re Williamson*, 8 A. B. R. 42, 114 Fed. 190 (D. C. Ga.). Also, *In re Stephens*, 8 A. B. R. 53, 114 Fed. 192 (D. C. Ga.). Also, *In re Boorstein*, 8 A. B. R. 89, 114 Fed. 696 (D. C. Ga.). Also, *In re Castleberry*, 16 A. B. R. 159, 143 Fed. 821 (D. C. Ga.).

No exemptions in property obtained by bankrupt through fraud in North Carolina. *In re Wolcott*, 15 A. B. R. 386, 140 Fed. 460 (D. C. N. Car.). Impliedly, *In re Hennis*, 17 A. B. R. 889 (Ref. N. Car.), wherein the fraud consisted in the willful disregard of an agreement to give a contemporaneous mortgage on purchase of goods.

158. *Burke v. Title & Trust Co.*, 14 A. B. R. 31, 134 Fed. 562 (C. C. A. Pa.); *In re Friedrich*, 3 A. B. R. 801, 100 Fed. 294 (C. C. A. Wis.); *In re Groves*, 6 A. B. R. 728 (Ref. Ohio, affirmed by D. C.); *In re McClintock*, 13 A. B. R. 606 (Ref. Ohio, affirmed by D. C.); *In re Prince & Walter*, 12 A. B. R. 680, 131 Fed. 546 (D. C. Pa.); *In re Von Kerm*, 14 A. B. R. 403, 135 Fed. 447 (D. C. Pa.); *In re Sharp*, 15 A. B. R. 491 (Ref. Ohio, affirmed by D. C.); inferentially, *In re Royal*, 7 A. B. R. 106, 112 Fed. 135 (D. C. N. Car.); inferentially, *In re Nunn*, 2 A. B. R. 664 (Ref. Ga.); inferentially, *In re Grimes*, 2 A. B. R. 730, 96 Fed. 529 (D. C. N. Car.); inferentially, *In re Lynch*, 4 A. B. R. 262, 101 Fed. 579 (D. C. Ga.); inferentially, *In re Kaufmann*, 16 A. B. R. 121, 142 Fed. 898 (D. C. Wis.). And the debtor will be held by his voluntary bankruptcy to have waived his right to prevent the creditors from entering on exempt land to seize more exempt property. *Obiter*, *In re Coffman*, 1 A. B. R. 530, 93 Fed. 422 (D. C. Tex.). But compare, inferentially, contra (that the State law must be complied with), as to the manner of claiming exemptions, *In re Wilson*, 6 A. B. R. 287, 108 Fed. 197 (D. C. Va.). Inferentially, contra, *In re Wunder*, 13 A. B. R. 701, 133 Fed. 821 (D. C. Penn.); inferentially, contra. *In re Ogilvie*, 5 A. B. R. 374 (Ref. Ga.).

tice upon execution process are not to be carried too far. The time and manner of obtaining it in this court are necessarily regulated by the Bankrupt Act, and it is there provided that the bankrupt shall claim in his schedules the exemptions to which he is entitled (§ 7a [8]); and that they are to be set apart to him by the trustee, who is to report to the court the items and estimated value thereof. Section 47a (11). Where this course has been pursued it must be regarded as effective and in time."

In re Lucius, 10 A. B. R. 653, 124 Fed. 455 (D. C. Ala.): "The Bankrupt Law allows to the bankrupt the exemption provided by the law of the State, but the manner in which the exemption is to be claimed, set apart and awarded is regulated by the Bankrupt Law. The voluntary bankrupt must claim the exemption to which he is entitled at the time of filing his petition."

In re Kane, 11 A. B. R. 533, 127 Fed. 552 (C. C. A. Ills.): "The Bankruptcy Act allows the exemptions which the State laws provided, and these laws, from motives of public policy, should be liberally construed. Courts of bankruptcy are not controlled as to the time or the manner in which claims for exemptions may be preferred in bankruptcy. The exemptions provided by the law of the State are allowed by the Bankruptcy Act, but the manner of claiming such exemptions, and of setting apart and awarding them, is regulated by the Bankruptcy Act."

But statutory regulations of a State requisite to perfect the claim of exemption, such as the filing of declaration of homestead with some officer, must also be complied with.¹⁵⁹

As a consequence of this rule, the bankrupt must claim his exemptions, if he wishes them, as directed by § 7 of the act, which prescribes the duties of bankrupts.¹⁶⁰

And if he claim his exemptions in writing, duly sworn to and filed with his schedules, his claim cannot be held to be "fatally" defective,¹⁶¹ although amendment may be required to make them conform to the Supreme court's prescribed form in bankruptcy.

Burke v. Title & Trust Co., 14 A. B. R. 31, 134 Fed. 562 (C. C. A. Pa.): "The learned referee (whose action the court simply approved) was of opinion that this claim 'is fatally defective, in that it does not specifically enumerate the articles claimed as exempt under the exemption law of the State of Pennsylvania.' But, as we have said in an opinion delivered to-day in the case of *Lipman v. Stein*, 14 Am. B. R. 30, 134 Fed. 235, though a bankrupt's right to exemption must be deduced from the State law, yet it is to be asserted in the manner prescribed by § 7 of the Bankruptcy Act itself; and that section does not require that he shall enumerate the articles claimed as exempt, but only

159. *In re Fisher*, 15 A. B. R. 652, 142 Fed. 205 (D. C. Va.).

160. Bankr. Act, § 7 (8): "The bankrupt shall * * * (8) prepare, make oath to and file in court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, and with the petition if a voluntary bankrupt, a schedule of his property, etc., * * * and a list of his creditors, etc., * * * and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee."

161. *Lipman v. Stein*, 14 A. B. R. 30, 134 Fed. 235 (C. C. A. Pa., affirming *In re Stein*, 12 A. B. R. 384).

that "the claim for such exemption as he may be entitled to" shall appear in the schedule which he is required to file. The claim in this case was for \$300 'of the * * * property * * * set out in schedule B, No. 2, 'under head of C,' and that the bankrupt was entitled to the exemption of that property to the amount stated is unquestionable. This was his right, and its denial was not justified by the fact that, in setting out the entire property, he seems to have excessively estimated its value. What he meant to claim was so much of that property as was of the value of \$300, and this, we think, he made clearly apparent. The law imposed no further condition upon him. It nowhere exacted a specification and appraisal by him of the articles claimed. Having given notice of his claim, it was not his duty, but that of the trustee (§ 47, subd. 11, 30 Stat. 557 [U. S. Comp. St. 1901, p. 3439]), to 'set apart' the bankrupt's exemptions and report the items and estimated value thereof to the court. And there is not a word in the statute to warrant the conjecture that Congress intended that the bankrupt himself should make an itemization and estimate which the trustee, in performing the function expressly assigned to him, might wholly disregard.

"It is true that amongst the forms promulgated by the Supreme Court is 'Schedule B (5),' in which is contained the words: 'property claimed to be exempted by the State laws, its valuation,' etc. But, waiving the question whether in this instance the property claimed and its valuation were not stated in substantial accordance with this direction, it is enough to say that we do not understand it to be anything more than a direction. It could not have been intended to be mandatory. These forms were not designed to effect any change in the law. They are 'forms,' and nothing more. As was said by the Supreme Court (General Order 38, 89 Fed. xiv, 32 C. C. A. xxxvii), they are to be 'observed and used with such alterations as may be necessary to suit the circumstances of any particular case;' and, under the circumstances of this case, we decline to hold that the failure of the bankrupt to precisely observe one of them was fatal to his claim, because we could not do so without subordinating substance to form, and refusing a legal right, merely on account of a defect in procedure, which has caused no injury to any one, and which, if requisite, might be cured by amendment."

But the claim for exemptions also should conform to the Supreme Court's prescribed form "Schedule 'B' (5)," and should specify each article in detail and its location and estimated value.¹⁶²

In re Von Kerm, 14 A. B. R. 403, 135 Fed. 447 (D. C. Pa.): "While a notice in general language, both in a voluntary and involuntary petition, of an intention to claim the exception may be amended if done in time * * * yet where the notice in either case is so general as not to indicate to the trustee what specific articles the bankrupt claims as his exemption, and the bankrupt files no schedule or makes no request upon the trustee to set aside specific articles of exemption until after the sale, he must be regarded as having waived his right of exemption, and he cannot claim three hundred dollars (\$300) out of the proceeds of sale. In re Wunder, 13 Am. B. R. 701, 133 Fed. 821; In re Prince & Walter, 12 Am. B. R. 675, 131 Fed. 546; In re Manning, 7 Am. B. R. 571, 112 Fed. 948; In re Haskin, 6 Am. B. R. 485."

In re Duffy, 9 A. B. R. 358, 118 Fed. 926 (D. C. Pa.): "Besides that, the

¹⁶². In re Groves, 6 A. B. R. 728 (Ref. Ohio, affirmed by D. C.); In re McClintock, 13 A. B. R. 606 (Ref. Ohio, affirmed by D. C.).

schedules prescribed by the Supreme Court call for a particular description of the property claimed, which of itself is controlling. * * * But this is a curable defect, and the petitioner asks leave to amend his schedules accordingly."

The decisions in *Burke v. Title & Trust Co.*, 14 A. B. R. 31, 134 Fed. 562 (C. C. A. Pa.) and in *Lipman v. Stein*, 14 A. B. R. 30, 134 Fed. 235 (C. C. A. Pa.), must not be taken to lay down the rule that the bankrupt need not itemize his claim for exemptions in accordance with the Supreme Court's Form of Schedule "B" (5). Those decisions simply hold that failure to so itemize the claim will not be fatally defective; that the bankrupt's right to exemptions conferred by § 6 of the Act will not be thereby lost, so long as the statutory requirements are satisfied; that otherwise the mere forms prescribed as part of the remedy would override the statute as to substantive rights. Those decisions do not at all imply that it will be sufficient, much less that it is good practice, for the bankrupt to disregard the requirements of the form prescribed for claiming exemptions known as Schedule "B" 5. Indeed, the concluding words of the court carry the implication that failure to itemize the claim is a defect, but that it is one remediable by amendment, the court saying:

"We decline to hold that the failure of the bankrupt to precisely observe one of them was fatal to his claim, because we could not do so without subordinating substance to form, and refusing a legal right, merely on account of a defect in procedure, which has caused no injury to any one, and which, if requisite, might be cured by amendment."

The Supreme Court's Orders and Forms are made in conformity with the Act and in certain circumstances indeed are held to be in the nature of advance interpretations of its provisions, especially of its remedial provisions. Nowhere does the Statute, in so many words, declare what shall amount to a sufficient "claim" of exemptions to satisfy the requirements of § 7; and the Supreme Court's Form "Schedule 'B' (5)" amounts simply to an advance interpretation of the words "claim for exemptions." And such interpretation is not only reasonable but necessary, for, without such itemization it is impossible to determine what property passes to the trustee and what the bankrupt retains. In the practical administration of estates it is absolutely essential that the bankrupt, at some time, in some place, indicate precisely the articles he claims as exempt, and the law very reasonably points out the time and place while the forms point out the precise description requisite. The decisions adverted to might, quite as well, have been expressly placed on the error of the court below in failing to require amendment, as upon the ground mentioned therein, and thus not have seemed to give a qualified license to bankrupts to disregard the wisely framed forms prescribed by the Supreme Court.

Thus, the bankrupt should make his claim for exemptions at the time and in the manner prescribed by the bankruptcy act in § 7 (8) and the Supreme Court's Schedule "B" 5.

§ 1049. **First Requirement of Exemption Claim—To Be in Writing and Sworn to.**—The claim must be in writing and the facts therein stated must be sworn to.¹⁶³

And no additional demand is requisite other than the bankrupt's "claim" in his Schedule "B" (5).¹⁶⁴

§ 1050. **Exempt Property to Be Scheduled as Assets Elsewhere in Schedule "B" as Well as in Schedule "B" (5).**—Exempt property must, however, be scheduled as assets elsewhere in Schedule "B" as well as "claimed" in Schedule "B" (5).¹⁶⁵

§ 1051. **Second Requirement—To Be Filed with Schedules.**—The claim must be filed with the schedule of assets and list of debts of the bankrupt.¹⁶⁶

The bankrupt is not to be permitted to defer his claim for exemptions. Thus, he may not make it 'at any time before sale' of the property claimed, as may be done under some State statutes.¹⁶⁷

§ 1052. **Third Requirement—Property to Be Particularly Described.**—The claim must describe in apt language the particular property claimed as exempt, with its location, present use, and estimated value. The description need not be minute, but should be apt enough to identify the property claimed.¹⁶⁸

It will not suffice to make the claim in general terms, as for instance, "Bankrupt claims \$500.00 worth of property in lieu of a homestead." Such manner of claiming does not aid the trustee to set apart the property claimed at all, and it fails utterly to mark off the bankrupt's property from the property of the creditors. Moreover, such claim does not conform to the form prescribed by the Supreme Court.¹⁶⁹

^{163.} Bankr. Act, § 7 (8).

^{164.} See post, § 1072½; and compare § 1083.

^{165.} In re Todd, 7 A. B. R. 770, 112 Fed. 315 (D. C. Vt.); In re White, 6 A. B. R. 451, 109 Fed. 635 (D. C. Mo.); In re Bean, 4 A. B. R. 53, 100 Fed. 262 (D. C. Vt.).

^{166.} Bankr. Act, § 7 (8).

^{167.} In re Groves, 6 A. B. R. 728 (Ref. Ohio, affirmed by D. C.); In re McClintock, 13 A. B. R. 606 (Ref. Ohio, affirmed by D. C.); In re Von Kerm, 14 A. B. R. 403, 135 Fed. 447 (D. C. Pa.); In re Kane, 11 A. B. R. 533, 127 Fed. 552 (C. C. A. Ills.); In re Nunn, 2 A. B. R. 664 (Ref. Ga.); In re Royal, 7 A. B. R. 106, 112 Fed. 135 (D. C. N. Car.); In re Lucius, 10 A. B. R. 653, 124 Fed. 455 (D. C. Ala.); In re Prince & Walter, 12 A. B. R. 680, 131 Fed. 546 (D. C. Pa.); In re Le Vay, 11 A. B. R. 114, 125 Fed. 990 (D. C. Pa.).

^{168.} Form of Schedule "B" (5) of the Supreme Court's prescribed Forms in Bankruptcy.

^{169.} In re Neal, 14 A. B. R. 554 (Ref. Ohio); In re Von Kerm, 14 A. B. R. 403, 135 Fed. 447 (D. C. Pa.); In re Prince & Walter, 12 A. B. R. 680, 131 Fed. 546 (D. C. Pa.); In re Groves, 6 A. B. R. 728 (Ref. Ohio, affirmed by D. C.); In re McClintock, 13 A. B. R. 606 (Ref. Ohio, affirmed by D. C.); In re Duffy, 9 A. B. R. 358, 118 Fed. 926 (D. C. Pa.), quoted, § 1048; apparently contra, when property mortgaged, In re Kane, 11 A. B. R. 533, 127 Fed. 552 (C. C. A. Ills.). But see ante, § 491; post, § 1056.

In re Wunder, 13 A. B. R. 701, 133 Fed. 821 (D. C. Pa.): "The fact that he has given notice, in his schedule filed, that he will claim \$300 worth of property to be appraised, will not entitle him to the amount of \$300 in cash out of the proceeds, or to property of that value, where he has not specified the articles, as claimed by the State law."

Nevertheless, as noted above, failure so to claim exemptions will not absolutely defeat them, for that would be to make the forms and orders override the provisions of the statute itself.¹⁷⁰ The court would simply require amendment or grant leave to amend.¹⁷¹

§ 1053. Fourth Requirement—Description to Be as of Date of Adjudication, etc.—The claim must describe the property claimed as exempt in the condition the property was in at the date of the adjudication, or at any rate at the time when, by law, the schedules should be filed.¹⁷²

But compare, as to amending schedule "B" (5) after the trustee has recovered a preference, so as to claim the property recovered, In re Falconer, 6 A. B. R. 557, 110 Fed. 111 (C. C. A. Ark.): "In making his claim for exemption in the first instance his choice was necessarily confined to such property as he could himself lay claim to, at the time, as forming a part of his estate. His right to select other property then held by third parties, whose title could only be challenged by the trustee, arose, and in the nature of things could be exercised only, when the title by which it was held was vacated and the property became actually, as well as potentially, a part of his estate."

§ 1054. Claiming Money When No Actual Money, but Only Goods in Estate.—Thus, if there was no actual money in the estate at the date of adjudication, it would not be proper to claim "\$500 in lieu of a homestead," for the simple reason there were no "dollars" then to be set apart to the bankrupt. "Goods" are not "dollars" although they may be convertible into dollars; therefore, when the bankrupt is trying to describe what is his property as distinct from what is his creditors', he should be required to describe existing property—"goods," if it be goods; "dollars," if it be dollars.¹⁷³

§ 1055. Claiming So Much Worth Out of Mass.—Thus, it is not sufficient simply to claim that property to the "amount of" a certain named sum should be set off to him; the exact property which he elects to take should be specified.¹⁷⁴

170. Lipman v. Stein, 14 A. B. R. 30, 134 Fed. 235 (C. C. A. Pa., affirming In re Stein, 12 A. B. R. 384); Burke v. Guarantee Title & Trust Co., 14 A. B. R. 31, 134 Fed. 562 (C. C. A. Pa.). See post, § 1064.

171. In re Duffy, 9 A. B. R. 358, 118 Fed. 926 (D. C. Pa.).

172. In re Neal, 14 A. B. R. 554 (Ref. Ohio).

173. In re Groves, 6 A. B. R. 728 (Ref. Ohio, affirmed by D. C.); In re McClintock, 13 A. B. R. 606 (Ref. Ohio, affirmed by D. C.); In re Neal, 14 A. B. R. 554 (Ref. Ohio); In re Berman, 15 A. B. R. 464, 140 Fed. 761 (D. C. Ohio).

174. In re Neal, 14 A. B. R. 554 (Ref. Ohio); compare, In re Hoyt, 9 A. B. R. 574, 119 Fed. 987 (D. C. N. Car.); In re Wunder, 13 A. B. R. 701, 133 Fed. 821 (D. C. Penn.); In re Duffy, 9 A. B. R. 358, 118 Fed. 926 (D. C. Pa.); In re

Analogously, *In re White*, 6 A. B. R. 451 (D. C. Mo.): "Under Rule 17 of General Orders in Bankruptcy, * * * it is made the duty of the trustee to report to the court, within 20 days after receiving notice of his appointment, the articles set off to the bankrupt by him, with the estimated value of each article. How could the trustee comply with this requirement of the law in respect of the property in question. * * * He made no selection of \$300 worth of property out of any particular property."

§ 1056. Where Exemption Claimed in Mortgaged Property.

—And if there be a mortgage on the property, then the claim should be of the "equity of redemption in the following described property," the particular description not being any the less necessary simply because the bankrupt claims only a qualified and not an absolute title therein.¹⁷⁵

§ 1057. Claiming "Proceeds," Where Property Still in Specie.—

Thus a claim of the "proceeds" of certain specified property is improper, the property still being in specie.¹⁷⁶

Prince & Walter, 12 A. B. R. 680, 131 Fed. 546 (D. C. Pa.); compare, *In re Staunton*, 9 A. B. R. 79, and *In re Wunder*, 13 A. B. R. 701, 133 Fed. 821 (D. C. Pa.); where the court says this same rule prevails in the State practice in Pennsylvania. See also, *In re Manning*, 7 A. B. R. 571, 112 Fed. 948 (D. C. Pa.); compare also, *In re Bessie Stein*, 12 A. B. R. 384, 130 Fed. 377 (D. C. Penn.); *In re LeVay*, 11 A. B. R. 114, 125 Fed. 990 (D. C. Pa.).

175. Compare, *In re Kane*, 11 A. B. R. 533, 127 Fed. 552 (C. C. A. Ills.). This decision should not be considered as authority for claiming exemptions in general terms. Although the language of the court is somewhat misleading and the reasoning subject to criticism, yet the decision itself is correct. What the bankrupt in that case was claiming, or should be held to have been claiming, was the equity of redemption in the certain specified chattels that were covered by the mortgage. He had a perfect right to claim the equity of redemption in the certain specified chattels that were covered by the mortgage. He had a perfect right to claim the equity of redemption as exempt. It was a chose in action or interest in property or right that was quite as much a proper subject for exemption as would have been any other right or intangible interest in specific property. The bankrupt, however, should have been required to describe the articles in which he claimed the exempt equity of redemption, as they existed at the date of the adjudication or at the time the law required his claim to be made. He should not have been permitted to claim the "proceeds" of property. "Proceeds" implies a selling, and the trustee cannot be obliged to sell exempt property, nor to convert property into money for the benefit of the mortgagee and the bankrupt. He must be given a chance to set apart exemptions, and it is no part of his functions to do more—to manage exempt property, marshal liens thereon and sell it and disburse the proceeds. No title to exempt property vests in him and it is a cardinal principle of the present bankruptcy law that he must not meddle with it, except to set it apart. The wording of the opinion in *In re Kane* is misleading in that it seems to give authority to a bankrupt to claim the "proceeds" of property not yet sold. The bankrupt would have received all that was due him, and that was in fact given him in that case, had he claimed simply the equity of redemption in certain specified articles and have been required to specify the articles for the guidance of the trustee.

176. *In re Haskin*, 6 A. B. R. 485, 109 Fed. 789 (D. C. Penn.); *In re Ber- man*, 15 A. B. R. 463 (D. C. Ohio); *In re Wunder*, 13 A. B. R. 701, 133 Fed. 821 (D. C. Penn.); *In re Von Kerm*, 14 A. B. R. 403, 404, 135 Fed. 447 (D. C. Pa.); compare, *In re Diller*, 4 A. B. R. 45, 100 Fed. 931 (D. C. Penn.), distinguished in *In re Haskin*, 6 A. B. R. 486, 109 Fed. 789 (D. C. Penn.). But compare, inferentially, contra, *In re Falconer*, 6 A. B. R. 557, 110 Fed. 111 (C. C. A. Ark.).

§ 1058. **But Where Not in Specie.**—But it is not improper if the property has been sold by order of court *before* the time for filing schedules has expired.¹⁷⁷

Lipman v. Stein, 14 A. B. R. 30, 134 Fed. 235 (C. C. A. Pa.): "The fact that a receiver was appointed by the court, who, by its authorization, sold all the assets of the bankrupt's estate before her claim was made or the time allowed for making it had expired, rendered it impossible to appropriate specific property to its liquidation; but her right to its allowance was not thereby extinguished."

Obiter, *In re Sloan*, 14 A. B. R. 435, 135 Fed. 873 (D. C. Pa.): "As the bankrupt's property in this case was sold by order of court, by a receiver appointed the day after the petition in bankruptcy was filed, and prior to the filing of the schedule by the bankrupt, and in view of the fact that he notified the receiver that he claimed his exemption and specified the property at the date of sale, he would be entitled to claim his exemption from the proceeds."

Apparently, *In re Renda*, 17 A. B. R. 522, 151 Fed. 614 (D. C. Pa.): "The bankrupt having made claim for his exemption within the time fixed by the Act, is not debarred because the goods were sold." But perhaps this was a case where the exemptions were properly described and then sold by agreement.

§ 1059. **Fifth Requirement—Estimated Values to Be Given.**—The claim should give the estimated values of the articles.¹⁷⁸

§ 1060. **Sixth Requirement—State Statute to Be Mentioned.**—The claim should mention the state statute under which the bankrupt claims.¹⁷⁹

§ 1061. **Seventh Requirement—Claim to Be Made by Bankrupt, Not by Mortgagee, Assignee nor Other Third Person.**—The statute, in § 7 (8) seems to require that the bankrupt himself make the claim for the exemptions. The right to claim exemptions is a purely personal right and may not be exercised by third parties, such as mortgagees;¹⁸⁰ nor by assignees;¹⁸¹ although, undoubtedly, after exemptions have been duly claimed, and at any rate after they have been set off by the trustee, they may be assigned.

In re Schuller, 6 A. B. R. 278, 108 Fed. 591 (D. C. Wis.): "The right of exemption is a personal privilege granted to the debtor, which he can exercise

177. *In re Stein*, 12 A. B. R. 384, 130 Fed. 629 (D. C. Penn., affirmed sub nom. *Lipman v. Stein*, 14 A. B. R. 30, 134 Fed. 235 (C. C. A. Penn.); *In re Le Vay*, 11 A. B. R. 114, 125 Fed. 990 (D. C. Penn.).

178. Schedule "B" (5). *In re McClintock*, 13 A. B. R. 606 (Ref. Ohio, affirmed by D. C.).

179. Schedule "B" (5).

180. *Mitchell v. Mitchell*, 17 A. B. R. 386 (D. C. N. Car.); *In re Sloan*, 14 A. B. R. 435, 135 Fed. 873 (D. C. Pa.).

181. **Whether Claim of Exemptions May Validate Fraudulent Transfers.**—A fraudulent transferee may not validate the transfer by setting up that the property was exempt, anyway. *Mitchell v. Mitchell*, 17 A. B. R. 389 (D. C. N. Car.); *Edmondson v. Hyde*, Fed. Case 4,285. But it is possible, under State rulings, that such claims, if made by the bankrupt himself, may be effectual to validate the transfer.

or waive, and, unless otherwise provided by the statute, it cannot be exercised by any other person; and the Wisconsin statute (*supra*) requires the claim and selection to be made by the debtor, or on his behalf, with an exception in favor of a wife, and confers no such right on a mortgagee."

[1867] *Edmonson v. Hyde*, Fed. Cas. 4,285: "If the bankrupt does not choose to assert any claim to have it exempted, * * * the mortgagee is in no position to claim it as against the assignee (in bankruptcy)."

§ 1062. Wife Claiming Where Bankrupt Fails or Refuses to Claim.—Failure of the bankrupt to claim exemptions may, perhaps, in States where a wife or child is entitled to make the claim in the event of the debtor's failure to do so, entitle the wife or child to make the claim in the bankruptcy court. There being no form prescribed for such an exigency, any reasonable manner would probably suffice, so it would seem. Yet this claim must be made promptly, at any rate, if the right exists at all.¹⁸²

Compare, inferentially, *In re Seabolt*, 8 A. B. R. 62, 63 (D. C. N. Car.): "The law is well settled, therefore, that, although the owner of a homestead or a person entitled thereto die without having the same allotted in his lifetime, the same can be allotted at the instance of his minor child or children, if he leave such, or in the absence of minor children, at the instance of his widow."

§ 1063. Failure to Claim Exemptions Deemed, Prima Facie, Waiver.—The failure to claim exemptions at all will (if unrebutted), be deemed a waiver of them;¹⁸³ but the presumption may be rebutted and the failure be cured.

§ 1064 Failure to Claim, or to Describe Particularly, Not Necessarily Fatal.—Failure to claim exemptions at all, or to claim them specifically, will not necessarily defeat them, for the failure may operate as authority to the trustee to convert all the property into money and to set aside the amount later asked for or later specifically demanded, after deduction of expenses; or the claim may later be inserted or corrected by amendment.

As heretofore noted, failure to describe with particularity the property claimed, certainly will not defeat the exemptions, if there be a "claim" for exemptions made in the schedules, since otherwise it would be to hold that the forms and orders override the statute itself.¹⁸⁴

¹⁸². Compare, *In re Tollett*, 5 A. B. R. 305, 105 Fed. 425 (D. C. Tenn.); *contra*, that such right cannot be exercised by wife, *In re Sharp*, 15 A. B. R. 491 (Ref. Ohio, affirmed by D. J.). See *ante*, § 1045.

¹⁸³. *Moran v. King*, 7 A. B. R. 176, 111 Fed. 730 (C. C. A. W. Va.); *obiter*, *In re Bolinger*, 6 A. B. R. 171, 108 Fed. 374 (D. C. Penn.); *In re Von Kerm*, 14 A. B. R. 403, 135 Fed. 447 (D. C. Pa.). See editor's note to *Sharpe v. Woolslare*, 12 A. B. R. 396, 401.

¹⁸⁴. See *ante*, § 1052

§ 1065. **Claim of "Proceeds," etc., May Authorize Trustee to Sell Exemptions with Remainder as Entirety.**—Where the bankrupt claims a certain amount "out of the proceeds" of the property, he undoubtedly thereby authorizes the trustee to convert the property into money for his benefit, and he should not be heard to complain if the trustee deducts the expenses of the operation, even though thereby the bankrupt does not receive the full amount of his demand.¹⁸⁵ And undoubtedly the same rule would apply where he claims simply so much in value, or so much worth, "out of" a certain mass of property, without designating the particular articles claimed.¹⁸⁶

§ 1066. **Claim May Be Inserted or Corrected by Amendment.**—Thus the omitted or defective claim for exemptions may be inserted or corrected by amendment.¹⁸⁷

In *re Wunder*, 13 A. B. R. 701, 133 Fed. 821 (D. C. Penna.): "He could, no doubt, have filed a schedule of property claimed, as an amendment to his notice in the schedule, * * * if done in time, and before the creditors have gone to the trouble and expense of a meeting for the purpose of passing upon the advisability of a sale, and have carried the sale into execution."

Thus, leave may be granted to amend to include property preferentially transferred, when it is subsequently recovered by the trustee.¹⁸⁸

§ 1067. **Leave or Order to Amend Requisite.**—It can be amended only by order or leave of court; that is to say, by leave of the referee, in practice.

§ 1068. **Amendment Required by Court, Where Exemptions Claimed Improperly.**—If there be a "claim" of exemptions but it be made improperly, as for instance, if it be made in general terms, the court may and indeed should, of its own motion, require amendment.¹⁸⁹

185. In *re Berman*, 15 A. B. R. 465, 140 Fed. 761 (D. C. Ohio); inferentially, In *re Kane*, 11 A. B. R. 533, 127 Fed. 552 (C. C. A. Ills.); contra, In *re Von Kerm*, 14 A. B. R. 403, 135 Fed. 447 (D. C. Pa.).

186. In *re Berman*, 15 A. B. R. 465, 140 Fed. 761 (D. C. Ohio).

187. Obiter, In *re Neal*, 14 A. B. R. 554 (Ref. Ohio); In *re Berman*, 15 A. B. R. 465, 140 Fed. 761 (D. C. Ohio); In *re Kaufmann*, 16 A. B. R. 121, 142 Fed. 898 (D. C. Wis.); obiter, In *re Von Kerm*, 14 A. B. R. 303, 135 Fed. 447 (D. C. Pa.); In *re Duffy*, 9 A. B. R. 358, 118 Fed. 926 (D. C. Penn.); In *re Bean*, 4 A. B. R. 53, 100 Fed. 262 (D. C. Vt.); In *re Fisher*, 15 A. B. R. 652, 142 Fed. 205 (D. C. Va.). Instance, In *re White*, 11 A. B. R. 556 (D. C. Penn.), in which instance "nope" was written in the schedule for claiming exemptions; after a long delay of more than a year leave to amend was asked for; the referee refused because there was "nothing to amend by;" held, refusal to be improper.

188. In *re Falconer*, 6 A. B. R. 557, 110 Fed. 111 (C. C. A. Ark.).

189. Bankr. Act, § 39 (a) (2): "Referees shall * * * examine all schedules of property and lists of creditors filed by bankrupts and cause such as are incomplete or defective to be amended."

§ 1069. **Leave Liberally Granted.**—Leave is liberally granted, as is usual in regard to exemption proceedings.¹⁹⁰

Impliedly, *In re Falconer*, 6 A. B. R. 557, 110 Fed. 111 (C. C. A. Ark.): "No bankrupt should be deprived of his exemption by a narrow and strict interpretation of laws which were passed for his benefit and prompted by a wise and humane public policy."

Obiter, *In re Royal*, 7 A. B. R. 106, 112 Fed. 135 (D. C. N. Car.): "The filing of a petition in bankruptcy is as a rule a deliberate act. Under some circumstances when pressed to the wall, which does not seem to have been the case in the present instance, haste is necessary and errors occur in making up schedules. When attention is called to such errors leave to amend and correct is always granted."

And leave should not, in general, be refused where the original omission or defect was not in bad faith and where the parties can be put in statu quo. Thus, even after sale, if the proceeds of the exempt property can be definitely distinguished, the bankrupt should be allowed to amend upon reimbursing the trustee for his expenses incurred by reason of the original failure to claim exemptions or to claim them specifically.

§ 1070. **Leave Refused Where Omission with Fraudulent Intent or Third Parties Injured.**—But leave should be refused where the omission to mention the property in the first place was intentional.¹⁹¹

Thus, sometimes a bankrupt fails altogether to schedule fraudulently conveyed property, held on secret trust for him, in the hope that the creditors will pass it over unnoticed and he be allowed to resume its enjoyment afterward. Then, on examination, the hidden property is revealed. Thereupon the bankrupt asks for it as exempt and files his application for leave to amend his claim for exemptions. Such an application should be refused; the trustee should not be robbed of the fruits of his work nor should the bankrupt be permitted to play fast and loose with his creditors. It is too late to claim the property as exempt then.

Leave to amend may be refused where the rights of third parties have intervened.¹⁹² And amendment should be refused where, after the trustee

190. Impliedly, *In re Kaufmann*, 16 A. B. R. 121, 142 Fed. 898 (D. C. Wis.); impliedly, *In re Berman*, 15 A. B. R. 465, 140 Fed. 761 (D. C. Ohio); impliedly, *In re Fisher*, 15 A. B. R. 653, 142 Fed. 205 (D. C. Va.).

Where the receiver, in an involuntary case, before the filing of schedules by the bankrupt, sells the property as perishable, including in the sale property later claimed as exempt when the schedules are filed, no part of the expenses can be taken out of the property thus later claimed; for the later filed schedules must be taken to have been in due time and not to have impaired the bankrupt's right to have his exemptions clear. *In re Le Vay*, 11 A. B. R. 114, 125 Fed. 990 (D. C. Pa.); *In re Bessie Stein*, 12 A. B. R. 384, 130 Fed. 377 (D. C. Penn., affirmed sub nom. *Lipman v. Stein*, 14 A. B. R. 30, 134 Fed. 235, C. C. A. Penn.). See post, § 1093.

191. *In re Bean*, 4 A. B. R. 53, 100 Fed. 262 (D. C. Vt.); *In re Nunn*, 2 A. B. R. 664 (Ref. Ga.); compare, to same effect, *In re Gross*, 5 A. B. R. 271 (Ref. N. Y., affirmed by D. C.); *In re Neal*, 14 A. B. R. 554 (Ref. Ohio).

192. *In re McClintock*, 13 A. B. R. 606 (Ref. Ohio, affirmed by D. C.).

has obtained possession of property not claimed as exempt on the plea that the lien of a creditor thereon as to the trustee is void under § 67 (f), although not void as to the bankrupt, the bankrupt asks leave to amend to claim it as exempt, thus attempting to assert the trustee's rights to enable himself to defraud the lienholder out of property to which, as between the bankrupt and the lienholder, the lienholder is entitled.¹⁹³

And leave to amend may be refused where the bankrupt has not specifically described the property and the property has been sold.¹⁹⁴

In *re Wunder*, 13 A. B. R. 701, 133 Fed. 821 (D. C. Penna.): "He could, no doubt, have filed a schedule of property claimed as an amendment to his notice in the schedule, as was done in *In re Duffy* (D. C.), 9 Am. B. R. 358, 118 Fed. 926, if done in time, and before the creditors have gone to the trouble and expense of a meeting for the purpose of passing upon the advisability of a sale, and have carried the sale into execution."

Amendment will not be permitted where the benefit will not accrue to the debtor or his family but solely to certain creditors holding waivers of exemptions in the property thus sought to be added or as to whom such property is not exempt.¹⁹⁵

§ 1071. Amendment Reverts to Date of Filing Original Claim.—Of course amendments of schedules and claims for exemptions, when made, revert to the date of the filing of the originals, and the rights of the parties should be passed on precisely as if the amended part had always been in the original schedules.¹⁹⁶

SUBDIVISION "D".

SETTING APART OF EXEMPTIONS.

§ 1072. Setting Apart of Exemptions Governed by Bankruptcy Act Itself.—Likewise the manner of setting apart exempt property is governed by the bankruptcy act, and not by the provisions of state law.¹⁹⁷ The exempt property must be set apart to the bankrupt by the trustee, and it must be so set apart as soon as practicable, and report thereof be made within twenty days after the trustee has received notice of his appointment.¹⁹⁸

^{193.} See remarks to similar effect in *In re J. C. Winship Co.*, 9 A. B. R. 638, 120 Fed. 93 (C. C. A. Ills.). However, compare practice as to recovery of preferences, post, § 1094, et seq.

^{194.} In *re Von Kerm*, 14 A. B. R. 403, 135 Fed. 447 (D. C. Pa.).

^{195.} *Moran v. King*, 7 A. B. R. 176, 111 Fed. 730 (C. C. A. Va., affirming *In re Moran*, 5 A. B. R. 472, 105 Fed. 901).

^{196.} Inferentially, in *re Neal*, 14 A. B. R. 554 (Ref. Ohio).

^{197.} In *re Grimes*, 2 A. B. R. 730, 96 Fed. 529 (D. C. N. Car.). But the "setting aside" must not involve the dislocating of valid liens, in *re Thomas*, 3 A. B. R. 99, 96 Fed. 828 (D. C. Wash.).

^{198.} Bankr. Act, § 47 (11): "Trustees shall respectively * * * set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment." In *re Black*, 4 A. B. R. 776, 104 Fed. 289 (D. C. Pa.); In *re Camp*, 1 A. B. R. 165, 91 Fed. 745 (D. C. N. Car.); In *re McClintock*, 13 A. B. R. 606 (Ref. Ohio, affirmed by D. C.).

§ 1072½. **No Demand to Set Apart Requisite.**—No additional demand for setting apart of exemptions need be made by the bankrupt; his simple claim for exemptions which he is required to file with his schedules is enough.¹⁹⁹

§ 1073. **Trustee to Set Apart.**—The trustee seems to be the only one qualified to perform the duty of setting apart the exemptions.²⁰⁰

In re Grimes, 2 A. B. R. 730, 96 Fed. 529 (D. C. N. Car.): "This duty cannot be performed by any other party. It is wholly and entirely the duty of the trustee, and any agreement on the part of the bankrupt or the creditors that the exemptions shall be allotted in any other manner than that presented by the Bankruptcy Law, or through other agencies than that of the trustee of the bankrupt, is a nullity."

Yet in an obiter in Smalley v. Laugenour, 13 A. B. R. 694, 196 U. S. 92, the United States Supreme Court says: "Where there is a trustee he sets apart the exemptions, and reports thereon to the court, § 47, cl. 11; where no trustee has been appointed, under General Order XV, the court acts in the first instance."

§ 1074. **Must Set Aside "Soon as Practicable," and within Twenty Days.**—And it is the trustee's duty to set apart exempted property as soon as "practicable" after his appointment.²⁰¹

General Order XVII of the Supreme Court's General Orders in Bankruptcy follows up the statutory provision of § 47 (11) by laying down the rule that

"The trustee shall make report to the court, within twenty days after receiving the notice of his appointment, of the articles set off to the bankrupt by him, according to the provisions of the 47th section of the act, with the estimated value of each article."

For this purpose the Supreme Court has prescribed a form Number 47, termed "Trustee's Report of Exempted Property;" and one court has held

199. See ante, § 1049; inferentially, McGahan v. Anderson, 7 A. B. R. 641, 113 Fed. 115 (C. C. A. S. C.); inferentially, In re Friedrich, 3 A. B. R. 801, 100 Fed. 284 (C. C. A. Wis.).

200. Compare, In re Smith, 2 A. B. R. 190, 93 Fed. 791 (D. C. Texas), to the point that there can be no review unless a trustee has been appointed and has set apart the exemptions. In re Friedrich, 3 A. B. R. 801, 100 Fed. 284 (C. C. A. Wis.). The receiver may set aside property claimed as exempt when he is about to sell perishable property to await the determination of the bankrupt's exemption rights. In re Joyce, 11 A. B. R. 716, 128 Fed. 985 (D. C. Penn.); In re Shaffer & Son, 11 A. B. R. 717, 128 Fed. 986 (D. C. Penn.); obiter, In re Le Vay, 11 A. B. R. 115, 125 Fed. 990 (D. C. Penn.).

But this setting aside is not the setting apart of exempt property to the bankrupt contemplated by the bankruptcy act, for such duty can only be performed by the trustee. Such property thus set aside to await the determination of the bankrupt's claim for exemptions may be delivered to the bankrupt upon the giving of security for its redelivery upon such determination. In re Shaffer & Son, 11 A. B. R. 717, 128 Fed. 986 (D. C. Penn.).

201. Bankr. Act, § 47 (11). Obiter, McGahan v. Anderson, 7 A. B. R. 645, 113 Fed. 115 (C. C. A. S. C.); In re Camp, 1 A. B. R. 165, 91 Fed. 745 (D. C. N. Car.).

that if the trustee fails to file such report, he will not be allowed for exemptions paid out by him.²⁰²

§ 1075. **Trustee's Report to Be Itemized, with Estimated Values.**—The trustee's report must be itemized and a separate valuation put upon each item.²⁰³

§ 1076. **Statutory Method of Bankruptcy Act to Be Followed—No Different Manner Proper.**—No other nor different manner of setting apart exemptions than that prescribed in the Act itself is proper.²⁰⁴

§ 1077. **Not to Set Aside Property Not Exempt by State Law.**—The trustee must not set apart as exempt property not exempted by the law of the State.²⁰⁵

In re Manning, 7 A. B. R. 571, 112 Fed. 948 (D. C. Penn.): “* * * what the law of the State does not give, cannot be set aside by the trustee.”

§ 1078. **Nor Property Not Claimed.**—The trustee must not set apart as exempt property not claimed as exempt by the bankrupt; his act is beyond his lawful powers if he does so.²⁰⁶

§ 1079. **Not Bound to Set Aside, if Bankrupt Not Entitled.**—The trustee is not bound in the first instance to set apart all the property claimed by the bankrupt as exempt, nor any of it, if he considers the bankrupt is not entitled to it.²⁰⁷

202. In re Hoyt, 9 A. B. R. 574, 119 Fed. 987 (D. C. N. Car.).

203. Bankr. Act, § 47 (11). Rule XVII. In re Manning, 7 A. B. R. 571, 112 Fed. 948 (D. C. Penn.); In re McClintock, 13 A. B. R. 606 (Ref. Ohio, affirmed by D. C.); In re Black, 4 A. B. R. 776, 104 Fed. 28 (D. C. Pa.); obiter, McGahan v. Anderson, 7 A. B. R. 645, 113 Fed. 115 (C. C. A. S. C.).

204. In re Grimes, 2 A. B. R. 730, 96 Fed. 529 (D. C. N. Car.). But compare contra practice, In re Lynch, 4 A. B. R. 262, 101 Fed. 579 (D. C. Ga.). And compare, In re Park, 4 A. B. R. 432, 102 Fed. 602 (D. C. Ark.).

205. In re Ogilvie, 5 A. B. R. 374 (Ref. Ga.). But in practice, what is to be done with the clothing on the person of an unmarried man who is not entitled to exemptions? The trustee would hardly invoke the authority of the bankruptcy court to denude the bankrupt.

And compare, In re Collier, 7 A. B. R. 131, 111 Fed. 508 (D. C. Mass.), where the Court rules that where an article claimed as exempt is of excessive value the trustee might take it for creditors upon giving the bankrupt money with which to buy one of proper value.

Also compare, In re Reinhart, 12 A. B. R. 78, 129 Fed. 510 (D. C. Ga.), where the Court permitted the supplementing of statutory specific exemptions by the value of those not in possession that might have been claimed.

206. In re Nunn, 2 A. B. R. 664 (Ref. Ga.).

207. In re Ellis, 10 A. B. R. 754 (Ref. Ohio); impliedly, In re Friedrich, 3 A. B. R. 801, 100 Fed. 284 (C. C. A. Wis.). Also see inferentially, Huenergardt v. Brittain Dry Goods Co., 8 A. B. R. 341, 116 Fed. 31 (C. C. A. Kas.); In re Irwin, 9 A. B. R. 689, 120 Fed. 733 (C. C. A. Ark.); contra, In re Campbell, 10 A. B. R. 723, 124 Fed. 417 (D. C. Va.).

§ 1080. **Appraisal Not Binding.**—The appraisal is not binding upon either the trustee, bankrupt or creditors as to exempt property, and it is not necessary to follow it, nor is it necessary to have a reappraisal, before the trustee may refuse to set aside the exemptions in accordance with the values placed on the articles by the appraisers. Indeed, the requirement of appraisal simply goes to the appraisal of the property belonging to the estate and therefore does not cover exempt property. Where the trustee is satisfied that the property is exempt, he would not be justified in having it appraised.²⁰⁸

§ 1081. **Who May Except to Trustee's Report of Exempted Property—Bankrupt and Creditors.**—Both the bankrupt and any of his creditors may take exceptions to the report of the trustee setting apart exemptions;²⁰⁹ whereupon the court (the referee) will hear the exceptions and determine their validity, and order the trustee to set apart whatever is determined to be exempt.²¹⁰

§ 1082. **Creditor Must File Exceptions within Twenty Days.**—If a creditor takes the exception, he must file his exception within twenty days after the trustee has filed his report setting apart the exempted property.²¹¹

Certain text books and decisions (see *In re Campbell*, 10 A. B. R. 723, 124 Fed. 417 (D. C. Va.), and *In re White*, 4 A. B. R. 613, 103 Fed. 774 (D. C. Vt.), have laid down the rule that the trustee has no discretion in the matter of setting apart exemptions at all; that so long as the bankrupt has observed the proper formalities in making his claim for exemptions, the trustee is bound to set apart the property claimed, no matter if in fact the bankrupt is not entitled to them; in effect, that the trustee is a mere automaton and that only creditors may take exceptions. This is not a correct idea and is founded upon a misapprehension of the real purport of that part of Rule XVII quoted.

^{208.} But compare, *In re McCutcheon*, 4 A. B. R. 81, 100 Fed. 779 (D. C. S. C.). Where, however, exempt property is appraised, the appraisal should follow the ordinary rules, and sacrifice values should not be the criterion, *In re Prager*, 8 A. B. R. 356 (Ref. Colo.).

Wife's furniture appraised as husband's, both being in bankruptcy; wife not estopped from claiming ownership although present at appraisal and knowing appraisers were acting in husband's case. *In re Jamieson*, 6 A. B. R. 601 (D. C. R. I.).

^{209.} *In re Ellis*, 10 A. B. R. 754 (Ref. Ohio).

^{210.} Gen. Ord. No. XVII: "The referee may require the exceptions to be argued before him and shall certify them to the court for final determination at the request of either party."

Inferentially, *In re Carmichael*, 5 A. B. R. 552, 108 Fed. 789 (D. C. Ky.). The point was not raised in this case but was involved.

^{211.} Gen. Ord. No. XVII: "Any creditor may take exceptions to the determination of the trustee within twenty days after the filing of the report." *McGahan v. Anderson*, 7 A. B. R. 641, 113 Fed. 115 (C. C. A. S. C.); *In re Ellis*, 10 A. B. R. 754 (Ref. Ohio). To same effect, obiter, *In re Allen & Co.*, 13 A. B. R. 521, 134 Fed. 620 (D. C. Va.).

Apparently the rule of statutory construction "expressio unius, exclusio alterius" is thought to be applicable and the mention of creditors alone, and the limitation of twenty days for them to file exceptions, is taken to mean that only creditors may file such exceptions. This would be a serious defect in bankruptcy practice were it the rule. For nothing is more helpless than an insolvent estate. The administration of such an estate is far different from an adversary lawsuit. In an adversary lawsuit there are two sides in opposition—each one alert to take advantage of the mistake or error of the opponent. In the administration of insolvent estates, on the contrary, after the first assembling of creditors and the election of trustee, the activity of creditors at once subsides. After that, the trustee is left wholly in charge and the individual creditor is little inclined to take part, probably because the benefit from his work goes to all and not to himself alone. It would be strange, indeed, if in such an important matter as the setting apart of exemptions, the trustee should be a mere automaton and creditors could not have him to watch out for their interests. The Supreme Court's General Order does not mean this at all. Nor does it mean that the bankrupt may not also file exceptions. It simply means that creditors will not be absolutely bound by their trustee's acts in regard to the important matter of exemptions, although in other matters relating to third parties the trustee's acts may be binding on creditors; but that, on the contrary, the creditors, as well as the bankrupt, may except to the trustee's report setting apart exempted property, and that the creditors in doing so must file their exceptions within twenty days so that the trustee may have it set at rest whether the beneficiaries of his trust—the creditors—will find fault with him in that particular. This, evidently, is the correct construction of the rule.

§ 1083. Schedule (b) 5, Trustee's Report and Written Exceptions, Only Pleadings Necessary.—The schedule claiming exemptions (Schedule (b), 5) and the trustee's report of exempted property and the subsequent exceptions thereto, are sufficient pleadings to raise the issue, and nothing more is requisite.²¹²

§ 1084. Whether Exceptions to Be Verified.—Exceptions probably need not be verified; it is doubtful that they are "pleadings."

Query, *In re Campbell*, 10 A. B. R. 723, 124 Fed. 417 (D. C. Va.): "While an exception to a trustee's report is in some sense a pleading, in that it makes an issue, and while such an exception may be treated as a pleading, 'setting up matters of fact,' yet I doubt if Congress, in enacting clause 'c' of § 18 of the Bankrupt Act (Act July 1, 1898, ch. 541, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429]) had the intent to require that exceptions to a trustee's report should be verified."

But lack of verification is at any rate waivable.²¹³

²¹². *McGahan v. Anderson*, 7 A. B. R. 641, 133 Fed. 115 (C. C. A. S. C.).

²¹³. *In re Campbell*, 10 A. B. R. 723, 124 Fed. 417 (D. C. Va.).

§ 1085. **Burden of Proof on Bankrupt, if Exceptions Amount to General Denial.**—The burden of proof of showing that an article, alleged to be exempt, is so, rests upon the bankrupt, if the exceptions amount to a general denial not affirming new matter.²¹⁴

§ 1086. **Res Judicata—Order Approving or Disapproving Trustee's Report of Exempted Property Res Judicata Elsewhere.**—The order of the bankruptcy court setting aside or approving the report of the trustee setting aside property as exempt is res judicata in the State courts as elsewhere as to all creditors properly notified of the bankruptcy.²¹⁵

Smalley v. Laugenour, 13 A. B. R. 692, 196 U. S. 93: "The State court was of opinion that Laugenour and his wife might have pleaded and proved facts showing that the property was exempt from execution at the time of the sale, making the issue directly in the State court, but, as they chose to rely on the principle of res judicata, that is, on the adjudication by the bankruptcy court, having jurisdiction of person and estate, in a proceeding in bankruptcy in which the judgment of Smalley and McLellan was provable, the court gave due force and effect to that adjudication. * * *

"All that was determined, and all that the State court was called on to determine, was the question of exemption under the State statutes. Its acceptance of the judgment of the Federal court in that regard does not bring the case within § 709.

"Writ of error dismissed."

Evans v. Rounsaville, 8 A. B. R. 236 (Sup. Ct. Ga.): "An exemption assigned and set apart by the bankrupt court * * * is no more subject to levy and sale than if it has been set aside by the ordinary of a county having proper jurisdiction."

§ 1087. **Conversely, Judgment of State Court as to Exemptions in Same Fund, Res Judicata.**—A judgment or decree of the State Court as to exemption rights in the same fund have been held res adjudicata and binding on the bankruptcy court.²¹⁶

But, of course, this could not be the rule where the State court proceedings were utterly without jurisdiction, as in cases of State bankruptcy or State Insolvency proceedings, and not simply valid until superseded as in cases of mere assignments for the benefit of creditors, or receiverships.

In *re Anderson*, 6 A. B. R. 555, 110 Fed. 141 (D. C. Mass.): "Upon the whole, though with considerable doubt, I think that the allowances made by

214. In *re Turnbull*, 5 A. B. R. 549, 106 Fed. 667 (D. C. Mass.).

No Reopening to Permit Contest of Exemptions Where Laches Exists.—After discharge has been granted and exemptions set off, it has been held that the matter will not be reopened to let in a creditor to file exceptions to exemptions where the creditor was duly scheduled and presumably had notice. In *re Reese*, 8 A. B. R. 411, 115 Fed. 993 (D. C. Ala.).

215. *Smith v. Zachry*, 8 A. B. R. 240 (Sup. Ct. Ga.).

216. In *re Rhodes*, 6 A. B. R. 173, 109 Fed. 117 (D. C. Ohio), assignment; also, compare, In *re Overstreet*, 2 A. B. R. 486 (Ref. Ark.); compare, In *re McBryde*, 3 A. B. R. 729, 99 Fed. 686 (D. C. N. Car.); compare, In *re Nunn*, 2 A. B. R. 664 (Ref. Ga.).

§ 99 are not properly exemptions within the purview of § 6 of the Bankrupt Act, but are concerned with that part of the insolvency law which is suspended in its operation by the passage of the Bankrupt Act."

Nor could such be the rule where all creditors were not bound by the judgment, as, for instance, in a suit brought by one creditor for his own benefit, where the property eventually was turned over to the bankruptcy court.

§ 1088. No Second Exemption Out of Same Fund.—No second exemption out of the same fund will be allowed by the Bankruptcy Court, where the State Court has previously allowed and set aside exemptions therefrom while the property was in its custody prior to bankruptcy.²¹⁷

§ 1089. Selling Exemptions with Other Assets as Entirety and Allowance Out of Proceeds.—By agreement between the bankrupt and the trustee, the exempt property may be sold along with the remainder of the property as an entirety, and the bankrupt be allowed exemptions out of the proceeds.²¹⁸ Such agreement, however, does not dispense with the requirements of § 7, as to the proper time and manner of claiming exemptions.²¹⁹ And where the exempted property is not separable from the assets belonging to the estate without manifest injury, it is held, in accordance with the laws of some States, that the entire lot may be sold and the exemptions be transferred to the proceeds of sale;²²⁰ in which event the trustee and not the bankrupt should pay the expenses of the sale.²²¹ And where a homestead is of a value in excess of that limited by statute, the bankrupt may—according to the rulings in the same cases—be permitted to retain the homestead on payment of the excess to the trustee.²²²

217. In re Miller, 1 A. B. R. 647 (Ref. Mo.); compare, In re Jeffers, 17 A. B. R. 368 (Ref. Ga.); compare, In re Hoag, 3 A. B. R. 290, 97 Fed. 543 (D. C. Wis.); compare obiter, In re Buckingham, 2 N. B. N. & Rep. 620 (Ref. Ohio): "It is undoubtedly true that successive allowances in lieu of a homestead at unreasonably short intervals of time would not be allowed, nor would more than one allowance be made out of the same property."

218. In re Richard, 2 A. B. R. 506, 94 Fed. 633 (D. C. N. Car.); In re Brown, 4 A. B. R. 46, 106 Fed. 441 (D. C. Penn.); In re Mayer, 6 A. B. R. 117, 108 Fed. 599, 600 (C. C. A. Wis.); In re Woodard, 2 A. B. R. 692, 95 Fed. 955 (D. C. N. Car.); instance, In re Renda, 17 A. B. R. 522, 149 Fed. 614 (D. C. Penn.); inferentially, McGahan v. Anderson, 7 A. B. R. 647, 113 Fed. 115* (C. C. A. S. C.); inferentially, In re Prince & Walter, 12 A. B. R. 675, 131 Fed. 546 (D. C. Pa.); inferentially, In re Kane, 11 A. B. R. 533, 127 Fed. 552 (C. C. A. Ills.); compare, In re Diller, 4 A. B. R. 45, 100 Fed. 931 (D. C. Calif.); In re Bolinger, 6 A. B. R. 171, 108 Fed. 374 (D. C. Penn.); compare, In re Bessie Stein, 12 A. B. R. 384, 130 Fed. 629 (D. C. Penn.); contra, and that such agreement is unlawful, In re Haskin, 6 A. B. R. 485, 109 Fed. 789 (D. C. Penn.); also contra, In re Grimes, 2 A. B. R. 730, 96 Fed. 529 (D. C. N. Car., reversing 2 A. B. R. 610); compare, In re Hoyt, 9 A. B. R. 574, 119 Fed. 987 (D. C. N. Car.). Such agreement by a tax collector, however, will not bind a municipality. In re Prince & Walter, 12 A. B. R. 675, 131 Fed. 546 (D. C. Penn.).

219. In re Woodard, 2 A. B. R. 692, 95 Fed. 955 (D. C. N. Car.); In re Prince & Walter, 12 A. B. R. 675, 131 Fed. 546 (D. C. Penn.).

220. In re Oderkirk, 4 A. B. R. 617, 103 Fed. 779 (D. C. Vt.); In re Diller, 4 A. B. R. 45, 100 Fed. 931 (D. C. Penn.).

221. In re Hopkins, 4 A. B. R. 619, 103 Fed. 781 (D. C. Vt.). But compare, In re Castleberry, 16 A. B. R. 431, 143 Fed. 1021 (D. C. Ga.).

222. In re Manning, 10 A. B. R. 498, 123 Fed. 180 (D. C. S. C.).

§ 1090. **Trustee Not Entitled to Indemnify before Delivering Exemptions.**—The trustee probably may not demand indemnity from the bankrupt for the twenty days allotted for filing exceptions to the trustee's report as a condition of delivering over the exemptions before the expiration of the twenty days.²²³ Therefore, since creditors have twenty days time within which to file exceptions to the trustee's report of exempted property, it follows that either the trustee must retain the property for twenty days, which it is doubtful that he may do, else set it apart and assume the risk of the filing and sustaining of exceptions. At any rate the trustee may not demand indemnity after the referee has decided that the bankrupt is entitled to them.²²⁴ But the receiver may demand indemnity for setting aside perishable property as exempt pending the determination of the bankrupt's exemption rights therein.²²⁵

§ 1091. **Nor to Refuse to Set Apart until Costs Paid.**—The trustee must not refuse to set apart exemptions until costs or expenses of administration are paid.²²⁶ But, it has been held that he may be ordered to pay the necessary costs of administration out of funds in his hands, although the funds may be otherwise exempt.²²⁷ And the suggested rule in *Lockwood's Case*, 10 A. B. R. 107, 190 U. S. 294, will not permit the withholding of the setting apart until the determination of a suit in tort against the bankrupt for the conversion of a note containing a waiver of exemptions.²²⁸ And as elsewhere noted (*ante*, § 1069), where the bankrupt has omitted to claim exemptions or has been indefinite in describing them, the court may impose as a condition to allowing amendment the payment of the costs or expenses necessary to put the parties in statu quo.

§ 1092. **Bankrupt Not Entitled to Reimbursement for Care of Exempt Property Pending Setting Off.**—The bankrupt is not entitled to reimbursement for his expenses in taking care of exempt property pending its being set off to him.²²⁹

§ 1093. **Rent, Storage and Other Charges Pending Setting Off.**—It has been held that the Bankruptcy Court has power to tax as costs against the bankrupt the rent and storage charges for the keep of the exempt property pending its being set apart to the bankrupt.²³⁰

^{223.} Inferentially, *In re Brown*, 4 A. B. R. 46, 100 Fed. 441 (D. C. Pa.).

^{224.} *In re Brown*, 4 A. B. R. 46, 106 Fed. 441 (D. C. Penn.).

^{225.} *In re Shaffer*, 11 A. B. R. 717, 128 Fed. 986 (D. C. Penn.).

^{226.} Inferentially, *In re LeVay*, 11 A. B. R. 115, 125 Fed. 990 (D. C. Penn.); *contra*, *In re Jackson*, 18 A. B. R. 216 (Ref. Ga.).

^{227.} *In re Herbold*, 14 A. B. R. 119 (D. C. Wash.); compare, *In re Castleberry*, 16 A. B. R. 431, 143 Fed. 1021 (D. C. Ga.).

^{228.} *In re Hartsell & Son*, 15 A. B. R. 177, 140 Fed. 30 (D. C. Ala.).

^{229.} *In re Groves*, 6 A. B. R. 728 (Ref. Ohio, affirmed by D. C.).

^{230.} Compare, *In re Castleberry*, 16 A. B. R. 431, 143 Fed. 1021 (D. C. Ga.).
Exempt Property May Be Subject to Payment of Statutory Fees in Bankruptcy; but Not Other Costs of Administration.—But exempt property may be

In *re Grimes*, 2 A. B. R. 730, 96 Fed. 529 (D. C. N. Car.): "The bankrupts' property has been thus preserved; but the bankrupts insist that their exemptions must first be set apart to them, and, if there be anything left, Schouler's claim for rental since their adjudication, and the legal and necessary expenses incurred in closing up the estate, can be paid out of the remainder of the estate of the bankrupts. This contention cannot be maintained either on legal or equitable grounds. The rental for the storage of the goods of the bankrupt firm is part and parcel of the legitimate costs incurred in this case, and is a lien upon the estate of the bankrupts, or any assets that may be in the hands of the trustee, or that may hereafter come into his hands."

Contra, In *re LeVay*, 11 A. B. R. 116, 125 Fed. 990 (D. C. Pa.): "The title to that which is now claimed (as exempt) having, therefore, never passed out of the bankrupt, even though temporarily in abeyance, cannot be subjected to the costs made in the attempt to otherwise deal with it (§§ 62, 64b); and this is true even though the appointment of the receiver and the sale of the goods as perishable would ordinarily be regarded as preservative steps taken in the interest of all parties.

"But there was this peculiarity in this case—the value of the goods sold was appraised at only slightly more than the exemptions claimed and it was obvious that no necessity existed for such a sale, thus distinguishing this case from those where impliedly the bankrupt gave his permission."

In cases of the amendment of schedules such payments may be required as a condition in order to put the parties in statu quo.²³¹

SUBDIVISION "E."

EXEMPTIONS ON RECOVERY OF PREFERENTIAL AND FRAUDULENT TRANSFERS; UPON AVOIDANCE OF GENERAL ASSIGNMENTS, AND WHEN ASSETS CONCEALED.

§ 1094. **Exemptions, on Recovery of Preferences and Fraudulent Transfers; and in Cases of Assignment, etc.**—Whether a bankrupt, after a preference or fraudulent transfer has been recovered by the trustee or surrendered to him, or a general assignment been set aside or concealed property been recovered, may come in and amend his schedules and claim his exemptions out of the property recovered, or even out of other property, is variously decided.

subject to the order of the court for the payment of the statutory fees. In *re Bean*, 4 A. B. R. 54, 100 Fed. 262 (D. C. Vt.): "And it may be subject to an order for payment of the statutory fees, which are primarily for services for the benefit of the bankrupt, and do not depend upon property not exempt, but upon absolute inability."

But compare, In *re LeVay*, 11 A. B. R. 115, 125 Fed. 990 (D. C. Penn.): "So far as the bankrupt was concerned, the whole proceedings, as well as this part of them, were an useless interference with her affairs. Conceding that an act of bankruptcy had been committed, it must have been evident from the start that the small stock of millinery which she had, even if it realized \$519 (at which it was appraised), was little more than enough to cover her exemption and the probable costs, leaving only the barest fraction, if anything at all, for general creditors. As it turned out, it has fallen far short of this, and the expenses incurred must therefore be borne by those who made them. They cannot be allowed to still further reduce the bankrupt's already scanty claim."

231. See *ante*, §§ 1064, 1069.

§ 1095. **On Recovery of Preferences.**—Thus, in cases where a preference has been recovered by the trustee or surrendered to him, it has been held by some courts that he may have exemptions;²³² and by others that he may not have exemptions.²³³

In re White, 6 A. B. R. 451, 109 Fed. 635 (D. C. Mo.): "The bankrupt in this case, prior to the institution of the suits by the trustee to recover from the preferred creditors the money in question, made no selection of any property out of which his \$300 was to come. He scheduled no other property than that which was absolutely exempt under said § 3159, and which he claimed as exempt, and which he withheld from the trustee. How was it possible for the trustee in bankruptcy to comply with the statute to set off to this bankrupt \$300 worth of property as exempt which he did not schedule? Under Rule 17 of the General Orders in Bankruptcy * * *, it is made the duty of the trustee to report to the court, within 20 days after receiving notice of his appointment, the articles set off to the bankrupt by him with the estimated value of each article. How could the trustee comply with this requirement of the law in respect of the property in question? The bankrupt had not scheduled it. He made no selection of \$300 worth of property out of any particular property. He did not even claim this property as a part of his assets. The law would be a mockery, and permit a party to take advantage of his own wrong, if after having transferred his property in fraud of the bankruptcy act, and compelling the trustee in bankruptcy, at the expense of the estate, to engage in protracted litigation, to uncover his fraud, and recover the proceeds of the property from the wrongtakers, the bankrupt could stand quietly by, and then come in and make his selection of \$300 in money out of the fruits of the litigation necessitated by his wrong and fraud. He is within neither the letter nor the spirit of the law."

Generally, the courts have seemed to consider the question to be controlled by the varying laws of the several states on the subject. One decision, *In re Coddington* (Penna.), 11 A. B. R. 122, however, is based on the provisions of the Bankruptcy Act itself. By this decision the bankrupt is held not to be entitled to exemptions out of preferentially conveyed property upon recovery or surrender of the same to the trustee, the argument being that the title to exempt property never passes to the trustee at all, therefore, if the court does permit him to recover property preferentially conveyed by the bankrupt, it can only be on the theory that the title is not in the bankrupt but in himself, which is equivalent to saying the property is recoverable because not exempt. Whilst the bankrupt might shield the conveyance already made by him to the preferred creditor by claiming the property as exempt, yet this claim can redound to the benefit only of the preferred creditor and will operate simply to protect the conveyance from

²³². *In re Falconer*, 6 A. B. R. 557, 110 Fed. 111 (C. C. Ark.); *In re Osborn*, 5 A. B. R. 111, 104 Fed. 780 (D. C. N. Y.).

²³³. *In re Long*, 8 A. B. R. 591, 116 Fed. 113 (D. C. Penn.); *In re Evans*, 8 A. B. R. 730, 116 Fed. 909 (D. C. N. Car.); compare, dissenting opinion, *In re Falconer*, 6 A. B. R. 557, 110 Fed. 111 (C. C. Ark.); *In re Sharp*, 15 A. B. R. 493 (Ref. Ohio, affirmed by District Judge); *In re Coddington*, 11 A. B. R. 122 (D. C. Penn.).

molestation and cannot be made to operate indirectly to give back to the debtor property that he could not have recovered directly from the creditor himself; the fraudulent or preferential conveyance being voidable only at the instance of creditors. In effect, since the right to exemptions is to be determined as of the date of adjudication, unless at that date the property belonged to the debtor and was recoverable by him, it cannot be exempt to him, for the ownership is not in him. But suppose the trustee should set it apart to him as being property not belonging to the estate. What would be the situation? The bankrupt would have had his exemptions set apart to him in property which he never himself could recover, for of course a debtor cannot recover property which he himself has fraudulently or preferentially conveyed to another, it being only as to creditors that the title is not good. So therefore, if, after the trustee has recovered the property, the bankrupt may step in and take it away as exempt, an inconsistency arises; for, on the one hand, the trustee who never possesses title to exempt property, is thus held to be the only one to whom the courts will give the exempt property, whilst on the other hand, the bankrupt, in whom the title to exempt property is supposed to have remained all the time, is precisely the one who cannot maintain a suit for its recovery and who has absolutely no standing in court at all to recover it.

Were bankruptcy exemptions, to be sure, simply a *priority* claim upon the funds passing into the trustee's hands the case would be different; but they are not simply a priority claim on a fund²³⁴—they are not part of the fund at all; the title to them never passes to the trustee, they always remain the property of the bankrupt and the trustee cannot be obliged to surrender property to one who has not enough title himself to recover it in his own name.

In *re Ogilvie*, 5 A. B. R. 380: "The Supreme Court of this State (Georgia) has decided that a homestead in bankruptcy constitutes a different estate than one allowed by State law. * * * The estate obtained in bankruptcy is a fee simple."

Now whilst all this is true, yet § 67 (e) by its express provisions sets aside fraudulent (although not preferential) transfers as to the bankrupt as well as to the creditors, and permits the bankrupt to have exemptions from the property so recovered; so the case *In re Coddington* could not lay down the correct rule as to fraudulently transferred property although it might do so as to property merely preferentially transferred.

²³⁴. But see *Fenley v. Poor*, 10 A. B. R. 377, 121 Fed. 739 (C. C. A. Ky.); also, see, *In re White*, 6 A. B. R. 451, 109 Fed. 635 (D. C. Mo.).

In some States homestead exemptions approximate in their nature actual estates and interests and thus harmonize with the theory of the present bankruptcy act; but in other States, as, for instance, Ohio and Kentucky, they seem to partake more of the nature of priority demands; accordingly in such States it is hard to reconcile the State exemption practice with that in bankruptcy. See *Schuler v. Miller*, 45 Ohio St. 325. See, *In re Fenley v. Poor*, 10 A. B. R. 377, 121 Fed. 739 (C. C. A. Ky.); compare, *In re Camp*, 1 A. B. R. 168, 91 Fed. 749 (D. C. Ga.).

Compare, *In re Neal*, 14 A. B. R. 550 (Ref. Ohio): "Under the laws of Ohio, a debtor may claim his exemptions out of fraudulently conveyed property recovered by a trustee, for the reason, that he never in fact parted with the title, and the recovery by the trustee and the trustee's title is under and by virtue of the debtor's title, and while the debtor by reason of his participation in the fraudulent conveyance cannot recover it himself, the law leaving the parties to the fraud as it finds them, yet when recovery is made, it is his property in the hands of the trustee to be administered and is subject to homestead.

"A debtor who makes a voluntary transfer of his property to a creditor, prior to bankruptcy, parts absolutely with all title thereto, and when the same, or its value, is afterwards recovered by the trustee, he is not entitled to his exemptions out of the same; especially is this true where the preferred creditor had a lien on the property which as between himself and the bankrupt would have precluded the allowance of exemptions."

And although the reasoning in *In re Coddington* is very cogent, yet the weight of authority seems to be that the state law will govern and that the bankrupt may claim his exemptions out of fraudulently or preferentially conveyed property recovered by the trustee or surrendered to him;²³⁵ one of the reasons assigned for the holding being that, as the property was exempt any way its transfer could not have depleted the creditors' fund and therefore could not have been fraudulent nor preferential.²³⁶

In re Falconer, 6 A. B. R. 557, 110 Fed. 111 (C. C. A. Ark.): "Under these circumstances, we think that the bankrupt was under no obligation at the time he filed his original schedule to claim his exemption out of the fund in controversy, or to indicate his intention to do so if the fund should be recovered by the trustee or surrendered voluntarily by the creditor. In making his claim for exemptions in the first instance his choice was necessarily confined to such property as he could himself lay claim to, at the time, as forming a part of his estate. His right to select other property then held by third parties, whose title could only be challenged by the trustee, arose, and in the nature of things could be exercised only, when the title by which it was held was vacated and the property became actually, as well as potentially, a part of his estate."

But such reasoning seems to ignore the fact that the very reason the property was recoverable was because the court setting aside the transfer had thereby held that the creditor's fund had been depleted by the transfer.

This would undoubtedly be the rule also in Ohio, where, in the state courts the doctrine is thoroughly established, that a debtor may claim exemptions out of fraudulently conveyed property when the property is recovered for the benefit of creditors; this doctrine being based upon the

²³⁵. *Bashinski v. Talbott*, 9 A. B. R. 513, 119 Fed. 337 (C. C. A. Ga.); *In re Osborn*, 5 A. B. R. 111, 104 Fed. 780 (D. C. N. Y.).

²³⁶. *In re Tollett*, 5 A. B. R. 404, 106 Fed. 866 (C. C. A. Tenn., reversing 5 A. B. R. 305). Where the homestead is indivisible and is of greater value than that allowed by law, it has been held in South Carolina that the bankrupt might retain it on paying to the trustee the excess. *In re Manning*, 10 A. B. R. 498, 123 Fed. 180 (D. C. S. C.).

principle that the avoiding of the conveyance operates to reinvest the debtor with the title to the property although he might not have been able to avoid the conveyance himself.

§ 1096. On Recovery of Fraudulently Transferred Property.

—So, also, there is a conflict of authority as to whether a bankrupt may have exemptions out of property recovered by the trustee that has been fraudulently conveyed by the bankrupt.²³⁷

That he may have exemptions therein.²³⁸

In *re Thompson*, 15 A. B. R. 287, 115 Fed. 924 (D. C. Wash.): "But it does not necessarily follow that, if the conveyance is set aside and the property is treated as a fund in the hands of a trustee for the payment of the bankrupt's debts, he has no interest in it. Counsel seek, if I apprehend their position correctly, to sustain the view that the transfer by Mrs. Oliver to the trustee passed the title to him whereby any interest of the bankrupt is cut off, and that inasmuch as he could not disturb her in her possession, or demand an accounting for the proceeds of the property, that he is also precluded from demanding that his exemptions be set aside by the trustee. The attempted transfer being void as to creditors, the property still remains that of the bankrupt for the purpose of paying his debts; otherwise, we would have the anomaly of the debts of a bankrupt being paid out of the property of a third person. The property, being subject to the debts of the bankrupt, could not be so upon any other theory than that of ownership by him. While it is true some courts have held that, where the bankrupt commits fraud in the conveyance of his property, which is recovered at the suit of creditors, he is precluded from making claim to exemptions, yet the weight of authority is the other way. Those authorities which hold that an act of fraud is sufficient to deprive one of exemptions, in my opinion, confound fraudulent transfers generally with statutory rights. There can be no such thing as fraud in claiming that which the law allows. The question under consideration does not appear to have been decided by the Supreme Court of the State. * * *

"There is another reason equally convincing. Congress in the Bankruptcy Act appears to have anticipated the contention made in this case. Section 67e declares that all conveyances, transfers, etc., made or given by a person adjudged a bankrupt under the provisions of the Act, with the intent and purpose on his part to hinder, delay and defraud his creditors, shall be null and void as against such creditors, 'and all property of the debtor conveyed, assigned

^{237.} *Obiter*, in *Bashinski v. Talbot*, 9 A. B. R. 513, 119 Fed. 337 (C. C. A. Ga.), although here it is doubtful as to whether the conveyance was fraudulent or not. But where the fraudulently conveyed property is reconveyed to the bankrupt before bankruptcy, the bankrupt may have his exemptions therein. In *re Thompson*, 8 A. B. R. 283, 115 Fed. 924 (D. C. Ga.); In *re Tollett*, 5 A. B. R. 404, 106 Fed. 866 (C. C. A. Tenn., reversing 5 A. B. R. 305); inferentially, In *re Allen & Co.*, 13 A. B. R. 518, 134 Fed. 620 (D. C. Va.).

For a peculiar instance, where, during the pendency of a suit in the State Court to set aside a fraudulent conveyance, the debtor obtained a reconveyance and then filed his statutory claim for homestead, but was afterwards declared bankrupt before the State Court had entered any decree, see In *re Allen & Co.*, 13 A. B. R. 518 (D. C. Va.), where the court granted the exemptions.

^{238.} In *re Tollett*, 5 A. B. R. 404, 106 Fed. 620 (C. C. A. Tenn., reversing 5 A. B. R. 305); inferentially, In *re Rothschild*, 6 A. B. R. 48 (Ref. Ga.).

or encumbered as aforesaid, shall, if he be adjudged a bankrupt and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt, and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors.'” In this case the fraudulent transferee voluntarily surrendered the property.

§ 1097. **Where General Assignment Nullified by Bankruptcy.**—So, also, there is a conflict of authorities as to whether a bankrupt may have exemptions out of property recovered by the trustee that has been assigned within four months of bankruptcy where the assignment has been declared void as being an assignment in trust for creditors.²³⁹

§ 1098. **Forfeiting Exemptions by Fraudulent Concealments or Removals.**—So, also, there is a conflict of authority as to whether a bankrupt forfeits his right to exemptions where he fraudulently disposes of his property, conceals it or removes it from the jurisdiction. Some cases have held that he does forfeit them;²⁴⁰ and such is the rule by statute in Georgia.²⁴¹

Other cases have held that he does not forfeit them.²⁴²

§ 1099. **Whether Concealing Other Assets Presumed Selection as Exempt, Warranting Refusal of Exemptions Claimed in Schedules.**—Where the bankrupt has concealed any of his assets, it may be presumed in accordance with the law of some States that he has selected those concealed as exempt and to the extent of their value other exemptions

²³⁹. That he may have these exemptions, see *Bashinski v. Talbott*, 9 A. B. R. 513, 119 Fed. 337 (C. C. A. Ga., affirming *In re Talbott*, 8 A. B. R. 427, 116 Fed. 417, which in turn affirmed *In re Talbott*, 9 A. B. R. 788), although in this case it is not clear whether there was any acting upon the assignment or other recognition of it than as being a species of agency for holding custody. *In re Falconer*, 6 A. B. R. 557, 110 Fed. 115 (C. C. A. Ark.). That he may not have his exemptions, *In re Staunton*, 9 A. B. R. 79, 117 Fed. 507 (D. C. Penn.).

²⁴⁰. *In re Duffy*, 9 A. B. R. 358, 118 Fed. 926 (D. C. Penn.); *In re Alex*, 15 A. B. R. 451, 141 Fed. 483 (D. C. Penn.); *In re Taylor*, 7 A. B. R. 410, 114 Fed. 607 (D. C. Colo.). Also, see *In re Yost*, 9 A. B. R. 153, 117 Fed. 792 (D. C. Penn.); compare, to same effect, *In re White*, 6 A. B. R. 451, 109 Fed. 635 (D. C. Mo.).

²⁴¹. *In re Thompson*, 8 A. B. R. 283, 115 Fed. 924 (D. C. Ga.); *In re Stephens*, 8 A. B. R. 53, 114 Fed. 192 (D. C. Ga.); *In re West*, 8 A. B. R. 564, 116 Fed. 767 (D. C. Ga.); *In re Williamson*, 8 A. B. R. 42, 114 Fed. 190 (D. C. Ga.); *In re Boorstin*, 8 A. B. R. 89, 114 Fed. 696 (D. C. Ga.); *In re Waxelbaum*, 4 A. B. R. 120, 101 Fed. 228 (D. C. Ga.); apparently contra, *In re Rothschild*, 6 A. B. R. 43 (Ref. Ga.).

²⁴². *In re Park*, 4 A. B. R. 432, 102 Fed. 602 (D. C. Ark.); *In re Peterson*, 1 A. B. R. 254 (Ref. Wis.). In those States where fraud bars exemptions, the creditors thus opposing exemptions must show specifically in what the misrepresentations consisted by which they were deceived, *In re Tobias*, 4 A. B. R. 555, 103 Fed. 68 (D. C. Va.).

will be refused him;²⁴³ but in some of the other states the rule does not obtain.²⁴⁴

In *re Park*, 4 A. B. R. 432, 102 Fed. 602 (D. C. Ark.): "The exceptions seem to be based upon the fact that the bankrupt has not accounted for all of his assets, and is in possession of portions of his assets which were not turned over to the trustee. This is no reason why he should not have his exemptions. If he has in his possession, or under his control, assets which he has not accounted for, the trustee has his remedy. If he has fraudulently transferred property to other persons, the trustee has his remedy, but the bankrupt should not be denied his exemptions on account thereof."

SUBDIVISION "F."

LIENS BY LEGAL PROCEEDINGS ON EXEMPT PROPERTY WITHIN THE FOUR MONTHS PRECEDING BANKRUPTCY.

§ 1100. **Whether Liens by Legal Proceedings on Exempt Property within Four Months, Nullified.**—Liens obtained by legal proceedings within the four months preceding the bankruptcy and whilst the bankrupt is insolvent, upon property claimed by the bankrupt in his schedules as exempt, have been held by some courts to be dissolved by the bankruptcy and by other courts not to be so dissolved.

Some cases hold that § 67 (f) annulling liens obtained by legal proceedings within the four months before bankruptcy does not apply to property claimed by the bankrupt as exempt and that the levy remains unimpaired so far as the bankruptcy law annulling liens is concerned.²⁴⁵

McKenney v. Cheney, 11 A. B. R. 54, 118 Ga. 387: "The effect of § 67f of the Bankruptcy Act of 1898 is not to avoid the levies and liens therein referred to against all the world, but only as against the trustee in bankruptcy and those claiming under him, in order that the property may pass to and be distributed among the creditors of the bankrupt. It is applicable only as against such trustee, and was designed to prevent preferences between creditors. "A discharge in bankruptcy does not discharge the lien of a judgment obtained, within four months prior to the adjudication of bankruptcy, upon a note waiving the homestead exemption allowed by the laws of this State upon lands set aside by the bankrupt court as exempt."

Jewett Bros. v. Huffman, 13 A. B. R. 738 (Sup. Ct. N. Dak.): "The lien of an attachment is not dissolved by the bankruptcy of the attachment debtor, where the property attached is exempt as against the trustee in bankruptcy,

²⁴³. See *Hoover v. Haslage*, 16 Ohio, C. C. Rep. 570. It probably lies at the base of the decision in *In re Duffy*, 9 A. B. R. 358, 118 Fed. 926 (D. C. Pa.), and *In re Mayer*, 6 A. B. R. 122, 108 Fed. 599 (C. C. A. Ohio), and *In re Alex*, 15 A. B. R. 450, 141 Fed. 483 (D. C. Pa.).

²⁴⁴. *In re Peterson*, 1 A. B. R. 254 (Ref. Wis.).

²⁴⁵. *In re Durham*, 4 A. B. R. 760, 104 Fed. 231 (D. C. Ark.); impliedly, *White v. Thompson*, 9 A. B. R. 653, 119 Fed. 868 (C. C. A. Ala.); impliedly, *Irre Allen & Co.*, 13 A. B. R. 518, 134 Fed. 620 (D. C. Va.); *In re Hopkins*, 1 A. B. R. 209 (Ref. Ala.); obiter, *In re Weaver*, 16 A. B. R. 265, 144 Fed. 229 (D. C. Ga.).

but is not exempt from seizure for the debt upon which the attachment is based.

"Where it is conceded that part and possibly all of the property attached is exempt from the bankruptcy proceedings, the property may be held under the attachment until it has been determined in the bankruptcy proceedings what part, if any, of the attached property has passed to the trustee in bankruptcy, freed from the bankrupt's claim for exemptions."

Obiter, Powers Dry Goods Co. v. Nelson, 7 A. B. R. 506 (Sup. Ct. N. Dak.): "Having reached the conclusion that the lien of the attachment in this case was not discharged by the mere discharge of the debt the question next presented is whether the discharge [adjudication] in bankruptcy did not in itself operate as a discharge of the lien. * * * Aside from the convincing reasons of the cases referred to, we find ample ground in the language of the statute relied upon for holding that the liens which are declared void by it do not include liens upon exempt property, over which, as we have seen, the State, and not the federal, courts have jurisdiction. Section 67f, after declaring that all attachments levied within four months prior to the filing of the petition shall be null and void, and discharged and released, declares that the effect of such a discharge shall be to pass the property covered by the lien 'to the trustee as a part of the estate of the bankrupt.' It is entirely plain that this section does not refer to liens upon property upon which the court does not undertake to administer, and over which it has no jurisdiction. Exempt property constitutes no part of the estate which passes to the trustee for the benefit of creditors. As before stated, under the plain policy of the Bankruptcy Act, as well as by its specific provisions, exempt property is not disturbed but is left to the debtor, to be held by him subject to the laws of the State, entirely freed from federal interference. If defendant's contention that the discharge in bankruptcy destroyed the lien created by the attachment upon his exempt property is true, then such exempt property would, under the section above referred to, pass to the trustee as a part of the estate of the bankrupt for the benefit of his creditors; thus entirely destroying the debtor's right to save the exemption allowed by the laws of the State from the reach of general creditors. No such absurd construction can be sustained. In this case the bankruptcy court had by an express order set apart the property levied upon before the attachment was levied. By that order it disclaimed further jurisdiction, even for the purpose of inventory and appraisal. Upon this state of facts, it seems clear the discharge in bankruptcy was without effect upon the lien theretofore created under the laws of this State upon property which was then subject exclusively to the jurisdiction of the State courts."

Sharp v. Woolslare, 12 A. B. R. 396 (Superior Ct. Penn.): "A trustee in bankruptcy is not entitled to the bankrupt's exemption of \$300, against a creditor who has attached the same by an attachment execution issued and served within four months prior to the bankruptcy, on a judgment waiving exemptions." The facts stated in this case fail to disclose, however, whether the bankrupt claimed the junk as exempt. Of course, if he did not claim it, it was not exempt.

Nor will the discharge in bankruptcy discharge the otherwise valid lien on the exempt property.²⁴⁶

²⁴⁶ *McKenney v. Cheney*, 11 A. B. R. 54, 118 Ga. 387; *Powers Dry Goods Co. v. Nelson*, 7 A. B. R. 506 (Sup. Ct. N. Dak.); *obiter, In re Weaver*, 16 A. B. R. 285, 144 Fed. 229 (D. C. Ga.).

Other cases hold that § 67 (f) annulling liens obtained by legal proceedings within the four months before bankruptcy, does apply to property claimed by the bankrupt as exempt, and so frees the bankrupt's exempt property from the levy precisely as it does the creditors' property, although, but for the bankruptcy, the right of exemption might not prevail against the levy.²⁴⁷

In *re Tune*, 8 A. B. R. 285, 115 Fed. 906 (D. C. Ala.): "Whatever benefit results from the annulment of attachment liens entends to exempt property as well as to that which is not exempt. It is the policy of the law to allow the bankrupt, as well as creditors, to benefit by the changed status."

Impliedly, In *re Beals*, 8 A. B. R. 639, 116 Fed. 530 (D. C. Ind.): "The moment that Thomas C. Beals was adjudged a bankrupt, the statue operated *ex proprio vigore* to nullify and render void the judgment set up in the answer of the Pennsylvania Company, and to wholly release and discharge the debt due the bankrupt from such judgment. On what principle can this court hold the judgment to be of any force and effect in the face of a valid statute which declares such a judgment to be a nullity? The adjudication under this statute wipes out the judgment of the justice as effectually as though it never existed, and releases and discharges the debt due the bankrupt from the garnishee judgment as completely and effectually as would a formal release executed by the judgment plaintiff. In obedience to the positive mandate of the statute, the court must deem the attachment null and void, and the wages due the bankrupt wholly released and discharged from the same. It is too firmly settled to be open to doubt that, if a garnishee pays over money on a void judgment, he must bear the loss. He will not be heard to say that he paid it in obedience to a valid judgment after notice and knowledge that the judgment has been rendered null and void by operation of law. The adjudication having rendered the judgment against the bankrupt and the Pennsylvania Company null and void, it must be treated as a nullity whenever and wherever drawn in question, either in a direct or in a collateral proceeding. Here the judgment is drawn in question collaterally, and its nullity results from the subsequent adjudication by this court of Thomas C. Beals as a bankrupt. The statute declares that such shall be the effect of the adjudication on the judgment of the justice of the peace. The argument *ab inveniēti* is without force. The judgment having been rendered null and void by the adjudication, if the plaintiff in that judgment should procure the justice of the peace to issue an execution against the Pennsylvania Company, the plaintiff, the justice, and the constable to whom the writ was delivered would be wrongdoers, and, if the property of the company were seized on such execution, they would be liable to an action as trespassers. The law imposes on every person the duty of protecting himself against the tortious acts of third persons, and the duty to do so, in legal contemplation, casts no wrongful burden upon him. As the property of the bankrupt is in the custody of the court, it is the duty of the court to protect it until its final disposition. It is a matter of no concern to the Pennsylvania Company what disposition of it shall ultimately be made by the court."

²⁴⁷ In *re Downing*, 15 A. B. R. 425, 139 Fed. 590 (D. C. Ky.); In *re Arnold*, 2 A. B. R. 180, 94 Fed. 1001 (D. C. Ky.); impliedly, In *re McCartney*, 6 A. B. R. 366, 109 Fed. 639 (D. C. Wis.); impliedly, In *re Bolinger*, 6 A. B. R. 171, 108 Fed. 374 (D. C. Penn.).

It would seem that the correct rule is that such liens are not annulled by the bankruptcy, because the reason lying at the basis of the annulment of legal liens, as well as that of preferences, is the protection of the creditor's trust fund and not the bankrupt's own property. Otherwise, even levies made on exempt property or notes or other obligations wherein exemptions have been expressly waived, would be void if made within the four months preceding bankruptcy whilst the debtor was insolvent.²⁴⁸ On the other hand, the mere fact that at the time of the levy the property was claimed as exempt or might have been so claimed, is not of moment, else a ready way of perpetrating preferences might exist. The question is material only when it concerns property claimed by the bankrupt in the bankruptcy proceedings as exempt.

§ 1101. Property Claimable as Exempt, but Not Claimed, Levies Nullified.—Where property, not exempt as to certain creditors (as, for instance, not as to judgments or levies for its unpaid purchase price, or wages as against levies on judgments for necessities, etc.), is not claimed by the bankrupt as part of his exemptions, although it might have been so claimed, such creditors have no special rights therein and a levy thereon within the four months period is void under the same circumstances as with other property.²⁴⁹

SUBDIVISION "G."

LEVYING ON EXEMPT PROPERTY BEFORE AND AFTER DISCHARGE AND WITHHOLDING DISCHARGE TO PERMIT LEVY.

§ 1102. Levying on Exempt Property before and after Discharge, and Withholding Discharge to Permit Levy.—After discharge, judgment cannot be had on notes containing waivers of exemption nor upon other rights of action against which particular property is not exempt, as, for instance, in actions for the purchase price of property sold, or for necessities, nor can execution be levied thereunder upon the property set apart to the bankrupt as exempt by the trustee; for the obligations are discharged for all purposes, and are not enforceable even against exempt property, although such property may not have been exempt therefrom or exemptions may have been waived; the debt is discharged though the property otherwise might not have been exempt from application by legal process to its payment.

Thus, as to notes containing waivers of exemptions.²⁵⁰

In re Sisler, 2 A. B. R. 769, 96 Fed. 402 (D. C. Va.): "It can no more survive a discharge, and be enforced in a State court, than if it were a debt due by open account."

²⁴⁸. Compare, In re Bolinger, 6 A. B. R. 171, 108 Fed. 374 (D. C. Penn.), where such a levy was held void as creating a preference.

²⁴⁹. In re Wilkes, 7 A. B. R. 574, 112 Fed. 975 (D. C. Ark.). Compare, however, In re Wells, 5 A. B. R. 308, 105 Fed. 762 (D. C. Ark.).

²⁵⁰. Claster v. Soble, 10 A. B. R. 446 (22 Pa. Super. Ct. 631).

Thus, as to purchase money levies.

Graham v. Richardson, 8 A. B. R. 700 (Sup. Ct. Ga.): "A discharge in bankruptcy releases a bankrupt from all his provable debts, except those expressly excepted by the Bankrupt Act, and a debt for purchase money is not among those excepted. It is true that, under the constitution of this State, an exemption is subject to levy and sale for the purchase money thereof, but our law gives a vendor no lien for purchase money, and before exempted property can be sold for its purchase money, judgment must be obtained against the debtor, and execution be levied on the property. If the debtor be discharged in bankruptcy, he is thereby absolutely released from the purchase money debt. * * * This is so, though he may, during the pendency of such proceeding, and before the discharge was granted, have sued out an attachment for the purchase money, and cause the same to be levied upon the property he had sold the bankrupt."

Thus, as to claims against which there are not exemptions.²⁵¹

§ 1103. **Bankrupt Staying Creditor Pending Hearing on Discharge.**—Before discharge and pending the bankruptcy proceedings neither judgment nor levy upon such property can be had, if the bankrupt is allowed to exercise the right of staying the proceedings.²⁵²

§ 1104. **Withholding Discharge to Permit Creditor to Levy, Where Property Not Exempt as to Him.**—In such cases the bankruptcy court may withhold the discharge and stay proceedings until the creditor can assert his peculiar rights upon the exempt property by appropriate proceedings in the state courts, as by action in equity and the appointment of a receiver to apply to the bankruptcy court for the possession, or perhaps even by levy of execution or attachment.²⁵³

^{251.} *Obiter*, In re Brumbaugh, 12 A. B. R. 204 (D. C. Penn.), which was the case of a judgment for breach of promise of marriage, there being no exemptions against judgments for torts in Pennsylvania.

^{252.} Bankr. Act, § 11 (a): "A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined."

Also, see "Staying Proceedings in Behalf of Bankrupt," ante, § 475, and post, § 2414, et seq., subject of "Discharge." *Bell v. Dawson Grocery Co.*, 12 A. B. R. 159 (Sup. Ct. Ga.); instance, *Roden Grocery Co. v. Bacon*, 13 A. B. R. 251 (C. C. A. Ala.).

^{253.} In re Allen & Co., 13 A. B. R. 526, 134 Fed. 520 (D. C. Va.); In re Ogilvie, 5 A. B. R. 374 (Ref. Ga.). Compare, analogously, effect of discharge of corporation on secondary liability of stockholders when judgment is necessary, In re Marshall Paper Co., 4 A. B. R. 463, 102 Fed. 872 (C. C. A. Mass.). Compare, analogously, the rule in N. Y. Federal Courts permitting creditors to proceed to judgment and levy after bankruptcy, in suits begun before, where unfilled chattel mortgages exist, In re Beede, 14 A. B. R. 697, 138 Fed. 441 (D. C. N. Y.). *Obiter*, In re Weaver, 16 A. B. R. 265, 144 Fed. 229 (D. C. Ga.); In re Meredith, 16 A. B. R. 336, 144 Fed. 230 (D. C. Ga.); *obiter*, In re Bender, 17 A. B. R. 895 (Ref. Ohio); *obiter*, *Snyder v. Guthrie*, 17 A. B. R. 903 (Penn. Com. Pleas); contra, In re Moore, 7 A. B. R. 289, 112 Fed. 289 (D. C. Ala.); contra, *Woodruff v. Cheeves*, 5 A. B. R. 296, 105 Fed. 601 (C. C. A. Ga.). Also, contra (inferentially), *Graham v. Richardson*, 8 A. B. R. 700 (Sup. Ct. Ga.); compare distinctions in In re Lucius, 10 A. B. R. 655, 124 Fed. 455 (D. C. Ala.).

Obiter, Lockwood v. Exchange Bank, 10 A. B. R. 107, 190 U. S. 294: "The rights of creditors having no lien, * * * but having a remedy under the State law against the exempt property, may be protected by the court of bankruptcy, since, certainly, there would exist in favor of a creditor holding a waiver note, like that possessed by the petitioning creditor in the case at bar, an equity entitling him to a reasonable postponement of the discharge of the bankrupt, in order to allow the institution in the State court of such proceedings as might be necessary to make effective the rights possessed by the creditor."

In re Jackson, 8 A. B. R. 594, 116 Fed. 46 (D. C. Penn.): "I think the restraining order should be so modified as to permit the creditor to assert such right as he may have gained by his execution against such property as may be set aside to the bankrupt under his claim for exemption, and the clerk will so modify the order."

Bell v. Dawson Grocery Co., 12 A. B. R. 159, 120 Ga. 628: "In the *Lockwood* case it was held that in cases of this character the court of bankruptcy would withhold the discharge of the bankrupt until a reasonable time had elapsed to give the creditors an opportunity to assert their claims in the proper State tribunal. As the court of bankruptcy has no power to aid or assist the creditors holding waiver notes, it becomes our duty to determine whether the State courts have such power, and whether the proper remedy has been sought in the present case. It is clear that the creditor cannot obtain a common-law judgment against the debtor and levy it upon the property exempted by the trustee. The bankrupt is under the exclusive jurisdiction of the court of bankruptcy, and no creditor would be allowed by that court to prosecute a claim in the State court in order to procure a judgment against the bankrupt. Yet the creditor has legal rights which he is entitled to enforce if he can find a court to enforce them. Our Code declares (Civ. Code 1895, § 4929): 'For every right there shall be a remedy, and every court having jurisdiction of the one may, if necessary, frame the other.' Whenever a person in this State enters into a contract with another whereby he agrees, for a sufficient consideration, to pay money, and in his obligation waives his right of homestead and exemption, this waiver is valid, and the debtor will be thereafter estopped to claim that any of his property is exempt from the judgment founded upon this contract. The waiver becomes in the nature of a security, in that the debt may be made out of any property, owned by the debtor, without regard to any exemption rights which the debtor would have had but for the waiver. In other words where the debtor waives the homestead and exemption, he means that all of his property shall be a security to the creditor for the payment of that debt. This then gives the creditor a legal right to rely upon all of the debtor's property for the payment of the debt. In the present case, as before stated, the creditor could not enforce his claim by a common-law proceeding against the debtor. From this remedy he is precluded by the proceedings in bankruptcy. The debtor has \$1,600 worth of property set apart to him. It is or will be in his possession. If it is personal property, he may dispose of it by mere delivery or it may be of such nature as to be consumed in the use. Much of it may be used or destroyed in his hands. In any event, the creditor would lose his rights unless the property could be protected by placing it in the hands of a receiver until the creditor can obtain a judgment which will bind the property. Civ. Code 1895, § 4904, declares: 'A court of equity may appoint a receiver to take possession of and hold subject to the direction of the court, any assets charged with the payment of debts, where there is manifest danger of loss, or destruction, or material injury to those interested.' In the present case it appears that there was great probability of loss and

destruction, and consequent injury to the interests of the creditor, if the debtor were given possession of the exempted property. The debtor has no right to complain, for, so far as appears, he voluntarily signed the waiver, and estopped himself to claim any exemption as against the claims of the creditor. The plaintiff gave him credit for the goods, doubtless upon the faith of the waiver. By signing the waiver he obtained the goods. He cannot now say that because he has been adjudicated a bankrupt the waiver amounts to nothing. But it was contended that a court of equity will not appoint a receiver except on the petition of one claiming title or having a lien. This is undoubtedly the general rule, but there are several exceptions. One of these is contained in the section of the Code last above cited. Another will be found in the case of *Sanford v. Fidelity & Guaranty Co.*, 116 Ga. 689, 43 S. E. 61, where the whole doctrine is ably discussed by Mr. Justice Chandler, and the cases in our reports collected. It seems to us that the peculiar facts of the present case are clearly such as to authorize a court of equity to grant relief to the creditor. The creditor has no remedy at law. By the proceeding in bankruptcy he has been deprived of his legal remedy, and he should be entitled to relief in a court of equity. The goods exempted are, as above stated, in the nature of a security for the payment of the debt. They were about to go into the hands of the debtor, and, unless equity took jurisdiction, the creditor would be entirely deprived of its rights. It would be inequitable and unconscionable to allow this debtor, after having waived all homestead and exemption, to take these goods as an exemption, sell or dispose of them, eat them up, or squander them while the creditor stood by without relief."

Roden Grocery Co. v. Bacon, 13 A. B. R. 251 (C. C. A. Ala.): In this case a creditor holding notes with waivers of exemption was allowed to prosecute an attachment suit instituted after the debtor's adjudication and to levy the same upon property claimed as exempt, the court saying: "While the creditor holding a waiver note given by a bankrupt has no lien on specified property—in fact, no lien at all—and the debt represented by such note is one within the purview of the Bankrupt Law, to be discharged by proper proceedings thereunder, yet the rights of said creditor are to be so far recognized as to require the withholding of the bankrupt's discharge a reasonable time to permit the creditor to assert in the proper State tribunal his alleged right to subject the exempt property to the satisfaction of his claim. *Lockwood v. Exchange Bank*, 190 U. S. 294, 10 Am. B. R. 107, 23 Sup. Ct. 751, 47 L. Ed. 4061. This being the case, it would seem that it is to the interest of the general creditors that such right should be prosecuted and enforced pending the bankruptcy, and prior to proof of debt to prevent the creditor holding the waiver from taking a dividend on his whole claim from the general assets, and thereafter availing himself of the right resulting from the waiver to proceed against the exempt property.

"As the creditor holding a waiver may proceed to assert his right in a State tribunal pending the proceedings in bankruptcy, it follows that the form his action may take in the State tribunal is of no concern in the bankruptcy court, unless such writs are issued and proceedings had as directly interfere with property passing to the trustee in bankruptcy, or with exempt property not claimed by the bankrupt and in actual custody of the bankruptcy court."

In re Wells, 5 A. B. R. 308, 105 Fed. 762 (D. C. Ark.): "The whole equity of this case, however, is with the vendor, and if he elects to proceed against the bankrupt to enforce the vendor's lien, the court, on application, will withhold the discharge of the bankrupt, if he be otherwise entitled thereto, until the proper tribunal may pass on the question."

Ingram v. Wilson, 11 A. B. R. 192, 125 Fed. 913 (C. C. A. Iowa): "A creditor like Wilson, who has the right, under certain conditions, to subject the homestead to the payment of his debt, must seek such relief as he is entitled to under local laws in the courts of the State; and if a discharge of the bankrupt from all his debts, when granted by the bankrupt court, will stand in the way of his obtaining relief, that court, after administering upon all the assets subject to its control, may withhold the bankrupt's discharge until a reasonable time has elapsed to enable Wilson to assert his rights in the proper form."

In *re Brumbaugh*, 12 A. B. R. 207, 128 Fed. 971 (D. C. Pa.): "There is ground, however, for the present in withholding final action on this subject. If it be as contended that the bankrupt is not entitled to retain the property which he has exempted, as against the Keim judgment, on the ground that it is for a tort, the only way to test that question as already intimated, is by proceedings in the State courts, by issuing execution and levying upon it. But as the legal effect of a discharge in bankruptcy would be to wipe out the liability (assuming that it is not one of those that are excepted by the act) the right to execution would be cut off if once the discharge went out. *Claster v. Soble*, 10 Am. B. R. 446, 23 Pa. Sup. Ct. 631. The judgment creditor has therefore a right to ask that a discharge be withheld for the present in order to enable her to test her rights in the way suggested. This was the course pointed out and sanctioned in *Lockwood v. Exchange Bank*, 190 U. S. 294, 10 Am. B. R. 107, already referred to, and it will be followed here.

" * * * But the discharge is withheld until the further order of the court, for the purpose of allowing the excepting creditor to assert in the State court by appropriate proceedings her alleged right to subject the property exempted to execution upon the judgment which she has recovered."

In *re Castleberry*, 16 A. B. R. 161, 143 Fed. 108 (D. C. Ga.): "But under the ruling of the Supreme Court in *Lockwood v. Exchange Bk.* the court will refuse a discharge until opportunity can be given to the creditors whose debts are good against the exemptions, to enforce the same in a court of competent jurisdiction. Of course, where the exemption claimed, as in this case, is in money held by the trustee, the bankruptcy court would hold the fund and protect it until proper proceedings can be instituted and the money sequestered by a court of competent jurisdiction, for the benefit of parties in interest."

Contra, In *re Richardson*, 11 A. B. R. 379 (Ref. Ala.): "Petition of creditor praying for stay of bankruptcy proceedings and for leave to prosecute suit in State Court to establish a lien in his favor upon property claimed by the bankrupt as exempt denied on the ground that the bankruptcy court would afford the petitioner all the relief it could obtain in a State Court at a great saving of time and expense; the referee distinguishing the *Lockwood* case."

And the rule will be the same whether the exemptions have already been set apart;²⁵⁴ or have not yet been set apart.²⁵⁵

Compare, In *re Hartsell & Son*, 15 A. B. R. 177, 140 Fed. 30 (D. C. Ala.): "The reason of the rule in *Lockwood's Case*, 190 U. S. 294, 10 Am. B. R. 107, requiring the court to withhold the discharge of a bankrupt, who would other-

²⁵⁴. Instance, *Lockwood v. Exchange Bank*, 10 A. B. R. 107, 190 U. S. 294; contra (but before the dictum in the *Lockwood* case), *Woodruff v. Cheeves*, 5 A. B. R. 296, 105 Fed. 601 (C. C. A. Ga.), in which such stay to permit the creditor to take action was denied.

²⁵⁵. Contra, In *re Richardson*, 11 A. B. R. 379 (Ref. Ala.), in which the referee held the bankruptcy court could determine such rights before the exemptions were set off.

wise be entitled to it, pending a suit against him on a written obligation for the payment of money, which contains a waiver of exemptions of personal property, has no application whatever to this case. We have here no suit to enforce any contract as to which there is a waiver of exemptions of personal property. On the contrary, the suit is in tort for the conversion of a note which contained a waiver of exemptions."

Such withholding of discharge does not deprive the bankrupt of the benefit of the discharge when the judgment thereafter is sought to be enforced against him in personam because the judgment is itself discharged, being, by the express words of § 63 (b) (5), a "provable" debt and hence a discharged debt. Any attempt thereafter to enforce the judgment against the bankrupt could be enjoined.

§ 1105. No Withholding if Exemptions Good against Levy.—Manifestly, the court would not withhold a discharge where the exemptions would prevail, anyway, against the judgment.²⁵⁶

§ 1106. Subjecting Exempt Property While in Trustee's Hands, by Equitable Action in State Court.—If the property sought to be subjected is still in the trustee's hands, the proper practice, perhaps, is for the creditor, as to whose judgment it would not be exempt, to subject the property by an equitable action, in which a receiver could be appointed; who then could obtain possession of the property from the trustee, upon application to the bankruptcy court.²⁵⁷

Compare, *Bell v. Dawson Grocery Co.*, 12 A. B. R. 159, 120 Ga. 628: "As the court of bankruptcy has no power to aid or assist the creditor holding waiver notes, it becomes our duty to determine whether the State courts have such power, and whether the proper remedy has been sought in the present case. It is clear that the creditor cannot obtain a common-law judgment against the debtor and levy it upon the property exempted by the trustee. The bankrupt is under the exclusive jurisdiction of the court of bankruptcy, and no creditor would be allowed by that court to prosecute a claim in the State court in order to procure a judgment against the bankrupt. Yet the creditor has legal rights which he is entitled to enforce if he can find a court to enforce them. * * * It seems to us that the peculiar facts of the present case are clearly such as to authorize a court of equity to grant relief to the creditor. The creditor has no remedy at law. By the proceeding in bankruptcy he has been deprived of his legal remedy, and he should be entitled to relief in a court of equity. The goods exempted are, as above stated, in the nature of a security for the payment of the debt. They were about to go into the hands of the debtor, and, unless equity took jurisdiction, the creditor would be entirely deprived of its rights. It would be inequitable and unconscionable to allow this

^{256.} But if liens by legal proceedings on exempt property are vacated by bankruptcy (as is sometimes contended to be the rule), then there could be no such advantage given to holders of waivers. Compare reasoning in *Klipstein v. Allen Miles*, 14 A. B. R. 15, 136 Fed. 385 (C. C. A. Ga.).

^{257.} In re *Ogilvie*, 5 A. B. R. 374 (Ref. Ga.); *obiter*, In re *Brumbaugh*, 12 A. B. R. 204 (D. C. Penn.); In re *Meredith*, 16 A. B. R. 336, 144 Fed. 230 (D. C. Ga.).

debtor, after having waived all homestead and exemption, to take these goods as an exemption, sell or dispose of them, eat them up, or squander them, while the creditor stood by without relief. * * * Of course, the State court is without power to take the property out of the hands of the court of bankruptcy, but it can, as was done in the present case, appoint a receiver to take charge of the property as soon as the trustee is ready to turn it over."

§ 1107. Levying Attachment or Ordering Surrender to Sheriff Holding Writ.—But, possibly, the bankruptcy court may, by order, permit levy of execution or attachment; or turn the property over to the sheriff holding writs of execution or attachment.²⁵⁸

Under the doubtful doctrine of one case, indeed, it might be proper to hold that the bankruptcy itself operates as a levy upon exempt property in its actual custody in behalf of the creditors holding waiver claims, or claims for unpaid purchase price.²⁵⁹

In *re Campbell*, 10 A. B. R. 731, 124 Fed. 417 (D. C. Va.): "I have not overlooked the contention that the excepting creditors have no standing, because they are not armed with executions against the bankrupt. This contention is founded on the language of the State Homestead Law 'shall hold exempt from levy, seizure, garnishment or sale under any execution, order or process.' Under proceedings in bankruptcy the property is in effect seized or levied upon as much in behalf of non-judgment creditors as of any party in interest. In a voluntary case the debtor surrenders his property, and when he claims some or all of it as exempt, he is asking that such property be not 'sold' under judicial 'process' or 'order.'"

§ 1108. Levying Direct Execution, after Exempt Property Set Apart.—And, perhaps, after the exempt property has been set apart, levy of execution may be made directly on the property, if judgment has already been obtained; at least, that seems to be the holding in some jurisdictions.

In *re Weaver*, 16 A. B. R. 265, 144 Fed. 229 (D. C. Ga.): " * * * as determined in *McKenney v. Cheney*, supra, and rightly determined, I think, the discharge in bankruptcy would be no bar to the enforcement of such judgment against exempt property. * * * Besides this, it is manifest that the intention of the court, in *Lockwood v. Exchange Bank*, was to give the creditors holding waiver notes, and without judgment, an opportunity to reduce their claims to judgment. For this purpose, it was indicated that a postponement of the discharge would be proper. It does not apply in my opinion, to judgment creditors whose rights, whatever they may be, have already been fixed by the rendition of a judgment, when that judgment appears to have become, as in this case, a finality between the parties. In this case the judgment creditor came into the bankruptcy court, proved his debt, and then, by leave of the court, was allowed to withdraw his debt from proof in the bankruptcy proceeding, for the express purpose of enforcing his judgment outside of the bankruptcy court."

²⁵⁸. In *re Durham*, 4 A. B. R. 760, 104 Fed. 231 (D. C. Ark.); compare, inferentially, In *re Jackson*, 8 A. B. R. 596 (D. C. Penn.); compare, inferentially, obiter, *Snyder v. Guthrie*, 17 A. B. R. 903 (Penn. Com. Pleas).

²⁵⁹. See discussion, post, § 1212.

SUBDIVISION "H".

REVIEW OF EXEMPTION MATTERS.²⁵⁹

§ 1109. **"Appeal" Not Proper in Exemption Matters.**—Appeal will not lie to revise an order relative to exemptions, for the disposition of exempted property is a "proceedings in bankruptcy" proper, and is not a mere "controversy arising in bankruptcy proceedings," and hence, not being within those cases of bankruptcy proceedings enumerated in § 25 wherein appeal is allowable, can be revised only by petition for review, under § 24 (b).

Ingram v. Wilson, 11 A. B. R. 192, 125 Fed. 913 (C. C. A. Iowa): "We are of opinion, however, that the order in question is an order made in the course of a bankruptcy proceeding, which this court is empowered to revise on a petition for review by virtue of § 24 of the Bankruptcy Act. It is not one of those cases in which an appeal in the ordinary form is expressly authorized by § 25 of the Bankrupt Act."

Likewise an order of the District Court allowing or refusing an exemption claim is not a "final decision allowing or rejecting a claim" within the meaning of § 25 (b) and an appeal from the Circuit Court of Appeals to the Supreme Court does not lie;²⁶⁰ nor does direct appeal from the District Court to the Supreme Court lie;²⁶¹ nor is a judgment of the Supreme Court of a State giving due force to an order of the bankruptcy court setting apart exemptions reviewable by the United States Supreme Court.²⁶²

§ 1110. **But "Review" under § 24 (b) Proper.**—But review under § 24 (b) is a proper remedy.²⁶³

§ 1111. **No Review unless Trustee Appointed Who Has Set Apart or Refused to Set Apart.**—There can be no review unless a trustee has been appointed; has set apart the exemptions;²⁶⁴ or has refused to set apart any exemption.

^{259.} As to appeal or error proceedings in general relative to exemptions, see post, § 2864, et seq., subject, "Appeal and Error Proceedings."

^{260.} *Holden v. Stratton*, 10 A. B. R. 786, 191 U. S. 115.

^{261.} *Lucius v. Cawthon-Coleman Co.*, 13 A. B. R. 696, 196 U. S. 149.

^{262.} *Smalley v. Langenour*, 13 A. B. R. 692, 196 U. S. 93.

^{263.} *Duncan v. Ferguson-McKinney Co.*, 18 A. B. R. 156, 150 Fed. 269 (C. C. A. Tex.); *Smalley v. Langenour*, 13 A. B. R. 692, 196 U. S. 93; *Ingram v. Wilson*, 11 A. B. R. 192, 125 Fed. 913 (C. C. A. Iowa).

^{264.} *In re Smith*, 2 A. B. R. 190, 93 Fed. 791 (D. C. Tex.). An appeal, without cross appeal only brings up the grievance of the party appealing, so where the court sustains in part and overrules in part the creditor's exceptions to the trustee's report of exempt property and the creditor alone appeals, the bankrupt filing no cross appeal, the case can only be considered upon the points wherein the court has overruled the creditor's exceptions, *McGahan v. Anderson*, 7 A. B. R. 641, 113 Fed. 115 (C. C. A. S. C.).

CHAPTER XXVIII.

HOW TITLE VESTS IN TRUSTEE.

Synopsis of Chapter.

- § 1112. Title Vests in Trustee by Operation of Law.
- § 1113. Scheduling by Bankrupt Not Essential to Passing of Title.
- § 1114. Property in Foreign Countries Requires Assignment by Bankrupt.
- § 1115. Bankrupt Compelled to Execute Assignments and Other Papers to Aid Passing of Title.

§ 1112. **Title Vests in Trustee by Operation of law.**¹—That is to say, in every part of the world over which the laws of the United States are paramount, the bankrupt's adjudication, in and of itself, without any assignment, transfer or other act of the bankrupt, operates to divest him of all title and to vest it in the trustee of his creditors.

In re Friedrich, 3 A. B. R. 803, 100 Fed. 284 (C. C. A. Wis.): "The title to the property of the bankrupt is vested in the trustee, not by conveyance but by operation of the law."

Under the law of 1841 title also vested by operation of law; but under the law of 1867 a formal conveyance or deed of assignment was requisite to vest title in the assignee in bankruptcy.²

As to the statute of 1867, *Hiscock v. Varick* Bk., 18 A. B. R. 9: "By the Act of 1867, it was provided that as soon as an assignee was appointed and qualified the judge or register should, by instrument, assign or convey to him all of the property of the bankrupt, and such assignment shall relate back to the commencement of the proceedings in bankruptcy, and by operation of law shall vest the title to such estate both real and personal, in the assignee."

§ 1113. **Scheduling by Bankrupt Not Essential to Passing of Title.**

—Title passes even if the property is not scheduled, so that failure of the bankrupt to schedule property will not prevent its title passing to the trustee and the bankrupt does not retain title by omitting it from the schedules.³ But the defendant, sued by the bankrupt on a cause of action belonging to

1. Bankr. Act, § 70 (a); *Hiscock v. Varick* Bank, 18 A. B. R. 9, 206 U. S. 28; (1867) *Markson & Spalding v. Heaney*, 4 N. B. Reg. 165.

In the case *In re Baird*, 11 A. B. R. 435, 126 Fed. 845 (D. C. Va.), the court seems to think that where the trustee is subrogated to the lien of attaching creditors in behalf of the estate under § 67 "f," the title is not conferred by operation of law but by order of court. Yet the order of court is merely supplementary to § 67 (e), rendering effective the provisions of § 67 (e), giving to the trustee the right to avoid any transfer which any creditor might have avoided.

2. *Rand v. Iowa Cent. Ry. Co.*, 12 A. B. R. 164, 96 App. Div. (N. Y.) 413 (reversed, on other grounds, in 16 A. B. R. 692).

3. *Rand v. Iowa Cent. Ry. Co.*, 12 A. B. R. 164, 96 App. Div. 413 (reversed, on other grounds, in 16 A. B. R. 692, 186 N. Y. 58). See ante, § 483.

the estate, but omitted from the schedules, may not, where no trustee has yet been appointed plead that the bankrupt is not the real party in interest.⁴

§ 1114. Property in Foreign Countries Requires Assignment by Bankrupt.—Of course property outside of the jurisdiction of the United States is controlled by the laws of the country where it is situated. The law of nations, whilst recognizing the common contractual obligations of men and enforcing the ordinary voluntary agreements and conveyances of men, pays no heed to the provisions of the various bankruptcy laws of the several nations and does not oblige one nation to recognize the bankruptcy laws of another nation. And title by operation of law naturally is not to be recognized out of the territory wherein the law is operative. So it is that when it comes to property located in foreign countries the courts of those countries do not recognize the passing of the title by the mere adjudication of bankruptcy in this country. Consequently they require evidence by way of the more common and universal instruments of voluntary conveyances such as deeds, bills of sale, etc., recognized all over the world, before they will acknowledge the title of the bankruptcy trustee. To that end, therefore, as also to aid in the transfer of title to property in this country, the bankrupt may be required to execute assignments.⁵

§ 1115. Bankrupt Compelled to Execute Assignments and Other Papers to Aid Passing of Title.—Thus it is that the bankrupt may be required to execute assignments and other papers to aid in effecting the transfer of title to the trustee.⁶

Fisher v. Cushman, 4 A. B. R. 646, 103 Fed. 867 (C. C. A. Mass.): "There can be no question of jurisdiction, inasmuch as the proceedings have taken place in the case in which she was adjudged bankrupt, and the court therefore

4. *Rand v. Iowa Cent. Ry. Co.*, 16 A. B. R. 692, 186 N. Y. 58 (reversing 12 A. B. R. 164, 96 App. Div. 413).

Concealed Property Does Not Revest in Bankrupt on Closing of Estate.—Assets, concealed by the bankrupt do not, on the closing of the estate, revest in him. *Fowler v. Jenks*, 11 A. B. R. 255 (Minn.).

5. Bankr. Act, § 7 (a) (5).

6. Bankr. Act, § 7 (a): "The bankrupt shall * * * (4) execute and deliver such papers as shall be ordered by the court; (5) execute to his trustee transfers of all his property in foreign countries." See ante, § 460.

Instances.—1. Order to assign insurance policy to trustee when bankrupt previous to the bankruptcy had already assigned it to a third person. The order is not reviewable. In *re Madden*, 6 A. B. R. 614, 110 Fed. 348 (C. C. A. N. Y.).

2. Order to assign commissions on renewal premiums accruing after bankruptcy, although original contract one involving personal trust and not itself assignable. In *re Wright*, 18 A. B. R. 198, 202, 151 Fed. 361 (D. C. N. Y.).

3. Order on bankrupt to assign his contingent interest in an insurance policy to the trustee to enable the trustee to give title upon a sale. In *re Coleman*, 14 A. B. R. 461, 136 Fed. 818 (C. C. A. N. Y.).

4. Order to assign contingent interest in tontine policy payable to wife if bankrupt dies before expiration of tontine period and also to execute power of attorney to exercise options at end of tontine period. In *re Phelps*, 15 A. B. R. 170 (Ref. N. Y.).

5. Order to assign cause of action for wrongful death subject to lien for

clearly had the power to proceed summarily for the purpose of merely compelling her to give her signature on the transfer of the license."

In re Hurlbutt, Hatch & Co., 13 A. B. R. 54, 135 Fed. 504 (C. C. A. N. Y.): "The general power of courts of equity to compel a transfer and sale of such personal privileges as patents and trade marks is asserted in *Ager v. Murray*, 105 U. S. 126, 131. The power of the court to require a bankrupt to execute the instruments necessary to effectuate the sale of a personal and exclusive right has been exercised in the cases of the transfer of liquor licenses * * * of a license of a stall in a market * * * and of a seat in the New York Stock Exchange under the Bankruptcy Act of 1867. * * *

"If there were any doubt as to the general power of the District Court to make such order, it would be resolved by the provisions of the Bankruptcy Act empowering courts of bankruptcy to * * * § 2 (7); * * * § 2 (15); * * * § 7 (4)."

In re Wright, 18 A. B. R. 198, 292, 151 Fed. 361 (D. C. N. Y.): "* * * this court has power to compel the bankrupt to execute a transfer thereof to the trustee in bankruptcy for the benefit of his creditors."

funeral expenses advanced on faith of it by wife where bankrupt is the beneficiary. In re Burnstine, 12 A. B. R. 596, 131 Fed. 828 (D. C. Mich.).

6. Order to sign request to Stock Exchange for sale of seat and payment of proceeds to trustee in bankruptcy. In re Hurlbutt, Hatch & Co., 13 A. B. R. 50, 135 Fed. 504 (C. C. A. N. Y.); (1867) In re Ketcham, 1 Fed. 840.

7. Transfer of liquor license. In re Fisher, 3 A. B. R. 406, 98 Fed. 89 (D. C. Mass., affirmed in 4 A. B. R. 646); In re Becker, 3 A. B. R. 412, 98 Fed. 407 (D. C. Penn.).

8. Transfer of license to stall in market. In re Emrich, 4 A. B. R. 89, 101 Fed. 231 (D. C. Penn.).

9. No right to order third person, joint owner with bankrupt, to join in making transfer. In re Brodbine, 2 A. B. R. 53, 93 Fed. 643 (D. C. Mass.).

Third persons claiming interest in the subject and entering appearance in opposition to the application for an order requiring the bankrupt so to execute assignments or other papers, thereby consent to the jurisdiction and are bound. In re Emrich, 4 A. B. R. 89, 101 Fed. 231 (D. C. Penn.): "In determining the nature of this license, and whether it should be transferred to the trustee, it had the right to call before it all parties concerned in that question, and dispose of all incidental questions. * * * Whatever her answer to the rule might be, it is clear it could not divest the court's jurisdiction of the original subject-matter. Whether she could thus be brought in by rule, and her claim determined by this means, if objected to, is a question not now before us, and upon which we express no opinion. Suffice it to say, she has submitted herself to the jurisdiction of the court, has invited its action upon her rights, and, having taken the chance of a favorable decision by the referee, she cannot now for the first time complain of lack of jurisdiction when the decision is adverse." Compare, inferentially, *Fisher v. Cushman*, 4 A. B. R. 646, 103 Fed. 867 (C. C. A. Mass.).

The bankrupt may also be required to disclose to the trustee the combination of his safe. So, also, may the officer of a bankrupt corporation. In re Smelting Co., 15 A. B. R. 83, 138 Fed. 954 (D. C. Penn.).

CHAPTER XXIX.

WHEN TITLE VESTS; AND STATUS OF PROPERTY AFTER FILING OF PETITION.

Synopsis of Chapter.

DIVISION 1.

- § 1116. Title Vests in Trustee, upon Appointment and Qualification but Relates Back to Adjudication.
- § 1117. Date of Cleavage of Title, Date of Adjudication.
- § 1118. Contractual Relations Not Dissolved.

DIVISION 2.

- § 1119. Status of Property after Filing Petition Not Clearly Marked in Decisions.
- § 1120. But Title Does Not Vest until Trustee's Qualification, Title Meanwhile in Bankrupt.
- § 1121. Bankrupt Quasi Trustee until Receiver or Trustee Appointed.
- § 1122. Destruction of Property Meanwhile.
- § 1123. Institution of Suits by Bankrupt Meanwhile.
- § 1124. Whether Liens Given in Meantime Subject to Creditors' Rights.
- § 1125. No Liens by Legal Proceedings after Adjudication.
- § 1126. As to Legal Liens between Filing of Petition and Adjudication.
- § 1127. Query, if No Trustee Ever Appointed, Where Does Title to Concealed Assets Rest?
- § 1128. Bankrupt Retains Dominion and Power of Disposal before Adjudication unless Receiver or Marshal Takes Possession or Injunction Issues.
- § 1129. Likewise, Remedies of Creditors Holding Securities, etc., Meantime Unimpaired.

DIVISION 3.

- § 1130. Property Acquired after Adjudication Does Not Pass.
- § 1131. After-Acquired Property Transferable at Date of Bankruptcy Passes, Though Incident to Property Not Passing to Trustee.

SUBDIVISION "A".

- § 1132. Property Acquired after Filing of Petition but before Adjudication.
- § 1133. Evils of Old Law Vesting Title as of Date of Filing Petition.
- § 1134. Bona Fide Transactions on Present Consideration Not Affected.
- § 1135. First, Property Acquired Meantime by Gift or Inheritance or Bought on Credit.
- § 1136. Second, Property Purchased Meantime with Proceeds of Property Which Was in Existence at Time of Filing Petition.

DIVISION 1.

WHEN TITLE VESTS.

- § 1116. **Title Vests in Trustee upon Appointment, etc., but Relates Back to Adjudication.**—Title vests in the trustee for creditors,

upon his appointment and qualification, but then relates back to the date of the bankrupt's adjudication.¹

§ 1117. **Date of Cleavage of Title, Date of Adjudication.**—The date of cleavage between the old and new estates of the bankrupt is the date of the adjudication.²

By other decisions it is held to be the date of the filing of the petition.

Pratt v. Bothe, 12 A. B. R. 533, 130 Fed. 670 (C. C. A. Mich.): "The Bankruptcy Act makes a final and sharply determined line in respect of the power of the bankrupt over his estate and the distribution of it as of the date of the filing of the petition against him. From that time his assets are in gremio legis, and he cannot, unless he compounds with his creditors, bind his assets. He may, of course, make new contracts and incur new obligations, but they are not chargeable to the funds which have become vested in the trustee until they have subverted the purpose of the bankruptcy proceedings, when, if anything remains, he reacquires it."

Under the law of 1867 the date of cleavage was the date of the filing of the petition.³ However that may be, upon adjudication, in general, all power of inchoate rights to become consummated or vested rights ceases;⁴ save and except dower rights which constitute, in law, actual though inchoate interests in land and which are specially excepted by § 8.⁵ At the day of adjudication and not until then does the title to the property leave the bankrupt and vest in his creditors.

§ 1118. **Contractual Relations Not Dissolved.**—But, as already noted, merely contractual relations are not dissolved nor put an end to by the adjudication in bankruptcy, nor by the bankrupt's discharge; they continue in full force, except in so far as they may have become merged in "provable" claims.⁶

1. Bankr. Act, § 70 (a). *Hiscock v. Varick Bk.*, 18 A. B. R. 9, 206 U. S. 28; *In re Burka*, 5 A. B. R. 12, 104 Fed. 326 (D. C. Mo.); *obiter*, *Van Kirk v. Slate Co.*, 15 A. B. R. 239, 140 Fed. 38 (D. C. N. Y.). *In re Elmira Steel Co.*, 5 A. B. R. 487, 109 Fed. 486 (Special Master N. Y.); *In re Harris*, 2 A. B. R. 359 (Ref. Ills.).

2. Impliedly, *Hiscock v. Varick Bk.*, 18 A. B. R. 9, 206 U. S. 28; *Inferentially*, *In re McKensie*, 13 A. B. R. 229, 132 Fed. 986 (D. C. Ark.); *In re Burka*, 5 A. B. R. 12, 104 Fed. 326 (D. C. Mo.); compare, *State Bank v. Cox*, 16 A. B. R. 36, 143 Fed. 91 (C. C. A. Ills.); *In re Elmira Steel Co.*, 5 A. B. R. 487, 109 Fed. 486 (Special Master N. Y.); *In re Duncan*, 17 A. B. R. 289, 148 Fed. 464 (D. C. S. Car.); *In re Harris*, 2 A. B. R. 359 (Ref. Ills.).

3. *In re Rennie*, 2 A. B. R. 182 (Ref. Ind. Ter.); *Hiscock v. Varick Bk.*, 18 A. B. R. 9, 206 U. S. 28.

4. Compare *Hawk v. Hawk*, 4 A. B. R. 463, 102 Fed. 679 (D. C. Ark.), where the court refused to enjoin distribution of a bankrupt's estate until the bankrupt's wife could get a divorce, she being entitled, under the State law to one-third absolutely of his personal property on divorce.

5. See ante, § 99, et seq.

6. See ante, §§ 451, 653. See post, § 2662, et seq., "Effect of Discharge on the Rights of the Parties."

DIVISION 2.

STATUS OF PROPERTY AFTER FILING OF PETITION.

§ 1119. **Status of Property after Filing Petition Not Clearly Marked in Decisions.**—The subject of the status of property after the filing of the petition is one upon which neither the law itself nor the decisions are clear, nor always consistent.⁷

§ 1120. **But Title Does Not Vest until Trustee's Qualification Title Meanwhile in Bankrupt.**—But title does not vest until the trustee's qualification;⁸ meanwhile in law the title, although defeasible, remains in the bankrupt.

In *re* Enge, 5 A. B. R. 372, 105 Fed. 893 (D. C. Pa.): "While it is true that during the interval between the adjudication and the appointment of a trustee the title to the property remains in the bankrupt, but liable to be divested upon the appointment of such trustee, and no permanent lien can be acquired upon it."

Rand v. Railway Co., 16 A. B. R. 697, 186 N. Y. 58 (reversing *Rand v. Railway Co.*, 12 A. B. R. 164): "It is apparent from the record that the omission to appoint a trustee must have been due to the failure of the plaintiff to disclose the existence either of this claim or any other property in the bankruptcy proceedings. While the concealment of any property on the part of a bankrupt must be deemed a reprehensible act as toward his creditors it by no means follows that such concealment has any bearing upon the question of whether the bankruptcy proceedings have gone far enough to divest the bankrupt of title. In our judgment the proceedings in the case of the plaintiff had not progressed sufficiently to deprive him of the right to maintain an action in his own name in the State court upon the claim in suit. The Bankruptcy Act of 1898 (§ 70) provides that the trustee of the estate of a bankrupt upon his appointment and qualification shall be vested by operation of law with the title of the bankrupt as of the date he was adjudged bankrupt. It is plain that this provision can never become effective until a trustee in bankruptcy shall have been appointed. Here none was appointed; hence the conditions do not exist which were requisite to render this provision of § 70 operative."

Compare, *Boonville Bk. v. Blakey*, 6 A. B. R. 13, 107 Fed. 891: "If in a legal sense a trustee, he [the receiver] is trustee for the bankrupt, in whom is the title of the property until it passes by operation of law, as of the date of adjudication to the trustee selected by the creditors."

§ 1121. **Bankrupt Quasi Trustee until Receiver or Trustee Appointed.**—The bankrupt himself is quasi trustee of the property and custodian and caretaker until a trustee, receiver or some other officer of the court is appointed.⁹

7. *Kinmouth v. Braeutigam*, 10 A. B. R. 84, 52 Atl. 226 (N. J.).

8. Bankr. Act, § 70 (a). *Rand v. Iowa Cent. Ry. Co.*, 16 A. B. R. 697, 186 N. Y. 58.

9. See ante, § 383. In *re* Wilson, 6 A. B. R. 287, 289, 108 Fed. 197 (D. Va.); inferentially, In *re* Allen, 3 A. B. R. 38, 96 Fed. 512 (D. C. Calif.); inferentially, *State Bank v. Cox*, 16 A. B. R. 36, 143 Fed. 91 (C. C. A. Ills.); compare *Rand v. Iowa Central Ry. Co.*, 12 A. B. R. 164, 96 App. Div. 413 (reversing ground that bankrupt nevertheless not divested of sufficient title to maintain suit in own name, 16 A. B. R. 692, 186 N. Y. 58.).

Inferentially and obiter, *Blake v. Valentine*, 1 A. B. R. 378, 89 Fed. 691 (D. C. Calif.): “* * * before the appointment of an assignee (or trustee), proceeding for an injunction to protect the property of the bankrupt may be instituted by the bankrupt or the petitioning creditor. After an assignee or trustee has been appointed, he is the only person who could institute such proceedings on behalf of the bankrupt estate.”

Compare, *Rand v. Railway Co.*, 16 A. B. R. 698, 186 N. Y. 58: “It may very well be that any sum recovered by the plaintiff [bankrupt after adjudication but before appointment of trustee] in the present action will be held by him as trustee for his creditors.”

Property or debts belonging to him before bankruptcy but coming into his hands after adjudication, must be turned over by him to the trustee;¹⁰ and if his receipt of it is conceded, the burden rests upon him to prove he has turned it over to the trustee.¹¹

§ 1122. **Destruction of Property Meanwhile.**—So that if the property is destroyed meanwhile by fire the insurance company may not raise the defense that the title had been transferred.¹² But if the bankrupt is required by the court actually *to assign* any of the assets, the policy will cease to cover such property.

§ 1123. **Institution of Suits by Bankrupt Meanwhile.**—In the meantime the bankrupt has sufficient title to maintain suits in his own name, at any rate where no receiver has been appointed or where title and not merely possessory right is essential to maintenance of the suit.¹³

§ 1124. **Whether Liens Given in Meantime Subject to Creditors' Rights.**—It has been held that any lien which the bankrupt attempts to create upon the property, pending the hearing on the bankruptcy petition or before the qualification of the trustee, is subject to the right of the creditors in bankruptcy.¹⁴

This is particularly so where the lien would result in a preference.¹⁵

But such rule cannot divest bona fide liens on presently passing consideration created in the meantime.¹⁶

Thus artisans' liens for repairs done in the meantime are valid.

10. Impliedly, *In re Leslie*, 9 A. B. R. 561, 119 Fed. 406 (D. C. N. Y.).

11. *In re Leslie*, 9 A. B. R. 561, 119 Fed. 406 (D. C. N. Y.).

12. *Fuller v. Jameson*, 184 N. Y. 605; S. C., on review, 98 App. Div. 53, 90 N. Y. Supp. 456, 16 A. B. R. 693, note; *Fuller v. N. Y. Fire Ins. Co.*, 185 Mass. 12 (Compare *Tefft v. Providence Washington Ins. Co.*, 25 Ins. Law Journ. 226, on cognate proposition); obiter, *Rand v. Ry. Co.*, 16 A. B. R. 697, 186 N. Y. 58. But compare, apparently but not really contra, *In re Hamilton*, 4 A. B. R. 543, 102 Fed. 683 (D. C. Ark.), where special terms of the particular policy were involved.

13. *Rand v. Ry. Co.*, 16 A. B. R. 697, 186 N. Y. 58.

14. *In re Austin*, 13 A. B. R. 136 (D. C. Hawaii), where an attempt to give a lien to the bankrupt's attorney for legal services (not connected with the bankruptcy) was declared futile.

15. Impliedly, *Pratt v. Bothe*, 12 A. B. R. 529, 130 Fed. 570 (C. C. A. Mich.), *Bankr. Act*, § 60 (a).

16. *In re Rich*, 17 A. B. R. 893 (Ref. Ohio).

§ 1125. **No Liens by Legal Proceedings after Adjudication.**—Nor can a lien by legal proceedings be meanwhile obtained thereon after the adjudication.¹⁷

§ 1126. **As to Legal Liens between Filing of Petition and Adjudication.**—Nor, according to two or three cases, if obtained before the adjudication, if after the filing of the petition;¹⁸ even upon fraudulently conveyed property.

But the reasoning of these decisions is hard to reconcile with the theory of the present law.¹⁹ Such a lien obtained by a creditor on the bankrupt's property after the filing of the petition but before adjudication is not null and void under § 67 (f) for that section annuls only liens obtained *before* the filing of the petition (see *In re Engle*, 5 A. B. R. 372, 105 Fed. 893). It is not null and void, either, on any theory that the property is in custodia legis—no receiver having been appointed and the marshal having made no seizure; and the custody of the bankrupt not being held to be that of the bankruptcy court until after adjudication. The statute relative to preferences covers this intervening period by providing in § 60 (a): "A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, etc." No similar provision exists, however, either in § 67 (c), (e) or (f), relative to liens obtained by legal proceedings. The presence of such a provision in the section relative to voluntary liens and transfers and its absence from those relative to liens obtained by legal proceedings lend strength to the contention that a lien may be obtained by legal proceedings on the bankrupt's property after the filing of the petition if before adjudication unless a receiver or the marshal be in charge, or unless the lien by legal proceedings amounts to a preference under § 60 (a).

§ 1127. **Query, if No Trustee Ever Appointed, Where Does Title to Concealed Assets Rest?**—But if no trustee at all is appointed, as the Supreme Court's General Order XV seems to permit in certain cases, the question arises in whom does the title to concealed property vest?²⁰

17. *In re Engle*, 5 A. B. R. 372, 105 Fed. 893 (D. C. Pa.). But compare, *Evans v. Staalle*, 11 A. B. R. 182 (Minn.), where the State court permitted a judgment creditor after the adjudication and before discharge to acquire a lien by a suit to declare a fraudulent trust in property bought for the bankrupt's benefit in the name of another.

18. *Kinmouth v. Braeutigam*, 10 A. B. R. 83, 52 Atl. 226 (N. J.). *Cox v. State Bk.*, 11 A. B. R. 112, 125 Fed. 654 (D. C. Ills.). Recovery of proceeds of attachment sale in suit started after the filing of the petition, *State Bank v. Cox*, 16 A. B. R. 33, 143 Fed. 91 (C. C. A. Ills.).

19. Compare, inferentially, *In re Pease*, 4 A. B. R. 547 (Ref. N. Y.).

20. Compare, *Rand v. Iowa Cent. Ry. Co.*, 16 A. B. R. 692, 186 N. Y. 53 (reversing 12 A. B. R. 164), quoted *supra*. Also, compare, as to title to concealed assets where estate closed, *Fowler v. Jenks*, 11 A. B. R. 255, 90 Minn. 74 (Sup. Ct. Minn.).

§ 1128. **Bankrupt Retains Dominion and Power of Disposal before Adjudication, unless Receiver or Marshal Takes Possession or Injunction Issues.**—Unless the bankrupt's property be sequestrated by a receiver or marshal or the bankrupt himself be enjoined, the bankrupt retains dominion over his property and has the power to dispose of it, after the filing of the petition, even until the date of adjudication.²¹

In re Milk Co., 16 A. B. R. 730, 145 Fed. 1013 (D. C. Pa.): “* * * the filing of an involuntary petition does not, ipso facto, take from him his dominion over it. It no doubt puts the property within the control of the court, if it sees fit to exercise the power, but pending and prior to an adjudication, it is still his own, title only vesting in the trustee, as of that date, after an adjudication has been obtained. (Section 70.) If this is not sufficient to protect the interests of creditors, in any case, upon a proper showing they may have the marshal put in possession or a receiver may be appointed, which will. Sections 2 (3) (5); 69.

“Subject, then, to the right of the trustee to avoid it as a preference, an honest disposition of his property by the bankrupt, even after proceedings have been instituted, therefore stands.”

But, of course, this power is subject to the right of the trustee, subsequently appointed, to recover such transfers as were preferential.²²

§ 1129. **Likewise, Remedies of Creditors Holding Securities, etc., Meantime Unimpaired.**—Likewise, the remedies of creditors holding securities, meantime are unimpaired.²³

DIVISION 3.

STATUS OF PROPERTY ACQUIRED AFTER ADJUDICATION.

§ 1130. **Property Acquired after Adjudication Does Not Pass.**—Property acquired after adjudication does not pass to the trustee at all, but belongs to the debtor's new estate, and is subject only to the claims of new creditors.²⁴

21. American Trust Co. v. Wallis, 11 A. B. R. 360, 126 Fed. 464 (C. C. A. Penn.); In re Benjamin, 15 A. B. R. 353, 140 Fed. 320 (D. C. Pa.); In re Mertens, 15 A. B. R. 369, 144 Fed. 818 (C. C. A. N. Y.); In re Pease, 4 A. B. R. 578 (Ref. N. Y.).

22. In re Milk Co., 16 A. B. R. 730, 145 Fed. 1013 (D. C. Penn.).

23. *Hiscock v. Varick Bk.*, 18 A. B. R. 9, 206 U. S. 28.

24. In re Smith, 1 A. B. R. 37 (Ref. N. Y.), claim against another bankrupt before claimant's own discharge. In re LeClaire, 10 A. B. R. 733, 124 Fed. 655 (D. C. Iowa); In re Wetmore, 6 A. B. R. 210, 108 Fed. 520 (C. C. A. Penn., affirming 3 A. B. R. 700, 99 Fed. 703, and 4 A. B. R. 335, 102 Fed. 290); In re Rennie, 2 A. B. R. 182 (Ref. Ind. Terr.); In re Parish, 10 A. B. R. 548, 122 Fed. 553 (D. C. Iowa); compare, analogously, In re Hoadley, 3 A. B. R. 780 (D. C. N. Y.). Instance, In re Polakoff, 1 A. B. R. 358 (Master's Report affirmed by D. C. N. Y.), which was a case of wages earned subsequent to adjudication. Instance, held not after-acquired property, *McNaboe v. Marks*, 16 A. B. R. 767 (N. Y. Sup. Ct.), which instance was that of a distributive share in a decedent's estate where the decree was entered after adjudication of bankruptcy, but “as of” a date anterior thereto.

§ 1131. After-Acquired Property Transferable at Date of Bankruptcy Passes, Though Incident to Property Not Passing to Trustee.

—It is undoubtedly true that after-acquired property, which is merely the earnings profit or incident of property existing beforehand and passing to the trustee, will itself pass to the trustee. The property with all its increments, earnings and rights passes to the trustee.

And if the after-acquisitions are capable of assignment, before the filing of the petition, they will pass, though they flow from property itself not passing. Thus, commissions on insurance premiums, accruing after the agent's bankruptcy under an insurance agency contract existing before the bankruptcy, will pass, even though the agency contract itself does not pass.²⁵

SUBDIVISION "A".

PROPERTY ACQUIRED DURING PENDENCY OF PETITION.

§ 1132. Property Acquired after Filing of Petition but before Adjudication.—Property acquired after the filing of the bankruptcy petition but before the adjudication, if the proceeds of property transferable or seizable at the time of the filing, vests in the trustee; if it be independently acquired or be bought on credit, it does not vest in the trustee.²⁶

§ 1133. Evils of Old Law Vesting Title as of Date of Filing Petition.—The subject of the status of property acquired after the filing of the petition but before adjudication, is somewhat difficult.

It has been noted that the date of the vesting of the title, even by relating back, is not the date of the filing of the petition. Were it otherwise, the mere filing of a petition against a bankrupt would tend to drive him out of business; for no one would take the risk of buying from him, because, were he finally adjudged bankrupt, the title to all the goods he had meanwhile been selling or otherwise dealing in would be in doubt—the title to them would have been in the trustee and the bankrupt's sales would all have been null and void, except perhaps as to purchasers without notice. Under such circumstances ultimate victory would be of little avail to the unfortunate debtor—his business would nevertheless have been ruined.²⁷

In *re Pease*, 4 A. B. R. 578 (N. Y. Ref.), 2 N. B. N. & R. 1108: "There was no such difficulty under the law of 1867. By § 14 of that statute the assignee's

²⁵ See ante, § 994; In *re Wright*, 18 A. B. R. 199, 151 Fed. 361 (D. C. N. Y., reversing 16 A. B. R. 778).

²⁶ Compare, In *re Harris*, 2 A. B. R. 359 (Ref. Ills.), where the rule is laid down broadly that property acquired after the filing of the petition, but before adjudication, does not pass. As a general rule such would be the case, yet the rule may be complicated by certain circumstances.

²⁷ Compare, under present law, obiter, In *re Krinsky Bros.*, 7 A. B. R. 535, 112 Fed. 972 (D. C. N. Y.): "Those who deal with a bankrupt's property in the interval between the filing of the petition and the final adjudication do so at their peril." Compare, to same effect, note to In *re Rennie*, 2 A. B. R. 182 (Ref. Ind. Terr.).

title vested by relation as of the date the proceedings were commenced. As a result, a merchant against whom a petition in bankruptcy was pending could not do business—the title being in the air until adjudication or dismissal. There seems little doubt that the insertion of the words ‘as of the date of the adjudication’ in the present law was intended to meet the difficulty. * * * It meets the difficulty complained of under the law of 1867, and applies to business the doctrine that the debtor is innocent of bankruptcy until proven guilty. It protects ad interim purchasers and keeps going concerns alive, for the benefit of the creditors, if adjudications follow and the benefit of the debtors themselves, if dismissals result. Nor can it be said that, by recognizing a valid title in the bankrupt until adjudication, creditors may be at the mercy of a dishonest debtor; Congress, foreseeing that, also enacted § 69, by which creditors may take possession of the property of debtors likely to take advantage of the situation, a privilege emphasized by the almost identical words of § 3e.

“This view also comports with well-established principles of bankruptcy legislation in the United States. Our policy has been to establish a day of cleavage, that is, a day before which the relation of debtor and creditor exists; but after which, at the debtor’s option, it ceases; a day before which all the debtor has becomes his creditors’, but after which that which he acquires is his, subject only to his new trusteeship to new creditors. With us that day has always been the day proceedings are commenced, and the present law repeatedly recognizes it. Compare §§ 1 (10), e-b, 9b, 11a, 29b (4), 60b, 63a (1), (2), (3), (5), 64b (4), 67 c-e-f, 68b. * * *

“The English Bankruptcy Act distinguishes sharply between the time of vesting and the property which vests. Section 54 vests the title in the trustee ‘immediately on the debtor being adjudged a bankrupt.’ But, by § 44, the property divisible among the creditors is defined as ‘all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge,’ while by § 43, ‘the commencement of the bankruptcy’ is defined as the day on which the voluntary petition is filed, or, if involuntary, the day on which the first act of bankruptcy (not earlier than three months prior) relied on was committed. In other words, in England, while the title vests on the date of the adjudication, it may relate backward to three months before the petition, and may also include everything acquired before the discharge. It is a little difficult to understand the justice of this, especially as by §§ 30 and 37 of the same act, a discharge operates only on debts existent or obligations created prior to the date of the ‘receiving order,’ i. e., in actual practice, the date of filing the petition. In other words, it would seem that in England creditors may share in after-acquisitions prior to the discharge, though their debts post-date the beginning of the proceedings, and yet, if not paid in full, still have undischarged debts for the deficit. But the point to which attention is called is that, in spite of this period of probation, during which the English bankrupt must continue to surrender all that he may acquire, the English law, like ours, and probably for the same reason, distinguishes between the time of vesting and the title which vests, and further fixes the time on the day we fix it.”

Compare analogously as to transactions on presently passing considerations not being preferences, *In re Davidson*, 5 A. B. R. 528-532, 109 Fed. 882 (D. C. Iowa): “The statute certainly cannot be invoked to put an end to legitimate business. And if the statute does mean, as is contended by objecting creditors, then it is readily seen that no business can be transacted with a merchant from the moment he becomes embarrassed.”

Under the Act of 1867, title reverted to the date of the filing of the petition as a result of which a merchant against whom a petition in bankruptcy was pending could not do business—the title being in the air until adjudication or dismissal.²⁸

In *re Mertens*, 15 A. B. R. 369, 142 Fed. 445 (C. C. A. N. Y.): "The change in the present Act, by which the trustee's title is that only which exists at the date of the adjudication, removes any uncertainty which arose under the Act of 1867. It was intended, we think, to permit all legitimate business transactions between a debtor and those dealing with him to be carried out and consummated as freely until he has been adjudicated a bankrupt as though no proceedings were pending. In many cases the proceedings against an alleged bankrupt are unfounded, and for this and other reasons never culminate in adjudication. While the filing of a petition in bankruptcy is a caveat to all the world, the notice ought not to have the effect of paralyzing all business dealings with the debtor, or to prevent lienors or pledgees from enforcing their contracts. This is its practical effect if the rights and remedies of all concerned are in suspense until it can be ascertained whether an adjudication is or is not to follow the commencement of the proceedings."

§ 1134. **Bona Fide Transactions on Present Consideration Not Affected.**—Such a condition as above related would be intolerable and was found to be so under the law of 1867. So the present law says in effect, Let the creditors file their petition, if they will; people may continue to buy of the debtor and deal with him with impunity until he is adjudged bankrupt or a receiver or marshal makes seizure of the property dealt with, even though they know of the petition, subject, only, to the right of the trustee to avoid preferences, if any are effected meanwhile.²⁹

²⁸. In *re Pease*, 4 A. B. R. 578 (N. Y. Ref.), 2 N. B. N. & R. 1108; also, to same effect, In *re Rennie*, 2 A. B. R. 182 (Ref. Ind. Terr.).

²⁹. In *re Mertens*, 15 A. B. R. 369, 142 Fed. 445 (C. C. A. N. Y.), *supra*. Perhaps, *Githens v. Schiffer*, 7 A. B. R. 453, 112 Fed. 505. Perhaps, In *re Duffy*, 9 A. B. R. 358, 118 Fed. 926 (D. C. Penn.). Perhaps, In *re Milk Co.*, 16 A. B. R. 730, 145 Fed. 1013 (D. C. Penn.). But compare, *obiter*, *contra*, In *re Krinsky Bros.*, 7 A. B. R. 535, 112 Fed. 972 (D. C. N. Y.). The debtor may pay his attorney for services to be rendered in bankruptcy by transferring property to him meanwhile, *Inferentially*, In *re Corbett*, 5 A. B. R. 224, 104 Fed. 872 (D. C. Wis.); In *re Habegger*, 15 A. B. R. 198, 139 Fed. 123 (C. C. A. Minn.); *contra*, *Pratt v. Bothe*, 12 A. B. R. 529 (C. C. A. Mich.); *contra*, In *re Austin*, 13 A. B. R. 136 (D. C. Hawaii). The transfer must be complete to pass title, however, In *re Corbett*, 5 A. B. R. 224, 104 Fed. 872 (D. C. Wis.).

Nevertheless, it has been held that no lien can be obtained in the meantime by levy under legal proceedings that will avail against the bankrupt's creditors. *Kinmouth v. Braeutigam*, 10 A. B. R. 83, 52 Atl. 226 (N. J.); In *re Engle*, 5 A. B. R. 372, 105 Fed. 893 (D. C. Pa.).

Effect of Refusal of Discharge on Title to Property.—Even if his discharge be refused, creditors' rights have attached, and none of them can deal with his old estate, either in satisfaction of any of his old debts, or his new debts—the estate must be administered in accordance with the proceedings prescribed by the Bankrupt Act. Of course, in such event any new property he may acquire may be levied upon by any creditor in satisfaction of the unpaid balance of his claim. *Kinmouth v. Braeutigam*, 10 A. B. R. 85, 52 Atl. 226 (N. J.): "In case of the failure of the bankrupt to obtain his discharge the judgment remains. But even in the latter event it can never be enforceable against any property owned by the bankrupt at the time he filed his petition in bankruptcy, but can only be used against after-acquired property."

Perhaps, *In re Benjamin*, 15 A. B. R. 353 (D. C. Pa.): "And even up to the moment of bankruptcy, a party may make a valid disposition of his property, where it is done for a fair consideration and with an honest motive."

As heretofore mentioned, if the debtor is suspected of making way with his property after the petition is filed against him, his creditors may have his property seized on process similar to levy of attachment, upon filing an affidavit and giving a bond; and thus the property may be held pending the trial of the debtor as to his bankruptcy. This remedy is amply sufficient to protect the debtor, for if he be not adjudged bankrupt on the final hearing his property is returned to him and the bond becomes liable for all damages for the seizure and detention.³⁰

Moreover, § 2 in clause 5 empowers the court to authorize the business of the bankrupt to be continued for a limited period by the marshal, if he has seized it, or by a receiver if one has been appointed, and thus, notwithstanding the seizure, the business may be kept intact as a going concern, contracts may be completed, goods manufactured and sold and everything kept in operation precisely as the bankrupt might have done, pending the hearing as to whether the debtor shall or shall not be adjudged to be a bankrupt. So the provisions of the present law are quite complete for protecting the creditor, as well as the debtor, pending the hearing of the petition, notwithstanding the statute makes the title vest as of the date of the adjudication instead of the date of the filing of the petition.

Nevertheless, a peculiar situation presents itself upon that very account when we come to the consideration of the broadest and most important class of assets that pass to the trustee, namely, class (5) of § 70, namely, property which prior to the filing of the petition the bankrupt could by any means have transferred or which might have been levied upon and sold under judicial process against him.

Are we to infer that the property acquired after the filing of the petition will not pass to the trustee, but will remain in the debtor notwithstanding the debtor may finally be adjudged bankrupt? The answer on analysis divides itself into two parts:

§ 1135. First, Property Acquired Meantime by Gift or Inheritance or Bought on Credit.—As to property given to the debtor or inherited by him meanwhile and property bought by him on credit meanwhile and not paid for with property or proceeds of property owned by him at the time the petition was filed, such property is the property of the bankrupt absolutely and does not pass to the trustee at all. There is no escape from the plain words of the statute, for such property could not "have been transferred by him by any means before the filing of the petition" nor could it have been levied on before that time nor was it the proceeds of any property that could have been transferred or levied on before the filing of the

30. *In re Milk Co.*, 16 A. B. R. 730, 145 Fed. 1013 (D. C. Penn.). Compare, to same effect, note to *In re Rennie*, 2 A. B. R. 182 (Ref. Ind. Terr.).

petition. His old creditors have no share in it and no right to touch it. It goes along with the property acquired after the adjudication to form the nucleus of the bankrupt's new estate, freed by his discharge, later granted, from the claims of his old creditors.³¹

In *re Pease*, 4 A. B. R. 578 (Ref. N. Y.): "Creditors who become such before the filing of the petition cannot compel a bankrupt to account for profits in business after the petition and before the adjudication, or for goods sold in the interval which were purchased of other dealers and not taken from the bankrupt's stock, but can for moneys collected in that interval, or even thereafter, for goods sold either before or after the petition out of the stock with which the trustee became vested on the adjudication."

In *re Burka*, 5 A. B. R. 12, 104 Fed. 326 (D. C. Mo.): "In other words, the property which the trustee acquires must have been property or rights which so existed prior to the filing of the petition that the bankrupt might have transferred them."

Property bought on credit since the filing of the petition and before the adjudication it will be noted has been excepted, although doubtfully. It would seem, on theory that *such property, neither having been in existence before the filing of the petition nor being the proceeds of such pre-existing property would not pass to the trustee*, and would not go to swell the fund for the payment of creditors.

As bearing out this conclusion, it is to be noted that in case such property were bought during that period, then the debt would not have been a provable debt in bankruptcy and consequently would not have been discharged by the bankrupt's discharge, not being "owing" at the date of the filing of the petition.

Thus, as to property bought on credit between the filing of the petition and the adjudication in bankruptcy, such property and the debt arising therefor are both taken out of the operation of the bankruptcy proceedings; the property does not pass to the trustee for the creditors, nor does the debt participate in the dividends, nor, for that matter is it released by the bankrupt's discharge.

This lends additional strength to the conclusion. And the property so purchased would likely not come within the operation of the bankruptcy act nor pass to the trustee for creditors, since it would be inequitable to have the property pass, if the debt could not participate.

In *re Burka*, 5 A. B. R. 12, 104 Fed. 326 (D. C. Mo.): "It is argued by claimant's counsel that because the trustee is vested with the title not only to property which the bankrupt had at the time of the filing of the petition against him, but also to such property as he may have acquired after that, and prior to the date of adjudication, and because all such property goes into the fund for creditors, therefore all creditors having claims which originated at any

31. In *re Rennie*, 2 A. B. R. 182 (Ref. Ind. Terr.); see, In *re Harris*, 2 A. B. R. 359 (Ref. Ills.), although in this case the character and origin of the property are not apparent. In *re Stoner*, 5 A. B. R. 402, 105 Fed. 752 (D. C. Pa.).

time prior to the actual adjudication should participate in the fund; in other words, that, as the property which the bankrupt acquires after the filing of the petition enhances the fund for the benefit of creditors, all creditors whose rights accrued at any time before actual adjudication should participate in it. This is a plausible argument, and I presume it would be true that, if the property acquired by the bankrupt after the filing of the petition and before the adjudication did vest in the trustee, creditors whose rights accrued between those dates should share in the property of the bankrupt, like other creditors; but the argument, in my opinion, is based on false premises. * * * Properly interpreted, the trustee is by operation of law vested with the title as of the date the bankrupt was adjudged to be a bankrupt. The further provisions of the section, already quoted, undertake to point out the property of which by operation of law he is to become the owner, namely, all property which prior to the filing of the petition the bankrupt could have transferred. In other words, the property which the trustee acquires must have been property or rights which so existed prior to the filing of the petition that the bankrupt might have transferred them. This clearly means the property or rights of property which existed at that time. Such being the true interpretation of § 70, it affords no ground for the argument made by claimant's counsel. Inasmuch as no property which the bankrupt may have acquired after the filing of the petition and before the date of adjudication is taken by the trustee, there is no ground for the argument that the claimant, holding a claim accrued since the filing of the petition, and before adjudication, should participate in the assets."

A still further complication arises where the property is bought meanwhile and bought on credit, but is paid for partly although not wholly out of funds belonging to the creditors. Certainly at any rate the creditors would have a lien on such property to the amount of such payment even if the property itself were not property in existence at the time of the filing of the petition.

§ 1136. Second, Property Purchased Meantime with Proceeds of Property Which Was in Existence at Time of Filing Petition.—

As to property acquired in the meantime between the filing of the petition and the adjudication but purchased with property or the proceeds of property that was in existence at the time the petition was filed and that could then have been transferred or levied on at that time, such property if still in existence does pass to the trustee on adjudication although the identical property itself was not in existence at the time the petition was filed and therefore could not itself then have been transferred or levied on; and this is so because the bankrupt got the property by selling his creditors' property and it is impressed with the consequent trust in his hands for their benefit. In other words, it passes to the trustee not because it is property that was in existence at the time of the filing of the petition and could have been transferred or levied on at that time, but because it is the proceeds of such property and because such property belonged, by the later adjudication, to his creditors and yet had been sold by the bankrupt: the bankrupt holding the proceeds as trustee or agent for the real owner of the

original property, precisely as would the marshal or a receiver had either of them held possession of the property during that meantime.

Although this precise course of reasoning does not appear to have been elaborated in any of the reported cases, yet it seems to be the course of reasoning actually adopted by the courts in arriving at their conclusions. The trustee may not be required to surrender property acquired by the bankrupt between the filing of the petition and the adjudication simply because it was not in existence when the petition was filed, so long as it is the proceeds of property that had belonged to the bankrupt at that time. Absolutely independent acquisitions during that period, however, belong unquestionably to the bankrupt, as, for instance, property acquired by gift from another, or by the death of an ancestor, or testator, and perhaps property bought on credit meanwhile and not paid for.

CHAPTER XXX.

TRUSTEE'S TITLE AND RIGHT TO ASSETS.

Synopsis of Chapter.

- § 1137. General Discussion and Complete Statement of Trustee's Title.
- § 1138. Section 70 (a) to Be Construed with Cognate Sections—Trustee Gets More than Bankrupt's Title and Rights.
- § 1139. Local Law Determines Effectiveness of Transaction to Accomplish Transfer of Title, Also Time Title Passes.
- § 1140. Also Governs Validity, Except Where Peculiar Rights—As to Preferences, Liens by Legal Proceedings, etc.—Conferred by Act Itself, Involved.
- § 1141. Intervention of Creditors' Rights Causing Modification of Rule That Bankrupt's Title Taken.
- § 1142. Conversely, Subject of Trustee's Succession to Bankrupt's Title Involved Also in That of Succession to Creditors' Title.
- § 1143. Subject of Trustee's Title and Rights Usually Somewhat Involved in Kindred Subject of What Kind of Assets Pass to Trustee.

DIVISION 1.

- § 1144. First, Trustee's Title and Rights as Successor to Bankrupt's Title.

SUBDIVISION "A".

- § 1145. Bound by Bankrupt's Sales, Mortgages, Deliveries, Bailments, Contracts and Equitable Liens.
- § 1146. Thus, as to Setting Apart or Delivery Sufficient to Pass Title to Goods Sold, Pledged or in Process of Manufacture and "Warehousing."
- § 1147. Bankrupt's Contracts of Purchase or Sale, and His Mortgages.
- § 1148. Bankrupt's Assumption of Mortgage.
- § 1149. Estoppels against Bankrupt, Good against Trustee.
- § 1150. Specific Contractual Rights and Equitable Liens.
- § 1151. Forfeiture Clauses, Rent, etc.
- § 1152. Fixtures.
- § 1153. Disregarding Note and Suing on Original Consideration.

SUBDIVISION "B".

- § 1154. Mechanics' and Subcontractors' Liens, Landlords' Liens, etc.
- § 1155. Mechanics' Liens, etc., Not Liens Obtained by Legal Proceedings nor Preferences.
- § 1156. Subcontractors' Liens.
- § 1157. Liveryman's Liens.
- § 1158. Artisan's Liens.
- § 1159. Statutory Liens for Supplies.
- § 1160. Landlord's Lien or Priority for Rent.

- § 1161. Mechanic's Lien, etc., Valid Though Affidavit or Stop Notice Not Filed Till after Bankruptcy of Owner, etc.
- § 1162. Failure to Perfect Lien in Statutory Form Invalidates.
- § 1163. But Where Perfecting Dependent on Legal Proceedings, Bankruptcy May Dispense with Same.
- § 1164. Consent to Payment of Fund into Bankruptcy Court.
- § 1165. Without Consent State Court Proper Forum Where Contractor or Sub-contractor Bankrupt.

SUBDIVISION "C".

- § 1166. Inchoate Dower Right Unimpaired.
- § 1167. Widow's and Children's Allowances.

SUBDIVISION "D".

- § 1168. Right of Stoppage in Transitu Unimpaired.
- § 1169. Right to Rescind for Fraud Unaffected.

SUBDIVISION "E".

- § 1170. Right of Set-Off and Counterclaim Unimpaired.
- § 1171. Which Governs: Law of State, United States, or of Forum.
- § 1172. Mutual Demands Must Have Existed before Bankruptcy.
- § 1173. Offset Need Not Be Due, if Owing.
- § 1174. And May Be Only Contingently Owing.
- § 1175. Separate Debt Not to Be Offset against Joint Debt.
- § 1176. Mutual Debts to Be between Same Parties, in Same Capacity.
- § 1177. Offset Must Be Provable Debt.
- § 1178. But Claim Not Proved within Year, Nevertheless Available as Offset.
- § 1179. Voidable Preference Not Available as Offset in Favor of Preferred Creditor.
- § 1180. But General Deposits in Bank Available to Bank as Set-Off, if Not Applied by Bankrupt on Bank's Claim.
- § 1181. Creditor Selling Claim to Effect Indirect Preference by Purchaser's Using Claim as Offset to Purchase Price.
- § 1182. Offsets Purchased with Knowledge of Insolvency or to Use as Offset, etc., Not Allowable.
- § 1183. Burden of Proof of Propriety of Offset on Debtor.
- § 1184. Supervening Insolvency Destroying Right of Offset.
- § 1185. Thus, Stockholding Creditor May Not Offset against Unpaid Subscriptions.
- § 1186. Supervening Insolvency Creating Right of Offset.
- § 1187. No Judgment against Trustee for Excess of Offset.
- § 1188. Likewise, No Judgment in Bankruptcy Proceedings against Claimant Where Estate's Claim Exceeds Claimant's.

SUBDIVISION "F".

- § 1189. Application of Payments.
- § 1190. Thus, Creditor's Right to Apply in Absence of Debtors' Instructions.
- § 1191. Application to Be as Equity Requires, in Absence of Directions.

SUBDIVISION "G".

- § 1192. Trustee Succeeds to Bankrupt's Defenses and Rights.
- § 1193. May Interpose Bar of Statute Limitations.
- § 1194. May Urge Statute of Frauds.
- § 1195. May Plead Illegality.
- § 1196. May Plead Usury.
- § 1197. May Redeem Mortgaged Property.
- § 1198. May Recover Property Misapplied to Agent's Private Debt.
- § 1199. May Defend That Chattel Mortgage Does Not Cover Specific After-Acquired Property or Is Void for Indefiniteness or for Failure to Comply with Statutory Requirements.
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- § 1429. Second Branch of Trustee's Peculiar Title and Rights Conferred by Bankruptcy Act—Nullification of Liens by Legal Proceedings.
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- § 1432. Void, Irrespective of Consent or Permission of Debtor.
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- § 1435. Invalidating of Liens Obtained by Legal Proceedings Distinguished from Barring of Debt by Bankrupt's Discharge.
- § 1436. Void, However, Only as to Trustee, Not as to Other Lienholders.
- § 1437. First Element Requisite to Nullify Lien by Legal Proceedings—Must Be Lien by Legal Proceedings.
- § 1438. Liens from All Courts Equally Nullified.
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- § 1440. Including Lien Acquired by Creditors by General Assignments.
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- § 1444. Legal Proceedings Not Themselves Creating Liens but Merely Enforcing Pre-Existing Rights or Liens Not Affected.
- § 1445. Lien Valid in Part, and Void as to Balance.
- § 1446. Receiverships, etc., May Operate to Create "Liens by Legal Proceedings."
- § 1447. Second Element Requisite to Nullify Lien by Legal Proceedings—Lien Obtained upon Property Which Otherwise (Save and Except, etc.) Would Go into Bankrupt's Estate.
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- § 1449. Judgments Whose Liens Annulled, yet Valid for Other Purposes, as Res Adjudicata, etc.
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- § 1451. Third Element to Nullify Lien—Lien Must Have Been Obtained within Four Months Preceding Filing of Petition.
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- § 1453. Whether Lien Obtainable by Legal Proceedings after Filing Bankruptcy Petition.
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- § 1456. But Where State Court Attempts Further Distribution.
- § 1457. Conversely, Suit Started before but Lien Obtained within Four Months, Lien Falls.
- § 1458. Likewise Levy within Four Months on Judgment Rendered before, Annulled.
- § 1459. State Law Controls as to Nature of Lien, Time Takes Effect, Abandonment, etc.
- § 1460. Fourth Element to Nullify Lien—Insolvency.
- § 1461. Fifth Element to Nullify Lien—Debtor Must Eventually Be Adjudged Bankrupt.
- § 1462. Invalidity of Liens by Legal Proceedings Ultimately Rests on Basis of Preference.
- § 1463. Clause "F" of § 67 Supersedes Clause "C" Where in Conflict.
- § 1464. Clause "F" Applies to Voluntary Bankruptcies as Well as to Involuntary.
- § 1465. Does Not Impair Obligations of Contract nor Divest Vested Rights.
- § 1466. Operates Only on Liens Obtained before Filing of Petition.
- § 1467. On Adjudication, Invalidating of Lien Relates Back to Inception.
- § 1468. Lien Absolutely Void and Falls of Itself.
- § 1469. Nevertheless Creditors Not to Sit by, Else Estopped.
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- § 1473. Bankruptcy Court May Enjoin.
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- § 1475. Trustee May Replevin.
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- § 1478. And Recovery Only to Be Had on Other Grounds than § 67 (f).

- § 1479. Proceeds of Execution or Attachment Sale in Sheriff's Hands Pass to Trustee.
- § 1480. Or Property Itself May Be Pursued and Recovered.
- § 1481. Bona Fide Purchasers at Legal Sales Protected.
- § 1482. Purchaser Has Burden of Proof of Bona Fides.
- § 1483. Sheriff Paying Over Proceeds before Filing of Petition Protected.
- § 1484. But Perhaps Liable if Pays after Petition Filed.
- § 1485. Lien for Costs Falls with Rest.
- § 1486. Sheriff No Right to Retain Creditor's Costs, nor to Retain Property Till Costs Paid.
- § 1487. Creditor May Prove Claim Where Lien Nullified, also Costs.
- § 1488. Creditor Whose Lien Nullified under No Duty to Keep Officer in Possession.
- § 1489. Preservation of Lien for Benefit of Estate.
- § 1490. Costs of Court Remain Lien in Cases of Preservation.
- § 1491. Order of Preservation Requisite.
- § 1492. Lien Not Preserved Is Void as to Other Lien Holders on Same Property.

SUBDIVISION "C".

- § 1493. Third Branch of Trustee's Peculiar Title and Rights Conferred by Bankruptcy Act—Fraudulent Transfers within Four Months.
- § 1494. Prima Facie Case without Proof of Transferee's Participation.
- § 1495. But Transferee's Good Faith and Valuable Consideration, Defense.
- § 1496. What Constitutes "Good Faith."
- § 1497. Section 67 (e) Not Applicable to Mere Preferential Transfers.
- § 1498. And Trustee Must Show Bankrupt's Actual Fraud.
- § 1499. Transfer Must Have Been within Four Months.

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- § 1500. Protection of Liens Which Are Not in Contravention of Act.
- § 1501. Is Converse of Avoidance of Liens Opposed to Act.
- § 1502. Lien within Four Months Valid if Other Essentials Exist.
- § 1503. First Essential to Protection of Lien—Unless Both Parties Guilty, Lien Protected.
- § 1504. What Constitutes "Good Faith."
- § 1505. Second Essential to Protection of Lien—Not to Be Given and Accepted in Contemplation of Bankruptcy or in Fraud of Act.
- § 1506. Third Essential to Protection of Lien—"Present Consideration."
- § 1507. Fourth Essential to Protection of Lien—Recording Where State Law so Requires "to Impart Notice."
- § 1508. Chattel Mortgages and Conditional Sales Contracts, Withheld for Time but Filed before Bankruptcy.
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- § 1510. Rights of Creditor against Sureties of Bankrupt, etc.
- § 1511. Applies to Secondary Liability on Obligation Itself, Not to Sureties in Court Proceedings—Attachment and Appeal Bonds Released if Liability Dependent on Judgment.

- § 1512. Creditor Entitled to All Remedies against Sureties.
- § 1513. Conversely, Rights and Defenses of Sureties of Bankrupt, Not Affected.
- § 1514. Right to Retain Indemnity Given at Signing Unaffected.
- § 1515. No Duty on Creditor to Prove Claim against Bankrupt Principal.
- § 1516. Right of Surety or Endorser to Prove Creditor's Claim against Bankrupt Principal.
- § 1517. Where Creditor Refuses to Let Surety Have Written Instrument to Attach to Proof, Surety Not Released.
- § 1518. Unless Surety Offers to Indemnify Creditor against Expense.
- § 1519. Creditor Entitled to Prove against Both Principal and Surety Where Both Bankrupt.
- § 1520. But Bankrupt Estate Not to Pay Two Dividends on Same Claim.
- § 1521. Creditor Receiving Dividends Out of Maker's Estate First, May Prove Only for Unpaid Balance against Surety.
- § 1522. Creditor Receiving Dividends Out of Surety's Estate First, Surety Entitled to Subrogation to Creditor's Claim against Maker's Estate in Proportion to Dividend Paid by Surety.
- § 1523. Discharge of Bankrupt Principal, Equivalent to Return of Execution Unsatisfied.
- § 1524. Staying Discharge and Permitting Creditor to Take Judgment to Fix Liability on Surety.

§ 1137. General Discussion and Complete Statement of Trustee's Title.¹—The trustee's title and right to assets is a threefold subject: The trustee succeeds to the bankrupt's title and stands in his shoes and takes the property, in cases unaffected by any fraud of the bankrupt towards creditors, in the same plight and condition in which the bankrupt held it and subject to all equities and rights imposed upon it in the hands of the bankrupt, except where there has been some transfer or encumbrance of the property or seizure of it by legal process, void as against the trustee by some positive provision of the bankrupt act.

But in cases affected by the fraud of the bankrupt towards creditors, as also where there has been some transfer or encumbrance of the property void as to creditors by state law for want of record or otherwise, the trustee succeeds to the rights of any creditor qualified by the state law to avoid the transfer or encumbrance or to take advantage of the fraud.

1. Bankr. Act, § 70 (a): "The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all (1) documents relating to his property; (2) interests in patents, patent rights, copyrights, and trade marks; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other persons; (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him."

See Bankr. Act, §§ 70 (e); 67 (a); 67 (e), (c), (f); 60 (a), (b).

And in addition thereto the trustee has the peculiar rights conferred by the special provisions of the bankrupt act, to avoid preferential and fraudulent transfers and liens obtained by legal proceedings within the four months preceding the bankruptcy.

§ 1138. **Section 70 (a) to Be Construed with Cognate Sections—Trustee Gets More than Bankrupt's Title and Rights.**—The statute, in § 70 (a), declares that the title taken by the trustee is the title that the bankrupt had, but this clause must be read in conjunction with other sections of the statute and with two other parts of the same section, otherwise a wholly insufficient idea of the complete title and rights of the trustee will be had.²

It is true the title which the trustee takes is that of the bankrupt. But his rights are those of the bankrupt and more. He has, by the positive provisions of the Act, the further rights which any creditor had by State law at the time of the bankruptcy, to set aside fraudulent transfers or liens and to expose the resultant title of the bankrupt. In addition thereto he has the special rights conferred by the bankruptcy law itself in protection of the insolvent estate and its preservation as a trust fund for the benefit of all creditors, namely, the peculiar rights of avoiding preferential transfers and liens obtained by legal proceedings within the four months preceding the bankruptcy.

That the trustee's rights are not restricted to those of the bankrupt will become evident as the subject is developed. Indeed, were it not so, the Bankruptcy Act would be a menace to the commercial community instead of a safeguard of it; for upon bankruptcy the remedies available to creditors are suspended and are superseded, with certain exceptions, by those available to the trustee. Thus (except in certain exceptional circumstances) the creditors may no longer pursue the debtor's property in their own right; therefore, it would be most disastrous were the trustee not given the right to continue the pursuit of it in the ways that were being availed of by creditors at the time of the bankruptcy.

Beasley v. Coggins, 12 A. B. R. 358, 48 Fla. 215: "Section 70 (e) was intended to provide simply that the trustee in bankruptcy should have the same right to avoid conveyances as was possessed by creditors, or any of them, and this with especial reference to the Statute of 13 Elizabeth. Under the Bankruptcy Act, when one is thereunder adjudged a bankrupt, creditors are not permitted to attack fraudulent conveyances of their debtor, made more than four months of the adjudication of bankruptcy; and, if the trustee could not do so, then the act would constitute a device to permit fraudulent conveyances to take effect with impunity, in case they are successfully concealed for the specified four months. It is only by holding that the trustee is subrogated to the rights of creditors against a fraudulent conveyance that full effect and operation can be

2. In *re Thorp*, 12 A. B. R. 202 (D. C. Va.).

given to the Statute of 13 Eliz. against fraudulent conveyances, from which our statute is substantially taken."

In *re Garcewich*, 8 A. B. R. 152, 115 Fed. 87 (C. C. A. N. Y.): "It is not the meaning of the present Act that the institution of proceedings in bankruptcy should secure immunity to the title of fraudulent vendors or mortgagors, and deprive creditors of a resort to property out of which, but for the proceeding, they could have satisfied their claims."

This clause 70 (a), then, giving the trustee, by operation of law, the bankrupt's title, should be read in conjunction with certain other parts of the statute, namely, in conjunction with subdivision, or rather class (4), of the same clause of this § 70, giving the trustee title also,

"to all property transferred by him (the bankrupt) in fraud of his creditors."

Also in conjunction with clause (E) of § 70, authorizing the trustee to avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, which reads as follows:

"The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication."

Also in conjunction with class (5) of § 70 (a):

"Property which at the time of the filing of the petition, the bankrupt could by any means have transferred or which could have been levied upon and sold under judicial process against him."

In *re Garcewich*, 8 A. B. R. 152, 115 Fed. 87 (C. C. A. N. Y.): "Section 70. declares in express terms that the title of the bankrupt shall vest in the trustee to 'all property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him.' That language is sufficiently comprehensive to vest the trustee with title to all property of the bankrupt as against the fraudulent title of another."

And in conjunction with clause (a) of § 67 which provides that,

"Claims which for want of record or other reasons would not have been valid liens as against the claims of any creditor of the bankrupt shall not be liens against his estate."

And in conjunction with clause (e) of § 67 which reads:

"That all conveyances, transfers, assignments or encumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged

a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors." "And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory, or District in which such property is situate, shall be deemed null and void under this Act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt."

And finally in conjunction with §§ 60 and 67 (c) and (f) of the Act relative to voidable preferences and nullified liens obtained by legal proceedings within the four months preceding the bankruptcy.

State Bk. v. Cox, 16 A. B. R. 36, 143 Fed. 91 (C. C. A. Ills.): "The formal title of the bankrupt to the estate passes to the trustee (70a) 'by operation of law' as of the date of adjudication, but the trustee is vested as well under subdivisions (4) and (5) with property transferred in fraud of creditors, and 'property which prior to the filing of the petition' the bankrupt 'could by any means have transferred' or which might have been levied upon and sold. Thus the narrow construction of the first-mentioned provision, which is sought for escape from liability for the plain violation of the Act through the seizure in question, not only ignores these succeeding and comprehensive clauses, but it would nullify the terms and entire policy of the act for the protection of creditors against spoliation of estates subject to bankruptcy proceedings."

Now, it is fundamental in law that a debtor cannot himself avoid his own fraudulent conveyance, this being so because the fraudulent conveyance gives a good title against him and no court will listen to his plea for declaring it null nor let him so stultify himself as to say he transferred it fraudulently and now wants it back. So it is only creditors who can avoid fraudulent conveyances, although in a qualified sense the debtor still has the title.

Andrews v. Mather, 9 A. B. R. 299, 134 Ala. 358: "Although property which has been fraudulently conveyed ceases to belong to the grantor, so far as any claim he himself can set up is concerned, yet the law regards property which has been fraudulently conveyed as still the property of the grantor, so far as creditors are concerned. The assignee in bankruptcy is an officer created for the benefit of creditors, and he is permitted to regard property fraudulently conveyed in the same way in which creditors are permitted to regard it."

Chesapeake Shoe Co. v. Seldner, 10 A. B. R. 466, 473, 122 Fed. 593 (C. C. A. Va.): "As between the bankrupt and his fraudulent grantee, the bankrupt has no title and to give any effect, or even meaning to Clause 4 (§ 70) we must construe the words 'title of the bankrupt' as between the bankrupt and his creditors."

Compare, inferentially, to same effect, *Bardes v. Bank*, 4 A. B. R. 175, 175 U. S. 526: "It was argued for the appellant that the clause cannot apply to a case like the present one, because the bankrupt could not have brought a suit

to set aside a conveyance made by himself in fraud of his creditors. But the clause concerns the jurisdiction only, and not the merits, of a case; the forum in which a case may be tried, and not the way in which it must be decided; the right to decide the case, and not the principles which must govern the decision. The bankrupt himself could have brought a suit to recover property, which he claimed as his own, against one asserting an adverse title in it; and the incapacity of the bankrupt to set aside his own fraudulent conveyance is a matter affecting the merits of such an action, and not the jurisdiction of the court to entertain and determine it."

Likewise an unrecorded or defectively recorded mortgage or other voluntarily given lien upon the bankrupt's property is always good between the parties; so that, again, it is only as to creditors that unrecorded liens are void. So when the statute, in § 70 (a), says the trustee shall be vested with the title of the bankrupt, the provision must not be thought to limit the trustee's rights to the mere rights of the bankrupt.

As long as other sections of the Act give the trustee greater rights than merely those that might be asserted by the bankrupt, the statute must be construed to mean that he takes the bankrupt's title and rights and in addition thereto takes more—takes also the rights of creditors.

The Bankruptcy Act, itself, then, gives the trustee by § 70 (a) not only the bankrupt's own title, but also expressly vests in him, by § 70 (b) (4), title to all property transferred by the bankrupt in fraud of creditors, and, by § 70 (e), gives him the right to clear away from the bankrupt's title to property all fraudulent transfers of such title which any creditor might, under State law, have avoided; and, by § 67 (a), gives him the right to clear away from the bankrupt's title to property all liens that would for any reason not have been valid liens against the claims of creditors under State law had there been no bankruptcy; all which rights are in addition to the peculiar rights conferred on the trustee by the special provisions of the Bankruptcy Act relative to avoiding preferential transfers and liens obtained by legal proceedings within the four months preceding the bankruptcy.

§ 1139. Local Law Determines Effectiveness of Transaction to Accomplish Transfer of Title, Also Time Title Passes.—In all the several branches of the discussion of the trustee's title and rights, whether they be those derived as the successor of the bankrupt or of the creditors, or be those independently conferred by the special provisions of the bankruptcy act itself, it is to be borne constantly in mind that the state law determines the efficiency of acts and transactions to effect the transfer of title of the property involved and also the time of the passing of title.

And the reason of the rule is obvious. The Bankrupt Act does not seek to give creditors through the trustee in bankruptcy any greater rights in each State than they would have without the Law, except where it confers upon the trustee the peculiar rights granted by its special provisions

relative to preferences, legal liens and fraudulent conveyances obtained within the four months preceding bankruptcy. The essential nature of the transfer or seizure, as to its effectiveness in each case to transfer title is, in pursuance of the same theory, left to the rules of property of the State, so that it is possible, even with regard to the peculiar rights conferred by the Act relative to preferences, legal liens and fraudulent conveyances within four months, that what will amount to a voidable bankruptcy preference in one State will not amount to a voidable bankruptcy preference in another State, and that what will amount to a void lien by legal proceedings in one State will not amount to a void lien in another State, the power of the particular transaction in each instance to effect a transfer of title, and, incidentally, the time such transfer of title shall be considered as having taken place and the kinds of property affected thereby, being left to the rules of property of each State. This is the basis of the distinction in *Thompson v. Fairbanks*, 13 A. B. R. 437, 196 U. S. 516.

Thus, it is quite possible in accordance with the rule of *Fairbanks v. Thompson*, that precisely the same facts in one State might lead to different results in another State, depending in great degree—even in regard to the peculiar titles conferred by the Bankruptcy Act itself as aforesaid—upon the effectiveness of those facts to transfer title in the several instances.

In other words, the nature of the transaction, that is to say, whether for instance, it amounts to a sale or bailment or pledge or mortgage or some other transfer of property, or whether sufficient delivery has been made to pass title, or whether recording or filing of an instrument be required and, if so, as to whom it will be void for lack of recording, etc., etc., is to be determined by State law and the Bankruptcy Law will take it as so determined.

However, after the State law has once settled the nature of the transaction, once determined whether the facts are sufficient to constitute a transfer of title, and, if so, the time the transfer takes effect and the property affected thereby, then the Bankrupt Act may forthwith step in and declare whether it is a voidable preference or a nullified legal lien.

§ 1140. Also Governs Validity, Except Where Peculiar Rights as to Preferences, Liens by Legal Proceedings, etc.—Conferred by Act Itself, Involved.—Where not affected by the peculiar provisions of the Bankruptcy Act, the law of the State will control in bankruptcy as to the validity of mortgages and other liens, and as to ownership and other interests in property.³

3. *Dodge v. Norlin*, 13 A. B. R. 176, 133 Fed. 363 (C. C. A. Colo.). Compare similar rule as to allowability of claims, ante, § 780. *Young v. Upson*, 8 A. B. R. 377, 115 Fed. 192 (D. C. N. Y.): Statute making presumptively fraudulent assignments of "goods and chattels" not accompanied with delivery, does not apply to assignments of book accounts as collateral.

In re *Tice*, 15 A. B. R. 97, 139 Fed. 58 (D. C. Pa.); In re *Beede*, 14 A. B. R. 697, 138 Fed. 441 (D. C. N. Y.); In re *Gosch*, 9 A. B. R. 613 (D. C. Ga.), re-

Thompson v. Fairbanks, 13 A. B. R. 442, 196 U. S. 516: "The Supreme Court of the United States, in determining the validity of a chattel mortgage covering after-acquired property, will accept as decisive the settled law of the State in which the mortgage was given, as established by the decisions of its highest Courts."

Hiscock v. Varick Bk., 18 A. B. R. 6, 206 U. S. 28: "The contracts of pledge were made, executed and to be performed in the State of New York, and the rights of the parties were governed by the law of that State. No preference under the Bankruptcy Act was alleged or proved, nor was there any allegation or proof that the pledge of the securities was in fraud of the rights of the creditors or trustee. The questions of the extent and validity of the pledge were local questions, and the decisions of the courts of New York are to be followed by this court."

Hewitt v. Berlin Machine Wks., 11 A. B. R. 709, 194 U. S. 296: "And the circuit court of appeals, adhering to that decision, held, in this case, that, inasmuch as by the New York statute, a conditional sale such as that in question was void only as against subsequent purchasers or pledgees or mortgagees in good faith, the district court was right and affirmed the judgment. We concur in this view."

In re Galt, 13 A. B. R. 579, 120 Fed. 443 (C. C. A. Ills.): "The law of the State of Illinois with respect to conditional sales, as expounded by its Supreme Court, runs counter to the great weight of authority, but has become a rule of property in that State, and we are bound to observe it."

In re Shirley, 7 A. B. R. 303, 112 Fed. 301 (C. C. A. Ohio): "The law of Ohio is controlling upon the Federal court in questions arising upon the validity of chattel mortgages given and filed in that State upon property therein."

In re Antigone Screen Door Co., 10 A. B. R. 359, 123 Fed. 249 (C. C. A. Wis.):

versed, on other grounds, in 12 A. B. R. 149, 126 Fed. 627 (C. C. A. Ga.); *In re Sheets Ptg. & Mfg. Co.*, 14 A. B. R. 668 (D. C. Ohio); *In re Dry Dock Co.*, 16 A. B. R. 328 (C. C. A. N. Y.).

In re Thackara Mfg. Co., 15 A. B. R. 258, 140 Fed. 126 (D. C. Pa.), where the lien of an execution levy was held in accordance with state law to be vitiated by use as security to compel payments by judgment debtor, rather than as satisfaction by sale and application of proceeds. *Morgan v. Nat'l Bk.*, 16 A. B. R. 644, 145 Fed. 466 (C. C. A. W. Va.). Also, in *re McArdle*, 11 A. B. R. 358, 126 Fed. 442 (D. C. Mass.); where it was held, that the mortgagee of the bankrupt's liquor license was not entitled to the proceeds of the sale of the liquor license sold by the trustee; since the police authorities refused to recognize the right to mortgage the license.

In re McKay, 16 A. B. R. 238 (D. C. N. Y.), as to whether income of a spendthrift trust passes to the trustee.

In re Noel, 14 A. B. R. 725, 137 Fed. 694 (D. C. Md.), wherein it was held that a State statute requiring mortgages to be recorded within six months of their execution cannot be evaded by making new mortgages every six months as renewals and keeping them all off the records, although none are more than six months old until replaced and although the last one is recorded within six months of its execution and before bankruptcy. Also, *Deland v. Miller*, 11 A. B. R. 744, 119 Iowa 368; *In re Josephson*, 8 A. B. R. 423 (D. C. Ga.), as to recording; *In re Kellogg*, 7 A. B. R. 623, 113 Fed. 120 (D. C. N. Y., affirming 6 A. B. R. 389); *In re Rogers & Woodward*, 13 A. B. R. 82, 132 Fed. 560 (D. C. Vt.); *In re Smith & Shuck*, 13 A. B. R. 105, 132 Fed. 301 (D. C. Iowa); *In re Mullen*, 4 A. B. R. 224, 101 Fed. 413 (D. C. Mass.); impliedly, *Allen v. Hollander*, 11 A. B. R. 756, 128 Fed. 159 (C. C. A. Mass.).

In re Greene, 13 A. B. R. 507, 134 Fed. 137 (D. C. Conn.): In this case it was held, that the formalities as to recording, etc., are to be determined by the law of the State where the property is located and not by that of the residence of the parties.

"We must accept as decisive the settled law of the State in which these chattel mortgages were given with respect to their validity."

In re First Nat'l Bk. of Canton, 14 A. B. R. 180, 135 Fed. 62 (C. C. A. Ohio): "In determining the validity of a chattel mortgage, this court will endeavor to follow the settled law of the State in which the transaction occurred."

In re Butterwick, 12 A. B. R. 536, 131 Fed. 371 (D. C. Pa.): "The trustee does not stand simply in the shoes of the bankrupt but is invested with the rights of his execution creditors. * * * This is to be determined by the local law."

In re Heckathorn, 16 A. B. R. 467, 144 Fed. 499 (D. C. Pa.): "This is a Pennsylvania transaction and is governed by local law. * * * The trustee in any such controversy is invested with the rights of creditors. * * * He is not limited, like an assignee under the State law, who is merely a representative of the debtor."

In re Car & Loco. Wks., 14 A. B. R. 333 (D. C. Ills.): "Whether the petitioner is entitled to delivery of the locomotives is one of Illinois law, the place where the work was to be done and the delivery made."

In re Worth, 12 A. B. R. 566, 130 Fed. 927 (D. C. Iowa): "The notes of the receiver, being Iowa contracts, and payable in Iowa, are to be governed by the laws of that State relating to usury."

In re Rodgers, 11 A. B. R. 90, 125 Fed. 169 (C. C. A. Ills., reversed, on other grounds, sub nom. Bank v. Title & Trust Co., 14 A. B. R. 102, 198 U. S. 280): "Although the rule is otherwise in other States with respect to conditional sales we are in duty bound to defer to the law of the State in respect of property within that State."

In re Miller & Brown, 14 A. B. R. 439, 135 Fed. 868 (D. C. Pa.): "In cases of this character, the local law governs, the title of the trustee being determined by the question whether the arrangement with regard to the property is good as against creditors. If it is, the property may be reclaimed; but if not, it cannot be."

Zartman v. Nat'l Bk., 16 A. B. R. 152, 159, 106 App. Div. 406: "If the law in this State coincided with that of the State of Vermont the authority (Thompson v. Fairbanks, supra) would be decisive, but as we have concluded otherwise the case is not applicable."

In re Cunningham v. Germ. Ins. Bk., 4 A. B. R. 367 (C. C. A. Ky.): "And the Court of Appeals of Kentucky, whose decisions in reference to the construction of the statutes of the State in relation to incorporations and the scope of the powers derived therefrom, we are required to follow, has recognized and adopted these propositions as applicable to the corporations of that State."

As decided by the highest court of the State.⁴

In re Andrae Co., 9 A. B. R. 135, 117 Fed. Rep. 561 (D. C. Wis.): "The law of a State as interpreted by its highest court governs the validity of the lien of chattel mortgage executed therein, if it does not fall within the preferences inhibited by the Bankruptcy Act."

In re Josephson, 8 A. B. R. 423, 116 Fed. 404 (D. C. Ga.): "As to a chattel mortgage not recorded, the State law not requiring recording and the mortgage

4. Thompson v. Fairbanks, 13 A. B. R. 437, 196 U. S. 516; In re Galt, 13 A. B. R. 579, 120 Fed. 64 (C. C. A. Ills.); In re Rogers & Woodward, 13 A. B. R. 82, 83, 132 Fed. 560 (D. C. Vt.); Dodge v. Norlin, 13 A. B. R. 176, 133 Fed. 363 (C. C. A. Colo.); Dolle v. Cassell, 14 A. B. R. 52, 135 Fed. 52 (C. C. A. Ohio, reversed, on other grounds, in York Mfg. Co. v. Cassell, 15 A. B. R. 633, 201 U. S. 344).

not being withheld from record by agreement not given to hinder, delay nor defraud creditors."

In *re Worth*, 12 A. B. R. 572, 130 Fed. 927 (D. C. Iowa): "The construction of the local statute by the highest court of the State is, under the familiar rule, controlling upon the federal courts of that State."

Contra, In *re Hull*, 8 A. B. R. 302, 115 Fed. 858 (D. C. Vt.): "The decision of the Supreme Court of the United States that a chattel mortgage under which the mortgagor has the right to sell and replace goods to be included in the mortgage is fraudulent as matter of law and void as to other creditors, must be followed by the bankruptcy court although the highest State court had determined that such a mortgage is good and valid." But see editor's note to In *re Hull* and compare the later case of In *re Rodgers & Woodward*, 13 A. B. R. 82, 132 Fed. 560 (D. C. Vt.).

Or as interpreted by the higher federal courts in previous decisions.⁵

And it is held in other cases that where the question depends upon a rule of distribution in equity or of preference among various claimants to funds in the hands of the court for distribution in accordance with equitable principles, the Federal decisions control, and not those of the State where the contract was made.⁶

Likewise the Federal Courts, administering the general law of equity, as accepted in England, and as generally accepted in this country, may recognize and establish an equitable claim within the purview of the general rules of equity, though, under the decisions of the State Court, it has no status under the local law.⁷

But where there is no authoritative rule on the subject in the State Law then the general rules of law will apply.⁸

In *re Peasley*, 14 A. B. R. 496, 137 Fed. 190 (D. C. N. H.): "Federal courts administer the general law of equity with respect to a subject upon which there is no positive or express rule of local law."

And it is held, in some cases, that where common law and not statutory law is involved, the Federal courts are not bound to follow the State decisions.⁹

And it is the law of the place of the performance of a contract that governs, not that of the place of its making.¹⁰

Thus the local law governs as to recording;¹¹ and other formalities such

5. Instance, In *re Burnham*, 15 A. B. R. 549, 140 Fed. 926 (D. C. N. Y.).

6. *Plow Co. v. McDavid*, 14 A. B. R. 653, 137 Fed. 190 (C. C. A. Mo.).

7. *James v. Gray*, 12 A. B. R. 573, 131 Fed. 401 (C. C. A. Mass.).

8. Compare, analogously, to same effect, and even more extreme, recognizing claims as provable under general equity rules where under local law they had no status, *James v. Gray*, 12 A. B. R. 573, 131 Fed. 401 (C. C. A. Mass.).

9. In *re Hess*, 14 A. B. R. 635, 138 Fed. 954 (Ref. Pa.).

10. *Union Trust Co. v. Bulkeley*, 18 A. B. R. 43 (C. C. A. Mich.).

11. Instance, In *re Greene*, 13 A. B. R. 504, 134 Fed. 137 (D. C. Conn.); In *re Josephson*, 8 A. B. R. 423, 116 Fed. 404 (D. C. Ga.).

Instance, In *re Rogers & Woodward*, 13 A. B. R. 82, 132 Fed. 560 (D. C. Vt.): Instrument sufficiently executed and recorded for chattel mortgage but

as those required by statute as to sales of merchandise in bulk.¹²

Also, local law governs as to pleading the statute of limitations as fraudulent real estate transfers;¹³ likewise, as to part performance taking transaction out of the statute of frauds;¹⁴ thus, as to chattel mortgages covering after-acquired property; the State law determining when the lien is to be considered as attaching, whether at the date of the chattel mortgage or of the acquisition of the property;¹⁵ thus, also, as to who are meant by the term "creditors" when applied to unrecorded liens under State statute; thus, as to the effect of withholding mortgages from record;¹⁷ and as to the validity of powers of sale in chattel mortgages.¹⁸

insufficiently for real estate mortgage does not fix lien on lessee's buildings : movable from premises where State law holds leaseholds to be real estate.

Instance, *In re Gosch*, 12 A. B. R. 149, 126 Fed. 627 (C. C. A. Ga., reversing 9 A. B. R. 610): Recording of conditional sale contract within 30 days of "date," under State statute, "date" being construed to be date of delivery of the property, not of the contract.

12. *Wright v. Hart*, 14 A. B. R. 565 (N. Y. Ct. App., reversing 13 A. B. 491).

13. *In re Dunavant*, 3 A. B. R. 41, 96 Fed. 542 (D. C. N. C.).

14. *In re Little River Lumber Co.*, 1 A. B. R. 482, 92 Fed. 585 (D. C. Ar. affirmed in 4 A. B. R. 313). Instance, conditional sales void in Pennsylvania. *In re Butterwick*, 12 A. B. R. 536, 131 Fed. 371 (D. C. Pa.).

15. *Thompson v. Fairbanks*, 13 A. B. R. 437, 196 U. S. 516.

16. See post, § 1209.

17. See post, § 1222.

18. See post, § 1258.

Other Instances of State Law Governing.—*In re Jacobs*, 1 A. B. R. 518 (C. La.): Louisiana Civil Code throwing burden of bona fides and value consideration upon mortgagee obtaining mortgage within three months of the mortgagor's failure.

In re McBride & Co., 12 A. B. R. 81, 132 Fed. 285 (Ref. N. Y.): "Accord a Satisfaction" upon disputed royalties decided in accordance with New York Law.

In re Kellogg, 7 A. B. R. 623 (D. C. N. Y., affirming 6 A. B. R. 389): Mortgage on real estate in New York is merely a chose in action, giving the mortgagee no legal estate in the land but merely a lien thereon as security for the debt.

Gove v. Morton Trust Co., 12 A. B. R. 297 (Sup. Ct. App. Div. N. Y.): Chattel mortgage not filed when made but filed within four months preceding bankruptcy of mortgagor and made in pursuance of prior agreement made at time money loaned, held void in New York. If any judgment creditor existed, though no levy had been made before bankruptcy.

Skillen v. Endelman, 11 A. B. R. 766, 39 Misc. 261, 79 N. Y. Supp. 413: Chattel mortgage statute requiring either immediate change of possession or immediate filing.

In re Goldman, 4 A. B. R. 100, 102 Fed. 122 (D. C. N. Y.): Expiration of bankrupt's right to redeem lands sold under execution cuts off the trustee's right of redemption in New York.

Young v. Upson, 8 A. B. R. 377 (D. C. N. Y.): Chose in Action (book accounts here) not within N. Y. Statute requiring assignments of "goods and chattels" to be accompanied with actual delivery.

In re Austin, 13 A. B. R. 136 (D. C. Hawaii): No attorney's lien on proceeds of judgment in Hawaii.

Blumberg v. Bryan, 6 A. B. R. 20, 107 Fed. 673 (C. C. A. Ala.): Wife may be adverse claimant in Alabama.

Hawk v. Hawk, 4 A. B. R. 463, 102 Fed. 679 (D. C. Ark.): Under State statute giving to wife, on divorce, one-third of husband's personalty, she has no interest in his bankrupt estate if she has not obtained a divorce and has not have its distribution enjoined until she can obtain a divorce.

§ 1141. **Intervention of Creditors' Rights Causing Modification of Rule That Bankrupt's Title Taken.**—In applying the principle of the trustee's succession to the bankrupt's title, it must not be forgotten that in many instances where it is said the bankrupt's title is the title taken, the rules of evidence as to the sufficiency of a transaction to effect a change of title, etc., will be different where creditors' rights have intervened from what it would be were the bankrupt's rights alone involved. This is notably so where the sufficiency or insufficiency of facts to constitute a delivery passing title is involved; what would amount to a sufficient delivery to pass title as against the bankrupt alone might be insufficient where creditors' rights have intervened.¹⁹

§ 1142. **Conversely, Subject of Trustee's Succession to Bankrupt's Title Involved Also in That of Succession to Creditors' Title.**—It is also to be borne in mind that the trustee "stands in the bankrupt's shoes" not only when the trustee has not succeeded to any other rights than those of the bankrupt himself but also frequently when he is subrogated to the creditors' rights; for oftentimes creditors, even levying creditors, must "stand in the bankrupt's shoes." Such being the case, there is more or less commingling of the apparently distinct subjects of the trustee's succession to the bankrupt's title and that of his succession to the creditors' rights which must not be lost sight of in considering particular instances of title.

§ 1143. **Subject of Trustee's Title and Rights Usually Somewhat Involved in Kindred Subject of What Kind of Assets Pass to Trustee.**—The subject of the title and rights of the trustee is necessarily to a greater or less extent involved in the subject of the kinds of assets passing to the trustee, and reference should be made to the cases under the latter subject in order to get a complete list of the cases involving the subject of the Trustee's Title and Rights.

DIVISION 1.

TRUSTEE'S TITLE AND RIGHTS AS SUCCESSOR TO BANKRUPT'S TITLE.

§ 1144. **First, Trustee's Title and Rights as Successor to Bankrupt's Title.**—The trustee succeeds to the bankrupt's title and stands in his shoes and takes the property, in cases unaffected by any fraud of the bankrupt towards creditors, in the same plight and condition in which the bankrupt held it and subject to all equities and rights imposed upon it in the hands of the bankrupt, except where there has been some conveyance or encumbrance of the

19. *Allen v. Hollander*, 11 A. B. R. 753, 128 Fed. 159 (D. C. Mass.); *In re Car & Locomotive Wks.*, 14 A. B. R. 331, 134 Fed. 919 (D. C. Ills.).

property or seizure of it by legal process, void as against the trustee by some provision of the Bankrupt Act.²⁰

Thompson v. Fairbanks, 13 A. B. R. 445, 196 U. S. 516: "Under that law [of 1867] it was held that the assignee in bankruptcy stood in the shoes of the bankrupt, and that 'except where, within a prescribed period before the commencement of proceedings in bankruptcy, an attachment has been sued out against the property of the bankrupt, or where his disposition of his property was, under the statute, fraudulent and void, his assignees take his real and personal estate, subject to all equities, liens, and encumbrances thereon, whether created by act or by operation of law.' *Yeatman v. New Orleans Sav. Inst.*, 95 U. S. 764. See, also, *Stewart v. Platt*, 101 U. S. 731; *Hauselt v. Harrison*, 105 U. S. 401. Under the present Bankrupt Act, the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or encumbrance of the property which is void as against the trustee by some positive provision of the Act."

York Mfg. Co. v. Cassell, 15 A. B. R. 637, 201 U. S. 344: "Under the provisions of the Bankrupt Act the trustee in bankruptcy is vested with no better right or title to the bankrupt's property than belonged to the bankrupt at the time when the trustee's title accrued. At that time, the right, as between the bankrupt and the York Manufacturing Co., was in the latter company to take the machinery on account of default in the payment therefor. The trustee under such circumstances stands simply in the shoes of the bankrupt and as between them he has no greater right than the bankrupt."

In re New York Economical Printing Co., 6 A. B. R. 615, 110 Fed. 514 (C. C. A. N. Y.): "The Bankrupt Act does not vest the trustee with any better right or title to the bankrupt's property than belongs to the bankrupt or to his creditors at the time when the trustee's title accrues. The present Act like all preceding bankrupt acts, contemplates that a lien good at that time as against the debtor and as against all of his creditors shall remain undisturbed. If it is one which has been obtained in contravention of some provision of the act, which is fraudulent as to creditors, or invalid as to creditors for want of record, it is invalid as to the trustee; and if it was one which was invalid as to some particular creditor, though valid as to other creditors, the trustee is in certain cases subrogated to the rights of that creditor."

In re Blake, 17 A. B. R. 669 (C. C. A. Mo.): "A trustee in bankruptcy, in

20. Bankr. Act, § 70 (a): "The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all. * * *"

Hewitt v. Berlin Machine Wks., 11 A. B. R. 709, 194 U. S. 296; *Humphrey v. Tatman*, 14 A. B. R. 75, 198 U. S. 91; (1867) *Donaldson v. Farwell*, 93 U. S. 631; (1867) *Casey v. Cavaroc*, 96 U. S. 467; *obiter*, *Linstroth Wagon Co. v. Ballew*, 18 A. B. R. 32, 149 Fed. 960 (C. C. A. Tex.); *Bank v. Rome Iron Co.*, 4 A. B. R. 448, 102 Fed. 755 (C. C. A. Ga.); (1867) *Hauselt v. Harrison*, 105 U. S. 401; *In re Cutting*, 16 A. B. R. 753, 145 Fed. 388 (D. C. N. Y.); *instance*, *Smith v. Mottley*, 17 A. B. R. 867 (C. C. A. Ohio); *In re Emslie*, 4 A. B. R. 128, 102 Fed. 291 (C. C. A. N. Y.); *In re Elmira Steel Co.*, 5 A. B. R. 487, 109 Fed. 456 (Special Master N. Y.); *partially*, *In re Kirby-Dennis Co.*, 2 A. B. R. 402, 95 Fed. 166 (C. C. A. Wis.); *partially*, *In re Standard Laundry Co.*, 8 A. B. R. 540, 116 Fed. 476 (C. C. A. Calif.).

cases unaffected by fraud, and wherein no attachments nor executions have been levied upon the property of the bankrupt stands in the shoes of the latter and has no higher nor better rights."

In re Garcewich, 8 A. B. R. 152, 115 Fed. 87 (C. C. A. N. Y.): "Under the present Bankrupt Act, as under previous bankrupt acts, the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or incumbrance of the property which is void as against the trustee by some positive provision of the act."

Compare [1841] Winsor v. McClellan, 2 Story 492, Fed. Cas. 17,887 (C. C. Mass): "Now the principle has been long established that the assignee in bankruptcy does not stand in the position of a purchaser, nor even in so favorable a position as an individual creditor may stand. 2 Story, Eq. Jur., §§ 1228, 1229, 1411; Langton v. Horton, 1 Hare 549, 563; Muir v. Schenck, 3 Hill, 228; Murray v. Lylburn, 2 Johns. Ch. 441, 443; Deac. Bankr. (Ed. 1827) pp. 320, 321, ch. 10, § 3. The assignee in bankruptcy takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities which exist against the same in the hands of the bankrupt. This was clearly laid down by Lord Hardwicke in Brown v. Heathcote, 1 Atk. 160, 162, and has ever since been adhered to, not only in courts of equity, but also, as the case of Leslie v. Guthrie, 1 Bing. N. C. 697, abundantly shown, at law. But I need not dwell upon this point, as it comes very fully under consideration in the case of Rand v. Winslow (not reported), at the last October term of the Circuit Court in Maine."

[1867] Yeatman v. Institution, 95 U. S. 764: "The established rule is that, except in cases of attachment against the property of the bankrupt within a prescribed time preceding the commencement of proceedings in bankruptcy, and except in cases where the disposition of property by the bankrupt is declared by law to be fraudulent and void, the assignee takes the title, subject to all equities, liens or encumbrances whether created by operation of law or by act of the bankrupt which existed against the property in the hands of the bankrupt."

[1867] Stewart v. Platt, 101 U. S. 731: "He takes the property in the same 'plight and condition' that the bankrupt held it. Winsor v. McLellan, 2 Story 492." "The assignee can assert, in behalf of the general creditors, no claim to the proceeds of the sale of that property which the bankrupts themselves could not have asserted in a contest exclusively between them and their mortgagee."

In re Great Western Mfg. Co., 18 A. B. R. 259, 152 Fed. 123 (C. C. A. Neb.): "A trustee in bankruptcy stands in the shoes of the bankrupt; and has no better title than he, in the absence of fraud, or of attaching or judgment creditors at the time of the filing of the petition."

Crosby v. Miller, 16 A. B. R. 814 (Ct. Appl. D. C.): "The assignee under the last Bankruptcy Act, and the trustee under the present bankruptcy law takes only such title as the bankrupt had subject to all equities. * * * There is no doubt that the trustee under the present law takes the title subject to all equities, liens or encumbrances, whether created by operation of law or by the bankrupt which existed against the property in the hands of the bankrupt."

[1841] Mitchell v. Winslow, 2 Story 630, Fed. Cases No. 9,673: "The present is a question between the assignee of a bankrupt, acting for the benefit of all the creditors, and the mortgagee, claiming title under his mortgage. * * * Now, it is most material to bear in mind under this aspect of the case, that it is a well-established doctrine that (except in cases of fraud), assignees in bankruptcy take only such rights and interests as the bankrupt himself had and

could himself claim and assert, at the time of his bankruptcy, and consequently they are affected with all the equities which would affect the bankrupt himself if he were asserting those rights and interests. This was expressly laid down by Lord Hardwicke in *Brown v. Heathcote*, 1 Atk. 160, 162, where he said: "The ground that the court go upon is this: that assignees of bankrupts, though they are trustees for the creditors, yet stand in the place of the bankrupt, and they can take in no better manner than he could."

In *re Hunt*, 14 A. B. R. 423, 139 Fed. 286 (D. C. N. Y.): "A trustee in bankruptcy is not a purchaser in good faith nor does he occupy the position of such a purchaser. He takes the property of the bankrupt in cases not affected by fraud in the same plight and condition the bankrupt held it as of the date of the adjudication and subject to all equities impressed on it in the hands of the bankrupt except in cases where there has been some conveyance or encumbrance void as against the trustee, made so by some positive enactment of the Bankruptcy Law. * * * He takes the title the bankrupt then had, no more, no less. Section 70, subd. (a). He takes title to such property charged with all liens and equities valid against the bankrupt unless, as just stated, they are made void or voidable by some positive provision of the Act. But in some cases liens may be avoided by the trustee that could not have been avoided by the bankrupt if the bankruptcy proceedings had not intervened."

Obiter, *Gove v. Morton Trust Co.*, 12 A. B. R. 300 (Sup. Ct. N. Y. App. Div.): "We suppose it will not be disputed that the trustee in bankruptcy takes the property of the bankrupt, subject to all liens and charges against it which might be enforced except for the provisions of the Bankruptcy Law."

In *re Foundry & Machine Co.*, 17 A. B. R. 293, 147 Fed. 828 (D. C. Wis.): "By this provision the trustee takes no better title than the bankrupt had. Liens which were at that time valid against the bankrupt remain undisturbed. * * * A trustee in bankruptcy is vested with no better right than the bankrupt. He does not take property sold to the bankrupt by conditional sale with a reservation of title in the vendor. The property is subject to all equities impressed upon it in the hands of the bankrupt. A ruling of the United States Circuit Court of Appeals that a seizure by the Bankruptcy Court operates as an attachment and an injunction for the benefit of all the persons having interests in the property was reversed in *York Mfg. Co. v. Cassell*, 201 U. S. 344, 353, 15 Am. B. R. 633."

Partially, In *re Kellogg*, 10 A. B. R. 10, 112 Fed. 52 (C. C. A. N. Y.): "The plaintiff, as trustee, stands in the shoes of the bankrupt. * * * He is the legal representative of the bankrupt."

Partially, In *re MacDonald*, 14 A. B. R. 804, 138 Fed. 463 (D. C. Conn.): "Upon adjudication, the trustee took title to all property which was then vested in the bankrupt, subject to all valid claims, liens and equities."

Partially, *Duplan Silk Co. v. Spencer*, 8 A. B. R. 375, 115 Fed. 689 (C. C. A. Penn.): "The trustee in bankruptcy, seeking by proceeding at law to enforce the title of the bankrupt to personal property so situated will be subject to all legal and equitable claims of others which exist against the bankrupt not in fraud of the Bankruptcy Law or the rights of general creditors."

Partially, In *re Nicholas*, 10 A. B. R. 296, 122 Fed. 299 (D. C. N. Y.): "The trustee in bankruptcy, on his appointment, took title to all the property on hand, subject to any rights of the appellant; but he took that title charged with all the liens, incumbrances and obligations existing against it, as they would have existed had the property remained in the hands of the bankrupt, and he took no other or greater interest in the property, and no other or greater rights under the contract, than the bankrupt himself had."

The trustee, then, is bound by all the acts, contracts and conditions of the bankrupt's ownership (except such as were invalid as against some creditor by State law, or are void by the peculiar provisions of the Bankruptcy Act itself relative to preferential and fraudulent transfers and liens by legal proceedings within the four months) and the trustee has all the rights and is entitled to make all the defenses the bankrupt has. He "stands (under such circumstances) in the shoes of the bankrupt."

Thus, if no circumstances exist that would have entitled a creditor, qualified under the State law, to avoid the contract of the bankrupt or the lien upon his property, or if such circumstances exist but no creditor exists who by State law was qualified to act, and if there was no preference nor lien obtained by legal proceedings nor fraudulent transfer within the four months preceding the bankruptcy, while the bankrupt was insolvent, then the trustee is bound and bound solely by the bankrupt's contracts and transfers, and this is so, no matter how onerous, how unprofitable, how improvident or unwise they may have been, being so bound to the same extent the bankrupt himself would have been bound. His claims and interests in property are subject to all defenses, counterclaims, offsets, liens and rights that would have been available against the debtor had the debtor not been adjudged bankrupt.

SUBDIVISION "A".

PROPERTY SUBJECT TO BANKRUPT'S SALES, MORTGAGES, CONVEYANCES, DELIVERIES, BAILMENTS, CONTRACTS AND EQUITABLE LIENS.

§ 1145. **Bound by Bankrupt's Sales, Mortgages, Deliveries, Bailments, Contracts and Equitable Liens.**—Thus, the trustee in laying claim to property is bound by the terms of the bankrupt's sales or conveyances of it and of his covenants, contracts and acts in relation thereto as construed by state law, no matter how onerous, unprofitable or unwise they may be—save and except, always, as the same may be in fraud of creditors' rights, or in contravention of statute.²¹

§ 1146. **Thus, as to Setting Apart or Delivery Sufficient to Pass Title to Goods Sold, Pledged or in Process of Manufacture; and "Warehousing."**—Thus, the trustee is bound by the sufficiency or insufficiency under State law of a setting apart by the bankrupt, or of other acts, to pass title to goods sold or manufactured;²² likewise, as to the sufficiency of facts to constitute "warehousing." Where a part of the bankrupt's premises is used as a storage warehouse, under the name of an independent

²¹. See post, § 1509.

²². Instance, tagging and setting apart of carriages at one end of wagon shop: *Allen v. Hollander*, 11 A. B. R. 755, 128 Fed. 159 (D. C. Mass.).

Instance, setting apart of locomotives sold but in process of repair: *In re Car & Locomotive Wks.*, 14 A. B. R. 331, 134 Fed. 919 (D. C. Ills.).

Instance, setting apart of lumber left on premises, under contract of sale of

warehouse corporation, and warehouse receipts are issued on the bankrupt's goods therein, such facts have been held to convey a good title to the pledgee, no fraud being shown.²³

§ 1147. **Bankrupt's Contracts of Purchase or Sale, and His Mortgages.**—Likewise, the trustee is bound by the terms of the bankrupt's purchases, sales and mortgages.

Thus, as to "sale and return," that is to say, a contract of sale with right to return;²⁴ likewise, as to purchases on approval.²⁵ Thus as to chattel mortgages and other securities to cover a floating balance of indebtedness;²⁶ and, as to the validity of chattel mortgages;²⁷ and, as to after-acquired property coming under a mortgage.²⁸ Again, in accordance with this rule the vendee's equitable interest in land for the purchase price already paid, will be protected where the seller's bankruptcy prevents the seller from completing the contract.²⁹ And the validity and effect of a deed of trust securing an annuity to a wife, where a decree for alimony was subsequently changed to such arrangement by agreement, although the parties subsequently remarried, was decided in accordance with the bankrupt's rights under State law; and accumulated interest thereon was held not allowable.³⁰ The question as to whether a certain transaction amounted to a "novation" or a mere substitution, where the purchaser of a plant took up an old mortgage and gave a new one covering more property, was decided in accordance with the bankrupt's rights under State law.³¹

Thus, also, as to whether chattel mortgages are void for indefiniteness has been decided in accordance with the state law.³²

season's output: *Stelling v. G. W. Jones Lumber Co.*, 8 A. B. R. 521, 116 Fed. 261 (C. C. A. Wis.).

Instance, setting apart of goods with statement that same sold, receipt being given: *In re Sherman Mfg. Co.*, 15 A. B. R. 740 (Ref. Mass.).

Instance, goods in process of manufacturer: *In re MacDonald*, 14 A. B. R. 797, 138 Fed. 463 (D. C. Conn.).

Instance, sale for cash, delivery by mistake without payment: *Southern Pine Co. v. Savannah Trust Co.*, 15 A. B. R. 618, 141 Fed. 802 (C. C. A. Ga.).

23. *Trust Co. & Warehouse Co. v. Wilson*, 14 A. B. R. 109, 198 U. S. 530; *Bush v. Export Storage Co.*, 14 A. B. R. 138 (U. S. C. C. Tenn.); *Love v. Export Storage Co.*, 16 A. B. R. 171 (C. C. A. Tenn.); contra, *Warehousing Co. v. Hand*, 16 A. B. R. 49, 143 Fed. 32 (C. C. A. Wis.); contra, *In re Rodgers*, 11 A. B. R. 79, 125 Fed. 691 (C. C. A. Ills., reversed for lack of summary jurisdiction sub nom. *Bk. v. Title & Tr. Co.*, 14 A. B. R. 102, 198 U. S. 280).

24. Instances, *In re Miller & Brown*, 14 A. B. R. 439, 135 Fed. 868 (D. C. Pa.); *In re Nicholas*, 10 A. B. R. 291, 122 Fed. 299 (D. C. N. Y.).

25. Instance, *In re Paper Co.*, 17 A. B. R. 121, 147 Fed. 858 (D. C. Pa.): After delay of year too late to deny title in bankrupt.

26. Instance, *In re Williams*, 9 A. B. R. 731, 120 Fed. 38 (D. C. Ga.).

27. Instance, *In re Foundry & Machine Co.*, 17 A. B. R. 291, 147 Fed. 828 (D. C. Wis.).

28. Instances, *In re Sentenne & Green Co.*, 9 A. B. R. 648, 120 Fed. 436 (D. C. N. Y.); *In re Adamant Plaster Co.*, 14 A. B. R. 815, 137 Fed. 251 (D. C. N. Y.); *In re Dry Dock Co.*, 16 A. B. R. 325 (C. C. A. N. Y.).

29. Instance, *In re Peasley*, 14 A. B. R. 496, 137 Fed. 190 (D. C. N. H.).

30. Instance, *Savage v. Savage*, 15 A. B. R. 599, 141 Fed. 346 (C. C. A. Va.).

31. Instance, *Long v. Gump*, 16 A. B. R. 501 (C. C. A. Ohio).

32. Instances, *In re Beede*, 11 A. B. R. 387, 120 Fed. 553 (D. C. N. Y.); *Davis v. Turner*, 9 A. B. R. 704, 120 Fed. 605 (C. C. A. N. Y.).

And the bankrupt estate has been held bound by the bankrupt's husband's signing of the bankrupt's name to a conditional sale contract, although the seller supposed himself to be dealing with the husband and that the signature was the husband's own signature.³³

And the assumption by the executive officers of a bankrupt corporation, of the functions of a board of directors with the acquiescence of the stockholders, has been held to bind the corporation and hence to bind the trustee.³⁴

§ 1148. **Bankrupt's Assumption of Mortgage.**—The trustee is bound by the bankrupt's assumption of mortgages.³⁵

§ 1149. **Estoppels against Bankrupt, Good against Trustee.**—Estoppels good against the bankrupt and not invalid against levying creditors had there been no bankruptcy, are good against the trustee.³⁶

§ 1150. **Specific Contractual Rights and Equitable Liens.**—Specific contractual rights (where recording is not necessary) and equitable liens and assignments created by the bankrupt are binding on the trustee, if binding on the bankrupt by State law and not void as in fraud of creditor's rights nor in contravention of the Bankruptcy Act.³⁷

Thus, where an owner had a right by specific contract to use material left on the premises by a building contractor, it was held, that title to the material did not pass to the trustee.³⁸ Again, an equitable lien on property already pledged (or already subject to an equitable lien by contract) and in a third person's hands, was held valid without delivery to the equitable lienors, the trustee's rights being held to be those of the bankrupt under State law.³⁹

So, also, the rights of the trustee, where a seller claims under contract a lien on timber not yet cut, have been decided in accordance with the rights of the bankrupt under State law.⁴⁰

Likewise, as to equitable assignments of insurance policies: the trustee stands in the bankrupt's shoes. Thus, an agreement made at time of com-

33. Instance, *In re Burkle*, 8 A. B. R. 542, 116 Fed. 766 (D. C. Conn.).

34. Instance, *Cunningham v. Germ. Ins. Bk.*, 4 A. B. R. 367, 101 Fed. 977 (C. C. A. Ky.).

35. Instance, *In re Standard Laundry Co.*, 8 A. B. R. 538, 116 Fed. 476 (C. C. A. Calif., affirming 7 A. B. R. 254): Chattel mortgage assumed by bankrupt, trustee may not question validity.

36. *In re Naylor Mfg. Co.*, 14 A. B. R. 284, 135 Fed. 206 (D. C. Pa.).

37. Instance, no equitable lien proved: *Rytenberg v. Schefer*, 11 A. B. R. 652, 131 Fed. 313 (D. C. N. Y.).

38. *Duplan Silk Co. v. Spencer*, 8 A. B. R. 367, 115 Fed. 689 (C. C. A. Penn., reversing 7 A. B. R. 563).

39. *McDonald v. Daskam*, 8 A. B. R. 543, 116 Fed. 276 (C. C. A. Wis., affirming *In re Veneer & Panell Co.*, 6 A. B. R. 275); *Bank v. Rome Iron Co.*, 1 A. B. R. 441, 102 Fed. 755 (U. S. C. C.).

40. Instance, *In re Muncie Pulp Co.*, 18 A. B. R. 60, 151 Fed. 732 (C. C. A. N. Y.).

mencing a line of credit, to procure and assign to the creditor policies of fire insurance covering the goods to be purchased therewith, operates as an equitable assignment and is valid in bankruptcy.⁴¹

In accordance with the rule, notice to debtors whose debts on book account have been assigned by the bankrupt as collateral security, has been held not essential to the validity of the assignment.⁴²

A verbal assignment by way of mortgage or pledge of book accounts to be after acquired, as security for present indorsements by relatives, has been upheld in accordance with the rights of the parties under State law.⁴³ And the validity of an assignment of future earned wages has been decided (at any rate as to wages earned before bankruptcy, where such assignment is not void as a preference) in accordance with general law.⁴⁴

Likewise, in accordance with the rule, a draft drawn by a landlord on his agent for future rents to be collected and discounted at bank, has been held to operate as an equitable assignment of the rents as they later accrued and to be good against the landlord's trustee in bankruptcy;⁴⁵ but notice at the bottom of invoices authorizing remittances to be made to third parties, has been held not to be an assignment of the accounts to such third parties.⁴⁶

A building contract stipulating against liens and duly recorded has been held, in accordance with the state law, to bar liens in Pennsylvania.⁴⁷ And, in accordance with general law, where an agreement for a contemporaneous mortgage has been disregarded and goods commingled, the seller has been held to have a lien on the entire mass for the purchase price.⁴⁸ And the wife's right to the proceeds of corporate stock held as security, where by State law she is incapacitated to contract, has been decided in accordance with State law.⁴⁹

Where equitable assignments have been made by bankrupts, of parts of funds due them as contractors from owners, the rights of the trustee have been decided in bankruptcy in accordance with the State law.⁵⁰ And in accordance with the main proposition, it has been held, that, where a bank has refused payment of the check of the bankrupt because of rumors of his

41. *Wilder v. Watts*, 15 A. B. R. 57, 138 Fed. 426 (D. C. S. C.); *In re Grandy & Son*, 17 A. B. R. 206 (D. C. S. C.); *McDonald v. Daskam*, 8 A. B. R. 543, 116 Fed. 276 (C. C. A. Wis.).

42. *Instance, Young v. Upson*, 8 A. B. R. 377, 115 Fed. 192 (D. C. N. Y.).

43. *Instance, Union Trust Co. v. Bulkeley*, 18 A. B. R. 35, 150 Fed. 510 (C. C. A. Mich.).

44. *Mallin v. Wenham*, 13 A. B. R. 210, 209 Ills. 252. Compare, *In re West*, 11 A. B. R. 782, 128 Fed. 205 (D. C. Oregon).

45. *In re Oliver*, 12 A. B. R. 694 (D. C. Tex.).

46. *Ryttenberg v. Schefer*, 11 A. B. R. 663, 131 Fed. 313 (D. C. N. Y.).

47. *Ludowici Tile Roofing Co. v. Penn. Inst.*, 8 A. B. R. 739 (D. C. Penn.).

48. *In re Hennis*, 17 A. B. R. 889 (Ref. N. Car.).

49. *Tucker v. Curtin*, 17 A. B. R. 354, 148 Fed. 929 (C. C. A. Mass.).

50. *Ludowici Tile Roofing Co. v. Penn. Inst.*, 8 A. B. R. 739 (D. C. Penn.); *Building contract*; *In re Hanna & Kirk*, 5 A. B. R. 127, 105 Fed. 587 (D. C. Penn.); *Building contract*; *In re Cramond*, 17 A. B. R. 23 (D. C. N. Y.); *Paving contract*.

failure, the holder has no right to the deposit but that the deposit should be ordered paid over to the trustee.⁵¹

§ 1151. **Forfeiture Clauses, Rent, etc.**—The trustee is bound by all forfeiture clauses and rent covenants of the bankrupt. Thus, where forfeiture of a long term lease was declared before bankruptcy for failure to build as covenanted, the trustee is bound by the forfeiture and the bankruptcy court will enforce it.⁵²

§ 1152. **Fixtures.**—The trustee takes the property under the bankrupt's rights as to fixtures.

Thus, it has been held by the bankruptcy court, in accordance with local or general law, that a steam engine was not a fixture; yet, if so, that the vendor's lien thereon was entitled to priority and that the trustee had no right thereto until the balance of the purchase price was tendered by him;⁵³ and the bankrupt vendee's right to remove alleged fixtures, where the contract preserves certain rights of removal, has been decided in accordance with local law.⁵⁴

§ 1153. **Disregarding Note and Suing on Original Consideration.**—The trustee may disregard a note and sue upon the original consideration, under the same circumstances and subject to the same limitations as the bankrupt.⁵⁵

SUBDIVISION "B".

MECHANICS' AND SUBCONTRACTORS' LIENS, LANDLORDS' LIENS AND SIMILAR LIENS.

§ 1154. **Mechanics' and Subcontractors' Liens, Landlords' Liens, etc.**—Mechanics' and Materialmen's liens and kindred liens, properly evidenced by affidavit duly filed and recorded, where requisite, and valid under the State law as against the bankrupt, in general are valid against the trustee, and he takes the property subject to them.⁵⁶

51. In re Grive, 18 A. B. R. 202, 151 Fed. 711 (D. C. Conn.).

52. Lindeke v. Associates Realty Co., 17 A. B. R. 215 (C. C. A. Minn.).

53. In re Smith, 9 A. B. R. 590 (D. C. R. I.).

54. Instance, In re Rodgers & Hite, 16 A. B. R. 401 (D. C. Pa.).

55. Instance, In re Jackson, 2 A. B. R. 501, 94 Fed. 797 (D. C. Vt.).

56. In re Beck Prov. Co., 2 N. B. N. & R. 532 (Ref. Ohio); In re Emslie, 2 N. B. N. & R. 922, 4 A. B. R. 126, 102 Fed. 291 (C. C. A. N. Y.), reversing 3 A. B. R. 282, 516; Howard v. Cunliff, 10 A. B. R. 71, 69 S. W. 737 (Mo. Ct. Appeals); George Carrol & Bros. Co. v. Young, 9 A. B. R. 645, 119 Fed. 576 (C. A. A. Penna.); In re Kirby-Dennis Co., 2 A. B. R. 402, 95 Fed. 116 (C. C. A. Wis., affirming 2 A. B. R. 218, 94 Fed. 818); In re Georgia Handle Co., 6 A. B. R. 472, 109 Fed. 632 (C. C. A. Ga.); In re Grissler, 13 A. B. R. 508, 136 Fed. 754 (C. C. A. N. Y.); Mott v. Wissler Min. Co., 14 A. B. R. 321, 135 Fed. 697 (C. C. A. Va.); In re Falls City Shirt Mfg. Co., 3 A. B. R. 437, 98 Fed. 592 (D. C. Ky.); In re Franklin, 18 A. B. R. 218, 226, 151 Fed. 642 (D. C. N. Car.); Crane Co. v. Smythe, 11 A. B. R. 747, 87 N. Y. Supp. 917; compare, In re Huston, 7 A. B. R. 95 (Ref. since District Judge N. Y.); In re Hobbs & Co., 16 A. B. R. 544, 145

§ 1155. **Mechanics' Liens, etc., Not Liens Obtained by Legal Proceedings nor Preferences.**—A mechanic's lien is not a lien obtained through legal proceedings;⁵⁷ nor is it a lien given by way of preference to secure a pre-existing debt.⁵⁸ It comes under none of the heads of those liens or conveyances or transfers that are void as against the trustee in bankruptcy. Such a mechanic's lien, rather, comes under the exception of clause (d) of § 70, which provides that

"Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law if record thereof is necessary in order to impart notice, shall not be affected by this act."⁵⁹

This becomes plain when one comes to reflect upon the nature of a mechanic's lien. A mechanic's lien arises by operation of law and, according to the law of most, if not all, of the States, begins with the first stone laid, the first nail driven or the first load of material dumped on the premises. It grows as the edifice grows and expands with the development of the work. It is there in an inchoate form from the beginning. It is essentially and clearly a lien arising upon a presently passing consideration, and must be assumed to have been in the contemplation of the parties engaged in the work both as owners and contractors. Therefore, such a lien is one given and accepted upon a present consideration, and is within the meaning of clause (d) of § 70, and is not a preference nor a lien obtained

Fed. 211 (C. C. A. W. Va.); obiter, *Moore v. Green*, 16 A. B. R. 653, 145 Fed. 480 (C. C. A. W. Va.); impliedly, *In re Cramond*, 17 A. B. R. 22 (D. C. N. Y.).

Instance, *In re Gosch*, 9 A. B. R. 613, 126 Fed. 627 (D. C. Ga., reversed on other grounds, in 12 A. B. R. 149): Sash and door factory not a "saw-mill" within Georgia lien law.

Instance, *Chauncey v. Dyke Bros.*, 9 A. B. R. 444, 119 Fed. 1 (C. C. A. Ark., affirming, with modifications, *In re Matthews*, 6 A. B. R. 96, 109 Fed. 603): Mechanics' liens in Arkansas having priority over prior mortgage unless prior mortgage given to raise money to make the improvements for which mechanics' liens arose.

Instance, *In re West Norfolk Lumber Co.*, 7 A. B. R. 648, 112 Fed. 759 (D. C. Va.): Mechanics' liens and liens for supplies under Virginia Supply Lien Act not liens upon proceeds of insurance policies, upon burning of buildings unless by express agreement.

Instance, *In re Oconee Mill Co.*, 6 A. B. R. 475, 109 Fed. 866 (C. C. A. Ga.): Special lien for furnishing machinery and repairs for mill, under Georgia law is entitled to preferential payment from proceeds of sale of the property, provided the claim of lien was duly recorded.

57. See post, subject of "Nullification of Liens Obtained by Legal Proceedings," § 1437. See *Howard v. Cunliff*, 10 A. B. R. 71, 69 S. W. 737 (Mo. Ct. App.); *In re Beck Prov. Co.*, 2 N. B. N. & R. 532 (Ref. Ohio); *In re Emslie*, 4 A. B. R. 126, 102 Fed. 291 (C. C. A. N. Y., reversing on this point 3 A. B. R. 282 and 516); *In re Kirby-Dennis Co.*, 2 A. B. R. 402, 95 Fed. 116 (C. C. A. Wis., affirming 2 A. B. R. 218, 94 Fed. 818); *Mott v. Wissler Min. Co.*, 14 A. B. R. 321 (C. C. A. Va.); obiter, *Moore v. Green*, 16 A. B. R. 653 (C. C. A. W. Va.); *In re Cramond*, 17 A. B. R. 32 (D. C. N. Y.).

58. *In re Emslie*, 4 A. B. R. 126, 102 Fed. 291 (C. C. A. N. Y., affirming on this point 3 A. B. R. 282, 516); *In re Beck Prov. Co.*, 2 N. B. N. & R. 532 (Ref. Ohio).

59. *In re Kirby-Dennis Co.*, 2 A. B. R. 402, 95 Fed. 116 (C. C. A. Wis., affirming 2 A. B. R. 218).

by legal proceedings. Moreover, such a lien is good against creditors under the State law, so is not void for want of record. Even if the bankruptcy of the owner occurs before the lien affidavit is filed, the lien is not affected so long as the affidavit is filed at some time within the statutory period for filing, although after the adjudication of bankruptcy; for the filing of the affidavit does not create the lien—it simply prolongs it. It is merely the statutory notice of the lien that must be given some time within the prescribed period after the completion of the work in order to continue the notice after the newness of the work itself has worn off and ceased to be a reminder of the rights of those who have done the work.⁶⁰

Obiter, *Moore v. Green*, 16 A. B. R. 653, 145 Fed. 211 (C. C. A. W. Va.): "The lien here claimed is analogous to that of mechanics, materialmen, sub-contractors, etc., which class of liens have been respected and enforced under the present Bankruptcy Act. They are given a lien by statute, but to be effective the same must be preserved and secured within a prescribed period by filing such claims, duly perfected, etc., for recordation in the designated court of the State. Being thus entitled to this inchoate lien, taking the steps to secure the benefit thereof within four months of bankruptcy has in every instance, so far as we are advised, been held not to be the taking of legal proceedings in contravention of the Act, but merely doing the necessary thing—taking the essential step—to secure the existing right under the statute. In this class of claims, by reason of the work done or supplies furnished under the agreement between the parties, the statute declares that there shall exist for the amount due a lien, upon the same being properly perfected. In this case the lien arises pursuant to the statute, and under and by virtue of the deed or transfer of the debtor's property, he being an insolvent, provided the creditors assail the same within the statutory period. To say that they should lose the right thus secured by taking the step necessary to secure or make the same effective would be an anomaly. This view of the law has been steadily maintained by the bankruptcy courts under the present Bankruptcy Act."

§ 1156. **Subcontractors' Liens.**—The same rules would apply in most States to subcontractors' liens.⁶¹ But, owing to the phraseology of the statutes in some of the States, such liens have sometimes there been held not to arise and progress coincidently with the furnishing of the work or materials but to arise only upon the filing of the statutory affidavit or notice, not being merely perpetuated thereby. In such States the subcontractor has, in some decisions, been held to be a mere general creditor until he files his affidavit nor notice, and the assignment of the contract by the head contractor would therefore defeat his rights. Therefore, in those States, if the head contractor is adjudicated bankrupt before the subcontractor has filed his affidavit or notice, the subcontractor may, by these holdings, lose his

60. *In re Beck Prov. Co.*, 2 N. B. N. & R. 532 (Ref. Ohio); *Howard v. Cunliff*, 10 A. B. R. 74 (Ct. of Appeals, Mo.); *Crane Co. v. Smythe*, 11 A. B. R. 747, 87 N. Y. Supp. 917.

61. *Fehling v. Goings*, 13 A. B. R. 154 (Court of Chancery, N. J.); *Crane Co. v. Smythe*, 11 A. B. R. 747, 94 App. Div. 53, 87 N. Y. Supp. 917; *In re Grissler*, 13 A. B. R. 508, 136 Fed. 754 (C. C. A. N. Y., rejecting its own former decision, *In re Roeber*, 9 A. B. R. 303, 121 Fed. 449); impliedly, *In re Cramond*, 17 A. B. R. 22 (D. C. N. Y.); *In re Huston*, 7 A. B. R. 92 (Ref. N. Y.).

opportunity to get a lien. Such was the holding in the case of *In re Roeber*, 9 A. B. R. 303, 121 Fed. 449 (C. C. A. N. Y.), reversing 9 A. B. R. 778; itself reversed in *In re Grissler*, 13 A. B. R. 510, 136 Fed. 754 (C. C. A. N. Y.).⁶²

However, the Court of Appeals of New York State⁶³ held the same as the District Court, in this case, and it would therefore seem that the U. S. C. C. A. in 9 A. B. R. 303, is in error, the federal courts being bound to follow the decisions of the highest court of the State as to the validity of liens created by the state statutes. Subsequently the Circuit Court of Appeals corrected the error, in the case *In re Grissler*, 13 A. B. R. 510, 136 Fed. 754 (C. C. A. N. Y.).

§ 1157. **Liveryman's Liens.**—So, also, a liveryman's lien is not a lien created by legal proceedings nor dependent thereon, and is preserved in bankruptcy.⁶⁴

§ 1158. **Artisan's Liens.**—So, also, an artisan's lien is unaffected.⁶⁵

§ 1159. **Statutory Liens for Supplies.**—A lien given by statute for supplies furnished a manufacturing concern is unaffected by the Bankruptcy Act.⁶⁶

§ 1160. **Landlord's Lien or Priority for Rent.**—A landlord's lien for rent or right to priority of payment on distribution is not impaired by the Bankruptcy Act.⁶⁷

62. Contra, *In re Huston*, 7 A. B. R. 92 (Ref. N. Y.).

63. *Kane Co. v. Kenney*, 174 N. Y. 69, 9 A. B. R. 778, cited in *In re Grissler*, 13 A. B. R. 508, 136 Fed. 754 (C. C. A. N. Y.).

64. *In re Pratesi*, 11 A. B. R. 319, 126 Fed. 588 (D. C. Del.); *In re Mero*, 12 A. B. R. 171, 128 Fed. 630 (D. C. Conn.).

65. *In re Lowensohn*, 4 A. B. R. 79 (D. C. N. Y.); Instance, *In re Rich*, 17 A. B. R. 893 (Ref. Ohio), taking from artisan's possession by deceit pending hearing on bankruptcy petition—lien still inheres.

66. *In re West Norfolk*, 7 A. B. R. 648, 112 Fed. 767 (D. C. Va.); *Mott v. Wissler Mfg. Co.*, 14 A. B. R. 321, 135 Fed. 697 (C. C. A. Va.); *In re Falls Shirt Mfg. Co.*, 3 A. B. R. 437 (D. C. Ky.).

67. *In re Belknap*, 12 A. B. R. 326, 129 Fed. 646 (D. C. Pa.); *In re Lines*, 13 A. B. R. 318, 133 Fed. 803 (D. C. Pa.); *In re Hoover*, 7 A. B. R. 330 (D. C. Pa.); *In re Mitchell*, 8 A. B. R. 324, 116 Fed. 87 (D. C. Del.); *In re Falls City Shirt Mfg. Co.*, 3 A. B. R. 437, 98 Fed. 592 (D. C. Ky.); impliedly, *Carriage Co. v. Solanas*, 6 A. B. R. 221 (D. C. La.); *In re Byrne*, 3 A. B. R. 268 (D. C. Iowa); impliedly, *In re McIntyre*, 16 A. B. R. 80 (D. C. W. Va.); *Wilson v. Penn. Trust Co.*, 8 A. B. R. 169, 114 Fed. 742 (C. C. A. Penn.); *In re Goldstein*, 2 A. B. R. 603 (Ref. Pa.); inferentially, *In re Hayward*, 12 A. B. R. 264, 130 Fed. 720 (D. C. Penn.); *In re Gerson*, 2 A. B. R. 170 (D. C. Penn.).

But compare, *Goldman v. Smith*, 2 A. B. R. 104 (Ref. Ky.), that claim of lien must be asserted in some manner within the statutory period notwithstanding intervening bankruptcy.

But compare, *In re Duble*, 9 A. B. R. 121, 117 Fed. 795 (D. C. Penn.), that the landlord may not distrain after tenant's adjudication as bankrupt but must rely wholly on priority under § 64 (b) (5).

And compare, *In re Wheaton Restaurant Co.*, 16 A. B. R. 294 (D. C. Penn.).

And compare, *In re Jefferson*, 2 A. B. R. 206, 93 Fed. 948 (D. C. Ky.), that the lien falls with the release of the contract obligation of the tenant.

Instance, where lien held on facts not to exist, *Des Moines Nat'l Bk. v. Council B. Sav.*, 18 A. B. R. 109, 150 Fed. 301 (C. C. A. Iowa).

But this subject is complicated by the fact that landlords are frequently also given priority by State law, upon distribution of an insolvent's estate, regardless of lien, and that this priority is preserved in bankruptcy by § 64 (b) (5). Therefore, these cases come with equal propriety both under the subject of the preservation of State priorities under Bankruptcy Distribution, and under the subject of the preservation of liens.⁶⁸

§ 1161. Mechanics' Liens, etc., Valid Though Affidavit or Stop Notice Not Filed Till after Bankruptcy of Owner, etc.—A mechanic's or materialman's lien may be valid, even if the affidavit is not filed until after bankruptcy of the owner of the building.⁶⁹

So, also, a lien given by statute for supplies furnished to a manufacturing or mining concern necessary to its operation, may be valid even if the statutory memorandum is not filed until after the bankruptcy, if it be filed within the statutory limitation of time.⁷⁰

To same effect, *In re West Norfolk Lumber Co.*, 7 A. B. R. 648, 112 Fed. 767 (D. C. Va.): "The time of furnishing the supplies is the period as of which the materialman is given a right of lien. The right to claim the lien arises under this section and may be enforced at any time after the supplies are furnished; but may be lost by failure to comply with some provisions of the Act giving the right. The only requirement is that the lien shall be filed within the 90 days after the last item of the bill becomes due and payable. If the claim is filed within that time, the lien secured relates to the time the supplies were furnished."

Likewise, the subcontractor may serve his "stop" notice or file his affidavit after the bankruptcy of the owner;⁷¹ or after the bankruptcy of the head contractor.⁷²

§ 1162. Failure to Perfect Lien in Statutory Form Invalidates.—Failure to perfect the lien according to the statutory formalities invalidates it.⁷³

68. Also, see post, subjects of "Distribution," and "Claims Entitled to Priority under State Laws," § 2204.

69. See note to *In re Kirby-Dennis Co.*, 2 A. B. R. 218 (D. C. Wis.); impliedly, *In re Beck Prov. Co.*, 2 N. B. N. & R. 532 (Ref. Ohio); *In re Lillington Lumber Co.*, 13 A. B. R. 153, 132 Fed. 886 (D. C. N. Car.); *In re Georgia Handle Co.*, 6 A. B. R. 472, 109 Fed. 632 (C. C. A. Ga.); *Kane Co. v. Kinney*, 9 A. B. R. 778, 174 N. Y. 69, 66 N. E. 619, followed in *In re Grissler*, 13 A. B. R. 509, 135 Fed. 754 (C. C. A. N. Y.). See ante, this subdiv., § 1155.

70. *Mott v. Wissler Mfg. Co.*, 14 A. B. R. 321, 135 Fed. 697 (C. C. A. Va.).

71. *In re Grissler*, 13 A. B. R. 508, 136 Fed. 754 (C. C. A. N. Y., reversing its own former ruling in *In re Roeber*, 9 A. B. R. 303, 121 Fed. 449); inferentially, *Fehling v. Goings*, 13 A. B. R. 134 (N. J. Chan.); *In re Lillington Lumber Co.*, 13 A. B. R. 153, 132 Fed. 886 (D. C. N. Car.).

72. *Crane Co. v. Smythe*, 11 A. B. R. 747, 87 N. Y. Supp. 917. In this case it was, in substance, held, that the adjudication in bankruptcy of a building contractor did not cut off the right of a materialman to file and enforce his lien for materials used in the building.

73. *In re Cramond*, 17 A. B. R. 34 (D. C. N. Y.).

In *re Kerby-Dennis Co.*, 2 A. B. R. 402, 95 Fed. 166 (C. C. A. Wis., affirming 2 A. B. R. 218, 94 Fed. 818): "The apparent inequity, in now denying equity, results, however, not from the Bankruptcy Act, but from their own omission to comply with the requirements of the local law. Both of these classes of laborers had liens upon the product upon which their labor was expended. The one class preserved their liens by proper proceedings, which the statute giving the lien rendered imperative for its continuance. The other class omitted so to do, and, therefore, by force of the statute which created the right, the lien is gone forever."

In *re Franklin*, 18 A. B. R. 220, 151 Fed. 642 (D. C. N. Car.): "Before a creditor can claim a lien given by a State statute he must comply with the statute and perfect his lien. It is only after so perfected that they are protected by the court of bankruptcy or by any other court."

§ 1163. But Where Perfecting Dependent on Legal Proceedings, Bankruptcy May Dispense with Same.—But where the perfecting or maintaining of a lien is by state statute made to depend upon the taking of certain legal proceedings within a specified time, the lien is absolved from such condition by the bankruptcy itself, the property thereby being already in custodia legis such that interference with it would be contempt.⁷⁴ Or perhaps the Bankruptcy Court would permit such proceedings to be taken with limitation of their effect, in analogy to the rule prevailing in regard to exempt property and to perfecting rights against a surety on a bankrupt's appeal bond.⁷⁵

§ 1164. Consent to Payment of Fund into Bankruptcy Court.—Where all parties in lien cases consent that the owner may pay the fund into the bankruptcy court, the litigation may be there carried on.⁷⁶

§ 1165. Without Consent, State Court Proper Forum, Where Contractor or Subcontractor Bankrupt.—Without consent of the parties, the state court is the proper forum, where it is not the owner but the contractor or subcontractor who is the bankrupt, and where third parties claim interests;⁷⁷ likewise, where the bankrupt was owner but sold the property before the bankruptcy, the purchaser retaining part of the purchase price to take care of liens that might be filed.⁷⁸

The rule would be different were it specific property that was thus placed by a stake holder in the custody of the bankruptcy court without the consent of the other parties. In that event the actual possession of the prop-

74. In *re Falls City Shirt Mfg. Co.*, 3 A. B. R. 437, 98 Fed. 592 (D. C. Ky.).

75. Compare, also, the opinions of the various courts on the subject of rents of mortgaged premises of the bankrupt accruing after adjudication, § 656, et seq.

76. Impliedly, In *re Huston*, 7 A. B. R. 92 (Ref. N. Y.).

77. Obiter, impliedly, In *re Adamo*, 18 A. B. R. 181, 151 Fed. 716 (D. C. N. Y.); impliedly, In *re Grissler*, 13 A. B. R. 508, 136 Fed. 754 (C. C. A. N. Y.); apparently contra, In *re Hobbs*, 16 A. B. R. 544 (D. C. W. Va.). See post, "Conflict of Jurisdiction."

78. In *re Greater American Exposition*, 4 A. B. R. 486, 102 Fed. 986 (C. C. A. Neb.).

erty would carry with it jurisdiction to adjudicate the rights of all persons claiming interests therein, whether such persons would consent to the jurisdiction or not. But the subject of subcontractors' liens is a debt—the owners' debt to the head contractor, which they have sought to appropriate by filing their subcontractors' claims; and, no matter if the owner pay an equivalent sum of money into the bankruptcy registry, he cannot thereby, discharge his debt without the subcontractors' consent, and the subcontractors may still sue him for the debt garnisheed by their statutory affidavits, notwithstanding. The bankruptcy court is not an appropriate forum for suing the owner for a mere debt, jurisdiction to recover debts—unless they be the money expression of the value of property belonging to the estate—not existing in the bankruptcy courts, even by the Amendment of 1903.⁷⁹

SUBDIVISION "C".

DOWER RIGHTS, CURTESY RIGHTS AND WIDOW'S AND CHILDREN'S DISTRIBUTIVE SHARE.

§ 1166. **Inchoate Dower Right Unimpaired.**—The inchoate right of dower is unimpaired and the trustee takes the property subject to the right becoming consummate through the bankrupt's death.⁸⁰

§ 1167. **Widow's and Children's Allowances.**—The widow's and children's allowances are a charge upon the property coming into the bankruptcy court if the bankrupt dies after the petition is filed and before adjudication.⁸¹ But if he die after adjudication, the widow and children have no right to allowance out of the bankrupt assets.⁸²

SUBDIVISION "D".

SELLER'S RIGHT OF STOPPAGE IN TRANSITU AND TO RESCIND SALE.

§ 1168. **Right of Stoppage in Transitu Unimpaired.**—The seller's right of stoppage in transitu is unimpaired;⁸³ likewise his right to retain possession, in case of the buyer's insolvency, before transit begins.⁸⁴

⁷⁹. See post, "Jurisdiction over Adverse Claimants," § 1682; also, § 1697.

⁸⁰. In re Slack, 7 A. B. R. 121, 111 Fed. 523 (D. C. Vt.). Compare to same effect, inferentially, In re Shaeffer, 5 A. B. R. 248, 105 Fed. 352 (D. C. Pa.); obiter, Bush v. Export Storage Co., 14 A. B. R. 143, 136 Fed. 918 (U. S. C. C. Tenn.).

⁸¹. Bankr. Act, § 8.

⁸². In re McKenzie, 15 A. B. R. 679, 142 Fed. 383 (C. C. A. Ark.); compare, In re Seabolt, 8 A. B. R. 57, 113 Fed. 766 (D. C. N. Car.); contra, In re Parschen, 9 A. B. R. 389, 119 Fed. 976 (D. C. Ohio); contra, In re Newton, 10 A. B. R. 345, 122 Fed. 103 (D. C. Conn.); compare, In re Slack, 7 A. B. R. 121, 111 Fed. 523 (D. C. Vt.). See ante, "Death of Bankrupt before Adjudication but after Petition Filed," § 99.

⁸³. In re Burke & Co., 15 A. B. R. 495 (D. C. Pa.); obiter, In re Portuondo Co., 14 A. B. R. 337, 135 Fed. 592 (D. C. Pa.).

⁸⁴. In re Portuondo Co., 14 A. B. R. 337, 135 Fed. 592 (D. C. Penn.).

§ 1169. **Right to Rescind for Fraud Unaffected.**⁸⁵—The seller's right to rescind a sale for fraudulent misrepresentations, etc., is unaffected.

In all these instances, the seller's substantive rights are unimpaired and he may retake the property if he makes out a case, although he may be obliged to seek his forum in the bankruptcy court itself rather than in the State Courts;⁸⁶ and the seller may retain the property, if he has on these grounds, before the bankruptcy, already rescinded the sale and obtained possession.⁸⁷

SUBDIVISION "E".

SET-OFF AND COUNTERCLAIM.

§ 1170. **Right of Set-Off and Counterclaim Unimpaired.**—The right of set-off and counterclaim is as valid against the trustee as it would have been against the debtor had he not gone into bankruptcy, and the trustee takes choses in action and other property subject thereto.⁸⁸

85. See post, "Reclamation Proceedings," § 1879, et seq. In re Hamilton Furniture & Carpet Co., 9 A. B. R. 65 (D. C. Ind.); In re Marco Gany, 4 A. B. R. 576 (D. C. N. Y.); In re Weil, 7 A. B. R. 90, 111 Fed. 897 (D. C. N. Y.); In re O'Connor, 9 A. B. R. 18, 114 Fed. 777 (D. C. Ga.); In re Patterson & Co., 10 A. B. R. 748, 125 Fed. 562 (D. C. Tex.); impliedly, In re Russell & Birkett, 5 A. B. R. 608 (Ref. N. Y.).

Instances where right of rescission denied: Failure to make out case because of seller as admission or proof that the seller would have sold the goods anyway, the fraudulent misstatement being denied by the bankrupt. In re Davis, 7 A. B. R. 276, 112 Fed. 294 (D. C. N. Y.).

No tender back of the consideration received. In re Murphy Barbee Shoe Co., 11 A. B. R. 434 (Ref. Mo.).

No reliance on the false statement. In re Epstein, 6 A. B. R. 60, 109 Fed. 878 (D. C. Ark.); In re Roalswick, 6 A. B. R. 752, 110 Fed. 639 (D. C. Mont.).

86. *Bloomingtondale v. Empire Rubber Mfg. Co.*, 8 A. B. R. 74, 114 Fed. 1016 (D. C. N. Y.).

87. Impliedly, *Lumber Co. v. Taylor*, 14 A. B. R. 231, 137 Fed. 321 (C. C. A. Pa.): And if the property has been sold by the bankruptcy court after he filed his petition claiming them he may recover the proceeds of the sale.

In re Weil, 7 A. B. R. 90, 111 Fed. 897 (D. C. N. Y.): Should he not be entitled to recover their entire value if the sale was made without his consent?

But if the goods have become component parts of a structure not separable therefrom without manifest injury to the whole, the right to retake the specific goods is lost. *Lumber Co. v. Taylor*, 14 A. B. R. 231, 137 Fed. 321 (C. C. A. Pa.): "The lumber purchased of defendant having only entered into the partial construction of the barges, no right of title thereto could be acquired by defendant's rescission of the sale for fraud."

Pleadings and Practice in Asserting Such Right.—See post, "Reclamation of Goods on Rescission of Sales for Fraudulent Misrepresentations," § 1879.

88. Bankr. Act, § 68: "In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be * * * allowed or paid."

Stich v. Berman, 15 A. B. R. 467 (Sup. Ct. N. Y. App. Div.); *Norfolk & W. Ry. Co. v. Graham*, 16 A. B. R. 615, 145 Fed. 610 (C. C. A. W. Va.).

The origin and history of this provision is discussed by Chief Justice Holmes of Massachusetts, since of the United States Supreme Court, in *Morgan v. Wordell*, 6 A. B. R. 167, 59 N. E. 1037 (Sup. Ct. Mass.). Compare, also, discussion in *In re Becher Bros.*, 15 A. B. R. 228, 139 Fed. 366 (D. C. Penn.).

§ 1171. Which Governs: Law of State, United States, or of Forum.—But except as the Bankruptcy Act itself amplifies or modifies the right, the exercise of the right, it has been held, will be subject to the rules regarding set-offs prevailing in the federal courts of the district rather than to those prevailing in the State Courts.

Trustee v. Mercantile Nat'l Bk., 14 A. B. R. 128, 182 N. Y. 264 (N. Y. Court of Appeals): "As the bankrupt law operates throughout the whole country, the construction to be given to it must necessarily be uniform throughout all the States, not varying with the local law. Therefore, in construing it we should be governed by the law of set-offs as it prevails in the Federal Courts and not in our own."

But ought not the rule rather be, that, except as the bankrupt act itself modifies or amplifies it, the rule of the court, State or Federal, wherein the remedy is applied should prevail?

§ 1172. Mutual Demands Must Have Existed before Bankruptcy.—Counter demands arising after bankruptcy cannot be offset. The mutual demands must have existed before the filing of the petition.⁸⁹

§ 1173. Offset Need Not Be Due, if Owning.—The debt sought to be set off need not be due at the date of adjudication, if owing.⁹⁰

§ 1174. And May Be Only Contingently Owning.—Indeed a debt not due and only contingently owing may be set-off: as the bankrupt's liability

^{89.} Instances held not proper set-offs, because not existing before bankruptcy: Right of contribution in favor of bankrupt's cosurety where the obligation is taken up by the cosurety after the filing of the petition has been held not capable of being used as an offset against a claim of the estate against the comaker or cosurety existing at the time of the filing of the petition. *In re Bingham*, 2 A. B. R. 223, 94 Fed. 796 (D. C. Vt.).

Quære, *In re Dillon*, 4 A. B. R. 63, 100 Fed. 627 (D. C. Mass.), but this is doubtful law since such comaker's or cosurety's right of contribution for obligations paid after the bankruptcy is held to be a provable debt.

But the set-off contemplated by the Bankruptcy Act arising in case of mutual debts or mutual credits between the estate of the bankrupt and a creditor includes a liability that has accrued to a trustee which had not accrued to the bankrupt, when the claim and liability are mutual. *In re Crystal Springs Bottling Co.*, 4 A. B. R. 55, 100 Fed. 265 (D. C. Vt.).

No set-off of the testator's claim against his own bankrupt legatee where the testator's death occurs after the legatee's bankruptcy, nor although the will provides for set-off of debts against legacies. *In re Woods*, 13 A. B. R. 240, 133 Fed. 82 (D. C. Penn.).

^{90.} *In re Ph. Semmer Glass Co., L't'd*, 14 A. B. R. 25, 135 Fed. 77 (C. C. A. N. Y., affirming 11 A. B. R. 665), where the bankrupt's deposit in bank was permitted to be offset against his liability as endorser on paper not yet matured, but maturing within the year after the adjudication. *Seammion v. Kimball*, 92 U. S. 362; *N. Y. County Bk. v. Massey*, 11 A. B. R. 42, 192 U. S. 138 (The facts of this case are explained in *Carr v. Hamilton*, 129 U. S. 249, and in *Scott v. Armstrong*, 146 U. S. 499); *Frank v. Mercantile Nat'l Bk.*, 14 A. B. R. 125 (N. Y. Court Appeals); *In re Kalter*, 2 N. B. N. & R. 264; *Union Nat'l Bk. v. McKay*, 2 N. B. N. & R. 913; *In re Little*, 6 A. B. R. 681, 110 Fed. 621 (D. C. Iowa); *Myers v. Dickerson*, 5 A. B. R. 595 (D. C. N. Y.); *Ex parte Howard Nat'l Bk.*, Fed. Cases No. 6,764; *In re City Bk. of Sav.*, Fed. Cases No. 2,742.

But in the event the debt is not due, no affirmative judgment may be rendered thereon in favor of the defendant. *Frank as Tr. v. Mercantile Nat'l Bk.*, 14 A. B. R. 125 (N. Y. Court App.).

as endorser on discounted paper not yet due may have offset against it a deposit in bank.⁹¹

§ 1175. **Separate Debt Not to Be Offset against Joint Debt.**—A separate debt cannot be set off against a joint debt in bankruptcy unless growing out of a transaction or under circumstances establishing that the joint credit had been given on account of the separate debt.⁹²

§ 1176. **Mutual Debts to Be between Same Parties, in Same Capacity.**—But the mutual debts must be between the same persons, in the same capacity: thus, a debt due from a bankrupt to an individual partner of a solvent firm, may not be offset against a debt due the estate from the partnership;⁹³ although if the firm were insolvent a different rule might prevail.⁹⁴ Nor may an individual claim be set off against a trustee's claim.

Western Tie & Timber Co. v. Brown, 13 A. B. R. 451, 196 U. S. 502: "Now, as we have seen, from the facts found, it must be that the agreement between Harrison and the tie company obligated the latter, when it made the deduction from pay rolls, to remit to Harrison the amount of such deduction, irrespective of the account between itself and Harrison. It follows that as to such deductions the tie company stood towards Harrison in the relation of a trustee, and therefore, the case was not one of mutual credits and debts, within the meaning of the set off clause of the bankrupt law."

§ 1177. **Offset Must Be Provable Debt.**—A set-off or counterclaim is not allowable in favor of any debtor of the bankrupt which is not itself provable against the estate; the claim sought to be set off must itself be a "provable debt."⁹⁵ Thus, a surety paying part of his principal's debt after

91. In re Ph. Semmer Glass Co. Lim., 11 A. B. R. 665 (Ref. N. Y.); obiter, *Morgan v. Wordell*, 6 A. B. R. 170 (Sup. Jud. Ct. Mass.).

92. In re Crystal Springs Bottling Co., 4 A. B. R. 55, 100 Fed. 265 (D. C. Vt.); *Gray v. Rollo*, 18 Wall 629; 21 L. Ed. 927.

93. In re Shults, 13 A. B. R. 84 (D. C. N. Y.).

94. Obiter, In re Shults, 13 A. B. R. 84, 132 Fed. 573 (D. C. N. Y.); In re Crystal Springs Bottling Co., 4 A. B. R. 55, 100 Fed. 265 (D. C. Vt.).

95. Bankr. Act, § 68 (b) (1). In re Ph. Semmer Glass Co. L't'd, 11 A. B. R. 665 (Ref. N. Y.), affirmed in 14 A. B. R. 25, 135 Fed. 77 (C. C. A. N. Y.).

In re Bingham, 2 A. B. R. 223, 94 Fed. 796 (D. C. Vt.), wherein it was held, a comaker of the bankrupt could not offset his right to contribution arising by his taking up the obligation since the bankruptcy against a claim existing against the comaker at the time of the filing of the petition. Such comaker's only right was to present the creditor's claim and take the dividends thereon. Compare, *quare*, In re Dillon, 4 A. B. R. 63, 100 Fed. 627 (D. C. Mass.).

Morgan v. Wordell, 6 A. B. R. 167, 178 Mass. 350, 59 N. E. 1037. In this case it was held, that a claim on which a preference had been received was on that account not a "provable" debt and yet might be used as an offset, if a "mutual credit." The right to offset the claim itself on which a preference had been received was denied on the ground that it was not "provable" against the estate, but the claim in the form of a claim for indemnity was finally permitted to be offset, as being a mutual credit, the payment by the surety giving rise evidently to a claim in his own right for indemnity or contribution as to which he would not need to stand in the creditor's shoes.

In re Becher Bros., 15 A. B. R. 228, 139 Fed. 366 (D. C. Penn.): In this case the trustee in bankruptcy of a tenant was denied the right to offset against the landlord's claim for unpaid rent damages in tort for negligently permitting water to flow into tenant's premises.

adjudication of the principal, may offset the amount paid, by way of pro tanto subrogation to the creditor's claim, against a debt due from the surety to the estate.⁹⁶ But "provable" means provable in nature, not that it may be proved; thus, claims not filed within the year are nevertheless provable, though too late to be "proved."⁹⁷

§ 1178. But Claim Not Proved within Year, Nevertheless Available as Offset.—But claims that are provable in their nature and have not been "proved" [filed] within the year are nevertheless available as offsets, if otherwise proper offsets.

Norfolk & W. Ry. Co. v. Graham, 16 A. B. R. 615, 145 Fed. 610 (C. C. A. W. Va.): "But we think it cannot be true that such failure to prove the claim to the excess in the bankruptcy proceeding leaves the company in the position of a mere debtor. Statutes of limitation are strictly construed. But even if the rule of construction were otherwise, the language of the clause in question and its context seem to us to plainly limit its effect to proceedings in bankruptcy. In enacting the Bankrupt Act, Congress could have had no reason for requiring a debtor creditor, whose claim against exceeds his debt to the bankrupt, to prove the excess and insist upon his rights as a creditor of the estate. And hence there was no reason for penalizing such failure by imposing a limitation upon the right of a person thus situated who does not wish to prove and claim the excess. The full purpose of § 57n seems to us to be subverted when it is held that the limitation applies merely to claims sought to be asserted in the bankruptcy proceeding.

"We think the true solution of the question before us is that the counterclaim which may be set off in an independent action brought by the trustee is (subject to the restrictions of § 68b, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3,450]) one that is provable in its nature, and need not necessarily be one that has been, or may yet be, proved in the bankruptcy proceeding."

§ 1179. Voidable Preference Not Available as Offset in Favor of Preferred Creditor.—Preferences voidable under § 60 (a) and (b) are not allowable as set-offs to claims against preferred creditors on the ground that the preferences and the claims constitute mutual debts and credits.⁹⁸

⁹⁶. In re Dillon, 4 A. B. R. 63, 100 Fed. 627 (D. C. Mass.).

⁹⁷. *Norfolk & W. Ry. Co. v. Graham*, 16 A. B. R. 615, 145 Fed. 610 (C. C. A. W. Va.); *Morgan v. Wordell*, 6 A. B. R. 167, 178 Mass. 350, 59 N. E. 1037.

⁹⁸. *Western Tie & Timber Co. v. Brown*, 12 A. B. R. 111 (C. C. A. Ark., reversed in 13 A. B. R. 447, 196 U. S. 502.

In re Ryan, 5 A. B. R. 396, 105 Fed. 760 (D. C. Ills.): Although this was a case of so-called "innocent preferences" before the Amendment of 1903, yet the principle involved is the same. "Cash payments on account (if received with reasonable grounds of belief, etc.) made within four months before the filing of the bankruptcy petition, are not included in the mutual debits and credits contemplated by § 68."

Compare, as to deposit in bank being available as offset, *New York Co. Nat. Bk. v. Massey*, 11 A. B. R. 42, 192 U. S. 138 (reversing In re Stege, 8 A. B. R. 515, 116 Fed. 342, C. C. A. N. Y.); also, compare to same effect, In re Elsasser, 7 A. B. R. 215 (Ref. Penn.). Also, compare, inferentially, *Morgan v. Wordell*, 6 A. B. R. 167, 59 N. E. 1037 (Mass. Sup. Jud. Ct.); also, compare, obiter, In re Dillon, 4 A. B. R. 63, 100 Fed. 627 (D. C. Mass.); also, compare, In re Scherzer, 12 A. B. R. 451, 130 Fed. 631 (D. C. Iowa).

Inasmuch as a debt upon which a preference has been given is nevertheless "provable" though not "allowable" (as noted, ante, § 632), the refusal to permit the offsetting of preferences must either be based on general principles of statutory construction or upon the interpretation of the term "provable" here to mean "allowable."

§ 1180. But General Deposits in Bank Available to Bank as Set-Off, if Not Applied by Bankrupt on Bank's Claim.—A deposit in bank has been held not to be a preference, even when applied upon a debt with full knowledge of the debtor's insolvency, where it had been made as a general deposit, subject to check and creating the relation of debtor and creditor, and not made as a deposit to pay a particular debt; and, therefore, not being a preference, to be available as an offset to the debtor's note or other debt.⁹⁹

New York County Nat. Bk. *v.* Massey, 11 A. B. R. 42, 192 U. S. 138, reversing *In re Stege*, 8 A. B. R. 515 (C. C. A. N. Y.), where the United States Supreme Court held, that a deposit of money within four months of bankruptcy, with a bank upon an open account subject to check, may be set off. The Supreme Court say: "A deposit of money to one's credit in a bank does not operate to diminish the estate of the depositor, for when he parts with the money he creates at the same time, on the part of the bank, an obligation to pay the amount of the deposit as soon as the depositor may see fit to draw a check against it. It is not a transfer of property as a payment, pledge, mortgage, gift or security. It is true that it creates a debt, which, if the creditor may set it off under § 68, amounts to permitting a creditor of that class to obtain more from the bankrupt's estate than creditors who are not in the same situation, and do not hold any debts of the bankrupt subject to set-off. But this does not, in our opinion, operate to enlarge the scope of the statute defining preferences so as to prevent set-off in cases coming within the terms of § 68a. If this argument were to prevail it would, in cases of insolvency, defeat the right of set-off recognized and enforced in the law, as every creditor of the bankrupt holding a claim against the estate subject to reduction to the full amount of a debt due the bankrupt receives a preference in the fact that to the extent of the set-off he is paid in full."

But doubtless if the deposit is not all the time subject to check, but is a deposit against the particular debt, it would amount to a method of paying

99. *In re Elsasser*, 7 A. B. R. 215 (Ref. Penn.); *In re Myers & Charni*, 3 A. B. R. 760 (D. C. Ind.); *In re Hill Co.*, 12 A. B. R. 221, 120 Fed. 315 (C. C. A. Ills.); *In re Little*, 6 A. B. R. 681, 110 Fed. 621 (D. C. Iowa); *In re Scherzer*, 12 A. B. R. 451, 130 Fed. 631 (D. C. Iowa); *In re Shults*, 13 A. B. R. 84 (D. C. N. Y.); *West v. Bk. of Lahoma*, 16 A. B. R. 733 (Sup. Ct. Okla.); *In re Medarsivine Carriage Co.*, 17 A. B. R. 897 (Ref. Ohio).

In re Meyer & Dickinson, 5 A. B. R. 593, 106 Fed. 828 (D. C. N. Y.): Bank issuing due bill on depositor's account in ignorance of depositor's general assignment, may, on bankruptcy of depositor later occurring, recover the due bill from the trustee for purposes of offset against unmatured notes of depositor. To same effect (1867), *In re Petrie*, 7 N. B. Reg. Fed. Cases 11,040; to same effect (1867), *Blair v. Allen*, 3 Dill 101, Fed. Cas. 1,483; to same effect (1867), *Scammon v. Kimball*, 92 U. S. 362; compare, also, to same effect (1867), *Traders' Bk. v. Campbell*, 14 Wall. 87; contra, *In re Keller*, 6 A. B. R. 621, 109 Fed. 118 (D. C. Iowa).

the debt by "transfer" and would be a preference, if other conditions also existed.

But where a bank holds ample security for the debt at the time of bankruptcy, but, by delay the security depreciates and leaves a deficit, it will not be allowed to offset the deposit.¹⁰⁰

And the date of the filing of the bankruptcy petition is the date at which the provability is to be tested.¹⁰¹

§ 1181. Creditor Selling Claim to Effect Indirect Preference by Purchaser's Using Claim as Offset to Purchase Price.—A creditor of the bankrupt cannot avoid the prohibitions of the Act against preferences by assigning his claim to one who in turn uses it as part of the purchase price of assets bought from the bankrupt.¹⁰²

§ 1182. Offsets Purchased with Knowledge of Insolvency or to Use as Offset, etc., Not Allowable.—But a set-off or counter-claim is not allowable in favor of any debtor of the bankrupt which was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy.¹⁰³

Western Tie & Timber Co. v. Brown, 13 A. B. R. 452, 196 U. S. 502: "To allow the set-off under the circumstances disclosed would violate the plain intentment of the inhibition contained in clause b (2) of § 68. * * * That is to say, whether or not the trust relation was engendered, the result would still be that the tie company, within the prohibited period, and with knowledge of the insolvency of Harrison, acquired the claims of the latter against the laborers, with a view to using the same by way of payment or set-off, so as to obtain an advantage over the other creditors which it was not lawfully entitled to do."

Compare, *Hackney v. Hargreaves Bros.*, 13 A. B. R. 164 (Neb. Sup. Ct.): "A creditor of a bankrupt cannot escape the consequences of the Bankrupt Act regarding unlawful preferences by assigning his account to a purchaser

100. *Steinhardt v. Nat'l Bk.*, 18 A. B. R. 86, 52 Misc. (N. Y.) 464.

Bank may be allowed to amend its claim by deducting deposits by way of offset, *In re Myers & Charni*, 3 A. B. R. 760 (D. C. Ind.).

Offset against claim upon an endorsement by bankrupt before maturity of paper. *In re Ph. Semmer Glass Co. L't'd*, 11 A. B. R. 665 (Ref. N. Y.), affirmed in 14 A. B. R. 25, 135 Fed. 77 (C. C. A. N. Y.).

No offset by retaining to apply on own claim against bankrupt storekeeper funds deducted from employees' wages to pay storekeeper for supplies furnished the employees; one relation is a trust relation, the other individual. *Western Tie & Timber Co. v. Brown*, 13 A. B. R. 447, 196 U. S. 502, reversing 12 A. B. R. 111.

101. *Steinhardt v. Nat'l Bk.*, 18 A. B. R. 87, 52 Misc. (N. Y.) 465.

102. *Hackney v. Hargreaves Bros.* (*Raymond Bros. Clark Co.*), 13 A. B. R. 164, 68 Neb. 634 (Sup. Ct. Neb.).

103. Bankr. Act, § 68 (b) (2). *In re Shults*, 14 A. B. R. 378 (D. C. N. Y.), affirming 13 A. B. R. 84, which was a case of assigning claims for the purpose of obtaining offset after bankruptcy, or at any rate, with knowledge of the impending bankruptcy. *Obiter, Stich v. Berman*, 15 A. B. R. 467 (N. Y. Sup. Ct. App. Div.).

of the property of the bankrupt, under an arrangement whereby such purchaser offers to assume the liability and satisfy such account, contingent upon the purchase of the bankrupt's property and where in the sale of such bankrupt's property as a part of the consideration, such purchaser agrees to and assumes such liability, and reserves from the purchase price an amount sufficient to satisfy the same.

"In such a case the legal effect of the transaction is to appropriate out of the assets of the bankrupt the amount required and used in the satisfaction of such claim by the purchaser assuming the liability, and other essential elements not being lacking, an unlawful preference in favor of such creditor results therefrom."

But the provision is only applicable where the trustee is one of the parties. It is not applicable as between strangers upon claims assigned and claims owing by the bankrupt.¹⁰⁴

§ 1183. Burden of Proof of Propriety of Offset on Debtor.—The burden of proof is on the debtor seeking to use the offset to show it was received before the bankruptcy and without knowledge of the impending bankruptcy.¹⁰⁵

§ 1184. Supervening Insolvency Destroying Right of Offset.—Wherever supervening insolvency would destroy the right of set-off, had there been no proceedings in bankruptcy, it will likewise destroy it in bankruptcy.

§ 1185. Thus, Stockholding Creditor May Not Offset against Unpaid Subscriptions.—Thus a stockholder who is also a creditor may not offset his claim against his liability for unpaid stock subscription, after the corporation becomes insolvent.

In re Albert Goodman Shoe Co., 3 A. B. R. 200, 96 Fed. 949 (D. C. Penna.): "He cannot be permitted to diminish a fund that he is under obligation to increase and thereby deprive the other creditors of money that it would be his duty immediately to return. If the Company had continued to be solvent, it might or might not have been at liberty, under all circumstances, to set off his subscription against his liability on the note. That point is not now involved for the fact of insolvency has supervened, and this creates a situation in which the rights of other creditors must also be considered. It would be highly inequitable to allow him to apply a part of the assets for his own benefit, until he has put into the funds money that he justly owes. He must cease to be a debtor before he can enforce his claim as a creditor."

Perhaps such instances should rather come under the subject of the creditor's title taken by the trustee.

104. Stich v. Berman, 15 A. B. R. 467 (N. Y. Sup. Ct. App. Div.).

105. In re Shults, 14 A. B. R. 378, 135 Fed. 623 (D. C. N. Y.).

§ 1186. **Supervening Insolvency Creating Right of Offset.**—On the other hand wherever supervening insolvency would give rise to the right of set-off, the right is enforceable in bankruptcy.¹⁰⁶

Schuler v. Israel, 120 U. S. 606: "While it may be true that in a suit brought by Israel against the bank it could, in an ordinary action at law, only make plea of set-off of so much of Israel's debt to the bank as was then due, it could by filing a bill in chancery in such a case, alleging Israel's insolvency, and that, if it was compelled to pay its own debt to Israel, the debt which Israel owed it, but which was not due would be lost, be relieved by a proper decree in equity."

§ 1187. **No Judgment against Trustee for Excess of Offset.**—But such claims can only be used for set-off—no affirmative judgment for any excess can be rendered against the trustee;¹⁰⁷ although of course the excess may be presented as a claim against the estate.

§ 1188. **Likewise, No Judgment in Bankruptcy Proceedings against Claimant Where Estate's Claim Exceeds Claimant's.**—Likewise there may be no judgment in the bankruptcy proceeding against the claimant where the estate's offset exceeds the creditor's claim. The trustee must seek his remedy by plenary action.¹⁰⁸

SUBDIVISION "F."

APPLICATION OF PAYMENTS.

§ 1189. **Application of Payments.**—The rights of the parties as to the application of payments remain unimpaired by the debtor's subsequent bankruptcy, and the trustee takes title subject thereto.¹⁰⁹

106. Compare, to same effect, *Carr v. Hamilton*, 129 U. S. 249. In *re Meyer & Dickinson*, 5 A. B. R. 593 (D. C. N. Y.): In this case a bank paid money by due bill in ignorance of a depositor's general assignment; the court held, that it might on the subsequent bankruptcy of the depositor, recover the due bill for the purpose of offset, even in Pennsylvania whose laws prohibit, under other circumstances, the offsetting of deposits against unmatured notes.

Special Deposit by Tenant with Landlord to Secure Covenants of Lease, on Landlord's Subsequent Bankruptcy to Be Applied According to Terms of Deposit and Not to Be Used as Offset to Rents Accruing after Bankruptcy.—Where a tenant deposited a fund with his landlord for the faithful performance of the covenants of the lease during its entire term, same to be applied on the last six months' rent, the landlord's bankruptcy will not entitle the tenant to offset the deposit against rents accruing after bankruptcy and before completion of the term of the lease. In *re Banner*, 18 A. B. R. 62, 149 Fed. 636 (D. C. N. Y.).

107. *Trustee v. Mercantile Nat'l Bk.*, 14 A. B. R. 125 (N. Y. Court App.).

108. See post, general subject of "Jurisdiction over Adverse Claimants," ch. XXXIII; analogously, *Fitch v. Richardson*, 16 A. B. R. 835, 147 Fed. 196 (C. C. A. Mass.). Similarly, § 764.

109. Instance, application of payments, *Hoffschlaeger Co. v. Young Nap*, 12 A. B. R. 517 (D. C. Hawaii): Account with partnership continued with its successor, a corporation, payments applied by creditors to partnership claim.

Instance, In *re Porterfield*, 15 A. B. R. 11, 138 Fed. 192 (D. C. W. Va.): Agent and principal: Tax collector, short in his accounts, receipts his own tax bills, nevertheless held, his taxes paid and moneys in his hands turned over to his

§ 1190. **Thus, Creditor's Right to Apply in Absence of Debtor's Instructions.**—The right of a creditor to apply payments as he may desire, in the absence of instructions from the debtor before the application, is unimpaired by the debtor's subsequent bankruptcy; although thereby the creditor is permitted to apply them on an unsecured debt rather than on a secured debt.¹¹⁰

But if he apply payments received during the four months period before bankruptcy (limited for avoiding preferences) on wages earned before the statutory period of three months (limited for priority of wages), thus leaving a priority claim for the full amount earned within the statutory three months, he must surrender the preferential payments, for the payments were not made on claims entitled to priority.¹¹¹ And a creditor may not apply a payment upon an unpaid check where the check was given before and the payment made after, a new invoice of goods was sold on credit to the insolvent, so as to enable him to offset the invoice against the payment as being a "new credit" subsequent to a preference.¹¹²

§ 1191. **Application to Be as Equity Requires, in Absence of Directions.**—The duty of the court to apply payments as equity may require in the absence of direction from the debtor in the first instance and of the creditor in the second instance, is unimpaired.¹¹³ And application will be made by a court of equity, first upon the interest and then upon the principal;¹¹⁴ and first upon the prior indebtedness, even though thereby the creditor is enabled to claim right of offset for unsecured new credits.¹¹⁵

SUBDIVISION "G."

SPECIFIC DEFENSES AND RIGHTS OF BANKRUPT TO WHICH TRUSTEE SUCCEEDS.

§ 1192. **Trustee Succeeds to Bankrupt's Defenses and Rights.**—On the other hand, the trustee is entitled to urge all the rights and all the defenses the bankrupt might have urged had there been no bankruptcy.

principal could not later be applied by the court first on other taxes then on his own.

Instances, *In re Johnson*, 11 A. B. R. 138 (D. C. N. Car.); *In re King Co.*, 7 A. B. R. 619, 113 Fed. 110 (D. C. Mass.); *In re Bailey*, 7 A. B. R. 26, 112 Fed. 406 (D. C. Vt.); *Zartman v. Hines*, 6 A. B. R. 139 (Ref. N. Y.); *In re Tanner*, 6 A. B. R. 196 (D. C. N. Y.).

110. *In re Johnson*, 11 A. B. R. 138 (D. C. N. Car.); *Hoffschlaeger v. Young Nap*, 12 A. B. R. 517 (D. C. Hawaii).

111. *In re King Co.*, 7 A. B. R. 619, 113 Fed. 110 (D. C. Mass.).

112. *In re Bailey*, 7 A. B. R. 26, 112 Fed. 406 (D. C. Vt.).

113. *Zartman v. Hines*, 6 A. B. R. 139 (Ref. N. Y.); *In re Tanner*, 6 A. B. R. 196 (Ref. N. Y.).

114. *Zartman v. Hines*, 6 A. B. R. 139 (Ref. N. Y.).

115. *In re Tanner*, 6 A. B. R. 196 (Ref. N. Y.).

Likewise Application of Securities to Be Made in Accordance with Contract.—Where a fund has been deposited as security with one subsequently becoming bankrupt such fund is to be applied in accordance with the contract and the bankruptcy will not permit a change of such application. Impliedly, *In re Banner*, 18 A. B. R. 61, 149 Fed. 936 (D. C. N. Y.).

§ 1193. May Interpose Bar of Statute of Limitations.—The trustee may (and it is indeed his duty to) plead the statute of limitations.¹¹⁶

In *re Wooten*, 9 A. B. R. 247, 250, 118 Fed. 670 (D. C. N. Car.): "It is the duty of the trustee to plead the statute of limitations, especially when required by creditors whom he represents."

Impliedly, In *re Lorillard*, 5 A. B. R. 603, 604, 107 Fed. 677 (C. C. A. N. Y.): "Two objections are urged to the allowance of these claims, (a) that they were outlawed at the time the petition was filed. * * * What written statement will be sufficient to take a case out of the operation of the statute of limitations is regulated by the provisions of the New York Code of Civil Procedure. Discussions of the general subject found in the opinions of the Federal courts and of courts of other States are, therefore, unpersuasive. The statute of New York, as interpreted by the New York courts, is controlling."

It is also held, that any creditor may interpose the defense;¹¹⁷ but this rule would properly apply only where no trustee had yet been appointed, or where the creditor's special rights, as distinguished from the rights of all the other creditors, are involved.

§ 1194. May Urge Statute of Frauds.—So, also, he may plead or interpose the Statute of Frauds.¹¹⁸

§ 1195. May Plead Illegality.—So, also, the trustee may plead and urge illegality.¹¹⁹

§ 1196. May Plead Usury.—So, also, he may plead usury although this defense is usually said to be one purely personal to the debtor.¹²⁰

Obiter, In *re Worth*, 12 A. B. R. 566, 130 Fed. 927 (D. C. Iowa): "It would seem that the legal representatives of the borrower might interpose the objection of usury the same as he might do. Whether the trustee in bankruptcy of this estate is such a representative and might interpose such objection for the purpose of preventing the allowance of illegal interest on this claim, need not be determined, for he is not interposing such objection."

In *re Stern*, 16 A. B. R. 510, 144 Fed. 956 (C. C. A. Iowa): "Under the Statutes of Iowa and the provisions of the Bankruptcy Act of 1898, § 57 (a), the defense of usury is as available to the debtor's trustee in bankruptcy as to the debtor himself."

116. In *re Farmer*, 9 A. B. R. 19, 116 Fed. 763 (D. C. N. Car.).

117. In *re Lafferty & Bros.*, 10 A. B. R. 290, 122 Fed. 558 (D. C. Penn.). See also, other instances, In *re Lorillard*, 5 A. B. R. 602, 107 Fed. 677 (C. C. A. N. Y.).

118. Instance, *Zartman v. Hines*, 6 A. B. R. 139 (Ref. N. Y.).

119. Impliedly, *Marden v. Phillips*, 4 A. B. R. 566 (D. C. Mass.).

120. In *re Kellogg*, 10 A. B. R. 7 (C. C. A. N. Y., affirming 7 A. B. R. 623), 113 Fed. 120 (D. C. N. Y., affirming 6 A. B. R. 389); In *re Miller*, 9 A. B. R. 274, 118 Fed. 360 (D. C. Ga.); In *re Wilde's Sons*, 13 A. B. R. 217 (D. C. N. Y.). Instance, *Ryttenberg v. Schefer*, 11 A. B. R. 652, 131 Fed. 313 (D. C. N. Y.): In this case a commission of 2½ per cent. on net sales, for guaranteeing consignments was held not usurious. Instance, In *re Sawyer*, 12 A. B. R. 269, 130 Fed. 384 (D. C. Mass.).

But creditors may not interpose the objection, for they do not succeed to the bankrupt's personal privileges, although the trustee does so succeed.

In *re Worth*, 12 A. B. R. 566, 130 Fed. 927 (D. C. Iowa): "It is the settled rule in Iowa that under these sections the plea or defense of usury is personal to the borrower and cannot be interposed by a stranger to the contract. * * * The objecting creditors in the present case are in no manner parties or privies to the alleged usurious contract of the Sheldon State Bank, in no manner connected therewith, and cannot therefore be heard to interpose the objection of usury thereto."

And the burden of proof rests on the trustee pleading the usury.¹²¹

§ 1197. May Redeem Mortgaged Property.—So, also, he may exercise the bankrupt's right to redeem mortgaged property;¹²² and may do so even after the creditors' time for redemption conferred by State statute had expired, if it is still within the bankrupt's statutory time, although this right usually is held to be purely personal to the debtor and not to inure to creditors.¹²³

§ 1198. May Recover Property Misapplied to Agent's Private Debt.—So, also, he may exercise the right of a principal, on the principal's discovery of the fraud, to recover property belonging to the principal that has been used by his agent with the knowledge of the agent's creditor to pay the agent's own debt.¹²⁴

§ 1199. May Defend That Chattel Mortgage Does Not Cover Specific After-Acquired Property or Is Void for Indefiniteness or for Failure to Comply with Statutory Requirements.—The trustee may defend that a chattel mortgage covering after-acquired property does not cover the particular after-acquired property in question;¹²⁵ or is void for indefiniteness;¹²⁶ or is void between the parties for failure to comply with statutory requirements.¹²⁷

^{121.} In *re Wilde's Sons*, 13 A. B. R. 217, 133 Fed. 562 (D. C. N. Y.).

^{122.} In *re Novak*, 7 A. B. R. 27, 111 Fed. 161 (D. C. Iowa); In *re Goldman*, 4 A. B. R. 100, 102 Fed. 122 (D. C. N. Y.).

^{123.} In *re Novak*, 7 A. B. R. 27, 111 Fed. 161 (D. C. Iowa).

^{124.} In *re Knox*, 3 A. B. R. 371, 98 Fed. 585 (D. C. N. Y.).

^{125.} Instance, In *re Dry Dock Co.*, 16 A. B. R. 325, 144 Fed. 649 (C. C. A. N. Y.), wherein after-acquired material was commingled with material covered by the mortgage and all used in the construction. In *re Sentenne & Green Co.*, 9 A. B. R. 648, 120 Fed. 436; *Des Moines Nat'l Bk. v. Council B. Sav. Bk.*, 18 A. B. R. 108, 150 Fed. 301 (C. C. A. Iowa); *Zartman v. Nat'l Bk.*, 16 A. B. R. 158, 109 App. Div. 406 (N. Y.).

^{126.} Instance, *Des Moines Nat'l Bk. v. Council B. Sav. Bk.*, 18 A. B. R. 108, 150 Fed. 301 (C. C. A. Iowa); *Stroud v. McDaniel*, 5 A. B. R. 695, 106 Fed. 493 (C. C. A. S. C.); impliedly, In *re Adamant Plaster Co.*, 14 A. B. R. 815, 137 Fed. 251 (D. C. N. Y.); instance held not void therefor, In *re Beede*, 11 A. B. R. 387, 120 Fed. 853 (D. C. N. Y.).

^{127.} Instances, held not void for indefiniteness, *Davis v. Turner*, 9 A. B. R. 704 (C. C. A. N. Car.); In *re Durham*, 8 A. B. R. 115 (D. C. Md.); In *re Berck & Co.*, 15 A. B. R. 694 (C. C. A. Ills.).

§ 1200. **May Urge Transfer Absolute in Form, but Mortgage in Fact.**—The trustee may urge that a transfer, absolute in form, is in fact a mortgage.¹²⁸

§ 1201. **May Plead Waiver.**—The trustee may plead waiver.¹²⁹

§ 1202. **May Plead Payment, Accord and Satisfaction, etc.**—The trustee may plead payment or other satisfaction of a debt or lien.¹³⁰

§ 1203. **Trustee Entitled to All Offsets, Rebates, etc., of Bankrupt.**—The trustee is entitled to all offsets, rebates, etc., that the bankrupt would have had.¹³¹

§ 1204. **May Plead Bankrupt's Lack of Capacity.**—The trustee may plead the bankrupt's want of capacity under State law to become obligated.¹³²

But it has been held, that corporate officers, assuming to act as directors, with the stockholder's acquiescence, will bind the corporation bankrupt.¹³³

§ 1205. **May Urge Articles Not Fixtures.**—And the trustee succeeds to the bankrupt's rights to urge that articles, such as machinery, etc., have not become fixtures but still belong to the bankrupt estate.¹³⁴

§ 1206. **May Urge Facts Constitute Sale.**—The trustee may urge that the facts constituted a sale to the bankrupt.¹³⁵ Thus, the trustee may urge

128. *Hastings v. Fithan*, 13 A. B. R. 676 (N. J. Ct. Errors).

129. Instance, *In re Wolf*, 3 A. B. R. 558, 98 Fed. 74 (D. C. Iowa).

130. Instance, *In re Thompson*, 11 A. B. R. 719, 128 Fed. 575 (C. C. A. N. Y.); compare, as to accord and satisfaction, *In re McBride & Co.*, 12 A. B. R. 31, 132 Fed. 285 (Ref. N. Y.).

131. See correlative right of creditor, ante subdiv. "E", of this division and chapter. *In re B. H. Douglass & Sons Co.*, 8 A. B. R. 113, 114 Fed. 772 (D. C. Conn.).

In re Royce Dry Goods Co., 13 A. B. R. 258, 133 Fed. 100 (D. C. Mo.): Offset of deficiency of payment of subscription to stock against claim of stockholder where deficiency arises by overvaluation of property transferred in payment of stock subscriptions.

In re Brewster, 7 A. B. R. 486 (Ref. N. Y.): Advancements made to daughter after reaching her majority for money to finish her art education, offset against her claim for services to parent.

Impliedly, *Powell v. U. S.*, 14 A. B. R. 192 (D. C. N. Y.): Rebate, internal revenue, when trustee not entitled thereto.

132. Instance, *In re Smith Lumber Co.*, 13 A. B. R. 118, 132 Fed. 618 (D. C. Tex.): Ultra vires guaranty by a corporation, bankrupt.

Instance, *Cunningham v. Germ. Ins. Bk.*, 4 A. B. R. 363, 101 Fed. 977 (C. C. A. Ky.): Indebtedness of bankrupt corporation alleged to be in excess of charter limits yet held binding on the facts.

133. *Cunningham v. Germ. Ins. Bk.*, 4 A. B. R. 363, 101 Fed. 977 (C. C. A. Ky.): Executive officers assuming functions of board of directors, by acquiescence of stockholders, bind bankrupt corporation.

134. *In re Rodgers & Hite*, 16 A. B. R. 401 (D. C. Pa.). See ante, § 1152.

135. See correlative subject of taking title subject to bankrupt's sales, etc., ante, § 1145, et seq.

that the title to goods sold to the bankrupt on approval have passed by long delay.¹³⁶

DIVISION 2.

RIGHTS OF TRUSTEE AS SUCCESSOR TO RIGHTS OF CREDITORS.

§ 1207. **Second, Trustee's Title and Rights as Successor to Creditors.**—In cases affected by the fraud of the bankrupt towards creditors, as also where there has been some transfer or encumbrance of the property void as to creditors by state law for want of record or otherwise, the trustee succeeds to the rights of any creditor who may be qualified under the state law to avoid the transfer or encumbrance or to take advantage of the fraud.

Transfers by the bankrupt, voidable as to any creditor are equally voidable as to the trustee; and he may set aside the transfer and recover either the property itself or its value from anybody, except a bona fide holder for value; and liens void as against creditors are equally void as to the trustee; and property generally, that could have been reached by a creditor may be reached by the trustee, and property that could not have been reached by a creditor cannot be reached by the trustee.¹³⁷

136. In re Paper Co., 17 A. B. R. 121, 147 Fed. 858 (D. C. Penn.).

Other Instances of Defenses of Bankrupt to Which Trustee Succeeds.—**Parol evidence to vary written lease:** the trustee has the same right as the bankrupt to demand that a written lease be not varied except on clear and satisfying evidence. In re Luckenbill, 11 A. B. R. 455, 127 Fed. 984 (D. C. Pa.).

Trustee of bankrupt heir may contest account of administrator. The trustee of a bankrupt heir may contest the account of the administrator. In re Clute, 2 A. B. R. 376 (Super. Court San Francisco). Even though the bankrupt himself be the administrator.

Trustee may recover part payment on bankrupt's oral contract for the purchase of land where the seller has refused to make a deed to the trustee and has leased the land to another. *Durham v. Wick*, 14 A. B. R. 385, 210 Pa. St. 128.

137. Bankr. Act, § 70 (a) " * * * shall * * * be vested by operation of law with the title * * * to all * * * (4) property transferred by him (the bankrupt) in fraud of his creditors."

And (e): "The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of adjudication."

Section 67 (a): "Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt, shall not be liens against his estate."

And (e): "And all conveyances, transfers or encumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while solvent, which are null and void as against the creditors of such debtor by the laws of the State, Territory or District in which such property is situate, shall be deemed null and void under this Act against the creditors of such debtor if he be adjudged a bankrupt and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt."

In re Cramond, 17 A. B. R. 28, 145 Fed. 966 (D. C. N. Y.); In re Shaw, 17 A. B. R. 196, 205 (D. C. Me.); *Bradley, Alderson & Co. v. McAfee*, 17 A. B. R. 499, 149 Fed. 254 (D. C. Mo.); *Receivers v. Staake*, 13 A. B. R. 281, 133 Fed. 717 (C. C. A. Va., affirmed in 15 A. B. R. 645, 202 U. S. 141, sub nom. *First Nat'l Bk. v. Staake*); *Andrews v. Mather*, 9 A. B. R. 296, 134 Ala. 358; In re

First Nat'l Bank *v.* Staake, 15 A. B. R. 645, 202 U. S. 141 (affirming *Receivers v. Staake*, 13 A. B. R. 281): "As remarked by the Court of Appeals: 'The rule that the trustee takes the estate of the bankrupt in the same plight as the bankrupt held it, is not applicable to liens which, although valid as to the bankrupt, are invalid as to creditors.'"

In *re* Rodgers, 11 A. B. R. 93, 125 Fed. 169 (C. C. A. Ills., reversed, on ground that summary jurisdiction did not exist, sub nom. *Bank v. Title & Trust Co.*, 14 A. B. R. 102, 198 U. S. 280): "We are therefore brought to the question whether, under the Bankruptcy Law, the trustee takes solely in the right of the bankrupt, or whether he also represents the rights which creditors have, and the authority to enforce them; whether the petition in bankruptcy is merely the appropriation by the bankrupt of his property to his creditors, or an assertion in behalf of creditors of rights which they had independently of the bankrupt, and which he himself could not assert. Notwithstanding some loose expressions

Lukens, 14 A. B. R. 683, 138 Fed. 188 (D. C. Pa.); In *re* Standard Laundry Co., 8 A. B. R. 538 (C. C. A. Calif.).

In *re* Baird, 11 A. B. R. 435 (D. C. Va.), where the court seems to think that where the trustee is subrogated to the lien of attaching creditors in behalf of the estate, the title is not conferred by operation of law but by the order of the court; yet the title is conferred by law upon the court making the order, § 67 (e) conferring the title in conjunction with § 67 *F.* *Beasley v. Coggins*, 12 A. B. R. 355, 48 Fla. 215.

See *Sheldon v. Parker*, 11 A. B. R. 152 (Sup. Ct. Nebraska), wherein the court say: "The Bankrupt Act of 1898 vests the trustee with title to all property conveyed by the bankrupt in fraud of creditors and he may proceed to recover the interest of the bankrupt in the property whether any creditor was in position to attack the transfer or not."

The cases of *Sheldon v. Parker* and In *re* Rudnick, 4 A. B. R. 534, 102 Fed. 750 (D. C. Wash.), emphasize only the expressly conferred title granted by § 70 (a) (4).

It is incorrect to denominate him an "innocent purchaser," or to say he stands in the shoes of an "innocent purchaser," as was said in *In re Thorp*, 12 A. B. R. 195 (Ref. Va., affirmed by D. C.), and in *In re Booth*, 3 A. B. R. 574, 98 Fed. 975 (D. C. Ore.), and as was denied in *Nat'l Bk. of Chattanooga v. Rome Iron Co.*, 4 A. B. R. 441 (C. C. Ga.), 102 Fed. 755, and in *In re Kellogg*, 7 A. B. R. 275, 113 Fed. 120 (D. C. N. Y.), and in *In re Hunt*, 14 A. B. R. 416, 139 Fed. 283 (D. C. N. Y.): "While the statute of New York (real property law, § 241) requires the recording of a real estate mortgage as against purchasers and mortgagees in good faith and for value only, such recording is not 'required' within the meaning of § 60a of the Bankrupt Act, 1898, as amended in 1903, in order to give it validity as against the mortgagor's trustee in bankruptcy, who is not a purchaser in good faith and does not occupy the position of such purchasers."

In *re* Beede, 14 A. B. R. 697, 138 Fed. 441 (D. C. N. Y.); In *re* Hewitt *v.* Berlin Machine Co., 11 A. B. R. 709, 714, 194 U. S. 296.

There is a possible qualification of the rule that the trustee gets all the title of a creditor; for, while § 70 (e) provides that the trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided and may recover the property transferred, or its value from the person to whom it was transferred, yet it adds the proviso, "Unless he was a bona fide holder for value prior to the date of the adjudication." Such property may be recovered or its value collected from whoever may have received it except a bona fide holder for value. Thus where the State statutes give creditors the right to avoid transfers and recover property from the transferee even if such transferee was a bona fide holder, as is the case in some matters, the trustee may not avail himself of the same right. *Skillen v. Endelman*, 11 A. B. R. 766, 79 N. Y. Supp. 413, unless he can also bring himself within § 67 (e) or some other section giving particular rights. In *re* Jacobs, 1 A. B. R. 513 (Ref. La.); In *re* Yukon Woolen Co., 2 A. B. R. 805, 96 Fed. 326 (D. C. Conn.).

Norcross v. Nathan, 3 A. B. R. 622 (D. C. Nev.): "The trustee in bankruptcy stands in the place of the creditors of the bankrupt, and has the same rights and may pursue the same remedies in their behalf as they could or would have been entitled to if there had been no adjudication in bankruptcy."

in the decisions upon this subject, we are satisfied, from a careful scrutiny of the act, that the filing of the petition is something more than the dedication by the bankrupt of his property to the payment of his debts; that the trustee is not only invested with the title of the property, but since, after the filing of the petition, the creditors are powerless to pursue and enforce their rights, the trustee is vested with their rights of action with respect to all property of the bankrupt transferred by him or incumbered by him in fraud of his creditors, and may assail, in behalf of the creditors, all such transfers and incumbrances to the same extent that creditors could have done had no petition been filed. The filing of the petition, followed by seizure and by adjudication in bankruptcy, is a seizure of the property by the law for the benefit of creditors, and an appropriation of it to the payment of the debts of the bankrupt. It is a seizure of the property by legal process, equal in rank to and of the same force and effect as by execution or attachment."

Chesapeake Shoe Co. v. Seldner, 10 A. B. R. 466, 122 Fed. 593 (C. C. A. Va.): "If the 'title of the bankrupt,' in § 70a, means title as between him and a consignor or vendor, this section of the act is not only utterly inconsistent with the entire spirit of the law, but the numerous decisions holding that the trustee in bankruptcy takes title to property sold to the bankrupt under unrecorded conditional contracts of sale must be held erroneous. 'The registry statutes of the States do not invalidate the title of the vendor by such a contract as between him and his vendee, but only as between the vendor and the creditors of the vendee. Quite aside from the violence done to the plain meaning of the words, 'title of the bankrupt * * * to property * * * which might have been levied upon and sold under judicial process against him,' clause 4 of § 70a would seem to make an end of the contention here set up. The trustee takes 'the title of the bankrupt * * * to * * * property transferred by him in fraud of his creditors.' If the words 'title of the bankrupt' do not mean title as between him and his creditors, the language above quoted is meaningless. As between the bankrupt and his fraudulent grantee, the bankrupt has no title (*Spencer v. Duplan Co.* (C. C.), 7 A. B. R. 563, 112 Fed. 638), and to give any effect; or even meaning to clause 4 we must construe the words 'title of the bankrupt' as meaning title as between the bankrupt and his creditors."

Bush v. Export Storage Co., 14 A. B. R. 138, 136 Fed. 918 (C. C. A. Tenn.): "The trustee, upon his appointment and qualification, is thus vested, by operation of law, without any deed of conveyance, with the title of the bankrupt, 'as of the date he was adjudged a bankrupt.' * * * In relation to a right or title thus derived by operation of law from the bankrupt himself, it is very true, and is well settled, that the trustee takes just such title as the bankrupt had, and no better or greater title, and subject to estoppel and to all liens or equities to which the title was subject in the hands of the bankrupt. * * *

"But this proposition, although well settled, does not meet or dispose of the contention here presented, for the right which is asserted by the trustee in the present suit was not derived by operation of law from the bankrupt, and the remedy being pursued is not one which was available to the bankrupt. The right here asserted, and the remedy adopted to enforce that right, passed, by operation of law, not from the bankrupt itself, but from creditors of the bankrupt; and the trustees are undertaking to enforce the right in the interest of the creditors of the bankrupt, and in their right, and not by virtue of any right or remedy which passed, by operation of law, from the bankrupt."

Mitchell v. Mitchell, 17 A. B. R. 389 (D. C. N. Car.): "A trustee in bankruptcy may avoid a mortgage fraudulent under a bankrupt law. The title attempted to be passed by such mortgage vests in such trustee. He stands in the shoes of the bankrupt, but represents the creditors, and is entitled to pos-

session, and may bring an action to enforce his right of possession. He can maintain any action either could maintain. Such an action is not analogous to a creditor's bill, and it is no objection to it that the claims against the bankrupt are not in judgment. The title is vested in him by operation of law.

"The bankrupt law instead of vesting in the trustee the remedies of the creditors against the property judgment, execution, and creditor's bills, vests in him at once the title to the property—makes him the owner.

"It is argued that the mortgage in controversy being good as between the parties is also good as between the mortgagees and trustee in bankruptcy of the mortgagor; but the rule is well settled that the trustee represents the rights of creditors, and may attack conveyances made by the bankrupt in fraud of creditors. It is so provided in the statute. The trustee may prosecute any suit to recover assets in the hands of third parties, or to enforce the payment of claims that could have been prosecuted by the creditors themselves had no proceedings in bankruptcy been instituted."

In *re Gray*, 3 A. B. R. 647 (N. Y. Sup. Ct. App. Div.): "When, however, the trustee seeks to avoid a fraudulent or any avoidable transfer by the bankrupt antedating the four months, he does so, not in the right conferred as a concomitant to the due operation of the system, but exclusively in the creditors' common-law right. He is, with relation to these anterior transfers, so to speak, subrogated to that right. Such of these anterior transfers as any creditor might have avoided, he may avoid. Such as no creditor could have avoided, he cannot avoid."

Gove v. Morton Trust Co., 12 A. B. R. 300 (Sup. Ct. N. Y. App. Div.): "The present Bankruptcy Act differs in some respects from preceding enactments of that character, in that it gives to the trustee in bankruptcy, in addition to the rights of the bankrupt, and the authority to set aside transfers made in fraud of creditors, the right which creditors would have to take advantage of the failure to file or record a mortgage or other instrument. Here, the right of a judgment creditor to resort to the property covered by the mortgage, and hence to its proceeds, has passed to the plaintiff; and we are of opinion that as a consequence he was entitled to the judgment he prayed for."

Impliedly, In *re Butterwick*, 12 A. B. R. 537, 131 Fed. 371 (D. C. Pa.): "The trustee does not stand simply in the shoes of the bankrupt but is vested with the rights of his execution creditors."

Warehousing Co. *v. Hand*, 16 A. B. R. 63, 143 Fed. 32 (C. C. A. Wis.): "The trustee succeeds, as of the date of the adjudication, not only to the bankrupt's title and possessory right to the property, but also to the right of the bankrupt's creditors to assert that the title and possessory right as to them is in the bankrupt. Section 70a (4) and (5); § 70e. * * * Liens that remain undisturbed are those that were good against both the bankrupt and his creditors immediately preceding the adjudication. *Hewitt v. Berlin Machine Works*, 194 U. S. 296, 11 Am. B. R. 709; *Thompson v. Fairbanks*, 196 U. S. 516, 13 Am. B. R. 437; *Chesapeake Shoe Co. v. Seldner*, 10 Am. B. R. 466, 122 Fed. 593. The conclusion results not merely from a consideration of the nature of the trustee's succession, but as well from the inhibitions of the Act. Section 67a (30 Stat. 564 [U. S. Comp. St. 1901, p. 3,449]) vitiates as liens all 'claims which for want of record or for other reasons' the bankrupt's creditors might have avoided as liens; that is, no secret liens or equities shall prevail against the trustee that were not good against the general unsecured creditors represented by the trustee. Section 67d protects 'the liens given or accepted in good faith * * * and for a present consideration, which have been recorded according to law, if record 'hereof was necessary in order to impart notice.' The liens thus saved are liens, not promises to give liens, not equitable claims that what ought to

have been done shall be considered done, but liens perfected according to law. 'Notice' as well as 'a present consideration' is necessary. If a chattel mortgage be given in good faith and for a present consideration, recording is not obligatory, but the imparting of notice is. Recording is one way, another is actual and continued change of possession. If a pledge be similarly given, recording is not 'necessary in order to impart notice,' because no provision has been made that a record of the fact shall be notice of the fact; but is 'necessary in order to impart notice' is the delivery of exclusive and unequivocal possession. We think that § 67d does not change § 67a into the meaning that 'claims which for want of record or for other reasons' are not good liens as against creditors, are good liens as against the estate if the lender advanced his money without any actual intent to defraud unsecured creditors. He is chargeable with the constructive intent which is attributed to secrecy."

In *re Heckathorn*, 16 A. B. R. 470, 144 Fed. 499 (D. C. Pa.): "The trustee in any such controversy is invested with the rights of creditors. * * * He is not limited like an assignee who is merely a representative of the debtor."

In *re Hunt*, 14 A. B. R. 416, 139 Fed. 283 (D. C. N. Y.): "But in some cases, liens may be avoided by the trustee that could not have been avoided by the bankrupt if the bankruptcy proceedings had not intervened."

State Bank v. Cox, 16 A. B. R. 35, 143 Fed. 91 (C. C. A. Ills.): "In other words, it is the established doctrine that bankruptcy proceedings are in rem, and when commenced all of the property then held by the bankrupt or for his use (aside from exemptions) is subjected to the jurisdiction of the bankruptcy court, and that, when bankruptcy is adjudicated, the sequestration reaches all such property at least, and becomes operative from the institution of proceedings, as 'a caveat to all the world,' preventing interference by attachments or other means in derogation of the interests of the estate."

In *re Rudnick*, 4 A. B. R. 534, 102 Fed. 750 (D. C. Wash.): "The right and title of a trustee is, in general, the same as the right and title which the bankrupt possessed prior to the adjudication, but to this is added authority to avoid fraudulent transfers of property."

Zartman v. Nat'l Bk., 16 A. B. R. 152, 159, 109 App. Div. 406: "He became vested by the order of appointment of all the property of every kind owned by the bankrupt and while it passed to him subject to liens valid against the organ company, he still represented the creditors and could pursue remedies available to them as judgment creditors."

Impliedly, In *re Shaw*, 17 A. B. R. 205 (D. C. Me.): "The only rights against Shaw which passed to the bank by the mortgage from the Keene Leather Company were rights by estoppel, which resulted from Shaw's standing by and assenting to the transfer. This is made the most of by the learned counsel for the bank; but, if the conveyance shall be held to be a conveyance by estoppel from Shaw to the bank, this estoppel can relate only to Shaw, and not to his trustee in bankruptcy. In spite of anything done by way of delivery to, and retention by, the mortgagee, I am of the opinion, as I have already indicated, that an attaching creditor of Shaw could have prevailed in an attachment of the bank, and, therefore, that there passed to this trustee property which might have been levied upon and sold under judicial process against the bankrupt."

But the trustee gets no more than the creditor's title (save and except as he gets the bankrupt's title and the peculiar titles conferred by the Bankrupt Act) and if a lien or other transfer is not void for lack of record or other faults, as against creditors at all whether they be merely general

creditors or even levying creditors, of course it is not void as against the trustee in bankruptcy.

Hewitt v. Berlin Machine Wks., 11 A. B. R. 709, 194 U. S. 296: "And the Circuit Court of Appeals, adhering to that decision, held in this case that, inasmuch as by the New York statute, a conditional sale such as that in question was void only as against subsequent purchasers or pledgees or mortgagees in good faith, the District Court was right, and affirmed the judgment. * * *

"We concur in this view, which is sustained by decisions under previous bankruptcy laws (*Winsor v. McLellan*, 2 Story 492, Fed. Cas., No. 17,887; *Donaldson v. Farwell*, 93 U. S. 631, 23 L. Ed. 993; *Yeatman v. New Orleans Sav. Inst.*, 95 U. S. 764, 24 L. Ed. 589), and is not shaken by a different result in cases arising in States by whose laws conditional sales are void as against creditors."

Likewise as to the effect of merely the bankruptcy proceedings as *lis pendens* against a creditor levying attachment on property fraudulently conveyed by the bankrupt.¹³⁸

§ 1208. But Creditor's Title Taken by Trustee, Generally, That Only of Some Existing Creditor "Armed with Process."—

The statute does not, by its wording, specify what is meant by the use of the word "creditor" in this connection, although in its § I of definitions, the word "creditor" is defined to mean anyone holding a debt, claim or demand provable in bankruptcy. Moreover, the phraseology of § 7C (c), giving the trustee the right to avoid any transfer made by the bankrupt which any creditor "might" have avoided, would not seem necessarily to imply that some creditor must actually, before the time of the filing of the bankruptcy petition, already have taken all the formal steps, such as the obtaining of judgment against the bankrupt or the attaching of the bankrupt's property before judgment, required of creditors in the process of subjecting debtors' property; and such has been the holding in some cases.

Beasley v. Coggins, 12 A. B. R. 355, 57 So. Rep. 213: "A trustee in bankruptcy occupies a relation similar to that of a judgment creditor of the bankrupt, and may file a bill in equity to set aside a fraudulent conveyance of real estate by the bankrupt, although neither the trustee nor any creditor has reduced any claim against the bankrupt to judgment."

The statute seems to strive to give the trustee the same right and remedy that any creditor "might" have exercised to avoid transfers, whether actually exercised or not, and such provision might not unnaturally be construed to give him either the right to take all the necessary steps that would have been required of such creditor, or, perhaps, even to dispense with such preliminary steps altogether. Certainly, since the pendency of the bankruptcy proceedings itself ties the creditors' hands from helping themselves by their ordinary remedies, it might seem not only a natural but also an eminently equitable construction of the law to hold that the trustee is subrogated not only to all rights and remedies for avoiding transfers which any cred-

^{138.} In *re Mullen*. 4 A. B. R. 230, 101 Fed. 413 (D. C. Mass.).

itor has already begun to assert, but also to all rights and remedies which any creditor "might" have asserted, as, indeed, the very wording of § 70 (3) appears to indicate.¹³⁹

Furthermore, it is a familiar rule in the subject of the equitable remedies of creditors that where there is already a sequestration of all the debtor's property for the benefit of creditors, the obtaining of preliminary judgment against the debtor, and the return of execution unsatisfied, being vain things, will not be required before resort may be had to equitable remedies against transferees of such debtor and other parties obligated to creditors by virtue of the debtor's dealings with them while insolvent; and this rule has been held in some cases applicable in bankruptcy.¹⁴⁰

Mueller v. Bruss, 8 A. B. R. 442, 112 Wis. 406: "There can be no doubt about the general proposition that, before a mere creditor or his representative can attack a conveyance alleged to have been made by his debtor in fraud of his creditors, he must show that he has exhausted his legal remedies. * * * Obtaining judgment on the claim with a return of an execution unsatisfied, is prima facie evidence of the exhaustion of all legal remedies against the debtor. The rule stated, however, is not inexorable and without exceptions. If it appears that for any reason a judgment against a debtor cannot be obtained, it will be excused as a preliminary to a creditors' suit. * * * The principle involved in the exceptions to the rule is that when a party has done all that is possible for him to do to prepare his case for equitable cognizance, he is not to be denied access to the only tribunal capable of granting relief."

Skilton v. Codington, 15 A. B. R. 817, 185 N. Y. 80: "The rule that a creditor must first recover a judgment is simply one of procedure and does not affect the right. Therefore, where the recovery of a judgment becomes impracticable, it is not an indispensable requisite to enforcing the rights of the creditor."

Such might have been an available construction of the statute as to the title of the trustee in bankruptcy; yet the Supreme Court has not adopted it. On the contrary the Supreme Court has carried into the construction of this Act the underlying idea of all our former bankruptcy acts, as well as that of the English Bankruptcy Acts (see *Winsor v. McClellan*, 2 Story 492, Fed. Cas. 17,887) and has denied to the trustee in bankruptcy any right creditors merely *might* have exercised, but had not already actually exercised, or placed themselves in position under State law to exercise; the idea being that the bankruptcy adjudication in no wise in and of itself affects the title but merely transfers whatever rights the bankrupt or any of his creditors actually had acquired at the time—save and except always as to preferences and liens by legal proceedings within the four months period.

The bankruptcy, in other words, picks up the estate precisely where it finds it, giving the trustee thereby no additional rights save such as are

¹³⁹ Impliedly, *In re Shaw*, 17 A. B. R. 205 (D. C. Me.).

¹⁴⁰ *Sheldon v. Parker*, 11 A. B. R. 169 (Neb. Sup. Ct.). Compare, to same effect, *In re Falls City Shirt Mfg. Co.*, 3 A. B. R. 437, 98 Fed. 592 (D. C. Ky.), where the court held, that the bankruptcy absolves the lienors under a mechanics' lien statute from the requirement of the institution of legal proceedings within a certain specified time.

conferred by the peculiar provisions of the act relative to preferences and legal liens, but giving to him all rights possessed by the bankrupt at the time of the bankruptcy and all rights then asserted by any creditor or which any creditor had already placed himself in position to assert.

Compare, *In re Mullen*, 4 A. B. R. 227, 101 Fed. 413 (D. C. Mass): "Probably § 70 (a) was not so much intended to avoid certain classes of transfers as to declare the right of the trustee to avoid transfers voidable by other persons. A similar observation is applicable to § 70 (a), subd. (5)."

§ 1209. **"Creditor" Same as in State Law, So Far as Concerns Necessity of "Arming with Process."**—The word "creditor" as used in the sections of the Bankruptcy Act relating to the title and rights of the trustee has the same meaning that is attached to it by the state law, and refers to a creditor "armed with process," where by the state law it is only as to such creditors that the inhibited transfer of the property or lien upon it is void.

Thus, since the word "creditor," as used in this connection in statutes, generally refers to such creditors only as have levied execution or attachment, or otherwise fastened upon the property itself, an unfiled chattel mortgage or other encumbrance required by law to be filed in order to be valid as against creditors, is nevertheless good in bankruptcy, unless some creditor has actually levied execution or attachment, or otherwise fastened on the property before bankruptcy, and the lien of the levy been preserved for the benefit of the estate.¹⁴¹

141. For discussion and distinction of the York case, see *In re Doran*, 17 A. B. R. 799.

In re Economical Printing Co., 6 A. B. R. 615, 110 Fed. 514 (C. C. A. N. Y.): "It remains to consider whether the trustee can take advantage of the non-compliance with the statute. It has always been held by the courts of New York that only such creditors can take advantage of it as are armed with some legal process authorizing the seizure of the mortgaged property, and are thereby in a position to enforce a lien upon it, * * * and that the mortgage is good as to creditors at large as well as between the parties. Under the Bankruptcy Act of 1867 (14 Stat. 517), a failure to file a mortgage of goods and chattels in the manner prescribed by law of the State, while rendering the mortgage void as against the creditors of the mortgagor if it was not accompanied by an immediate delivery and followed by an actual and continuous possession of the chattels, did not affect its validity as against the assignee of the mortgagor in bankruptcy. The assignee succeeded merely to the title of the mortgagor, and as between the mortgagor and the mortgagee the validity of the mortgage was unaffected by the failure. *Stewart v. Platt*, 101 U. S. 731, 25 L. Ed. 816. Under the present act, however, by § 67, 'claims which for want of record or for other reasons would not have been valid liens as against the creditors of the bankrupt' are not liens against his estate (subdivision 'a'), and by subdivision 'b,' whenever a creditor is 'prevented from enforcing his rights against a lien created or attempted to be created by his debtor, who afterwards becomes a bankrupt,' the trustee of the estate is subrogated to and may enforce the rights of such creditor for the benefit of the estate. And by § 70 (subd. 'e') 'the trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided.' When the mortgagor was adjudicated a bankrupt, there was, so far as appears, but one judgment creditor. Whether any other creditor could have eventually entitled himself to the benefit of the statute was a matter of mere conjecture. It would have depended not only upon

York Mfg. Co. v. Cassell, 15 A. B. R. 633, 201 U. S. 344: "We have not been referred to any decision of the Supreme Court of Ohio as to the meaning of the statute requiring the filing of contracts of conditional sales, but we concur with the Circuit Court of Appeals in this case, that the statute would render the unfilled contract void as to the same class of creditors mentioned in the chattel mortgage statute. Therefore the contract would be void as to creditors who before its filing had 'fastened upon the property' by some specific liens. As to creditors who had no such liens, being general creditors only, the statute does not avoid the sale, which is good between the parties to the contract."

In re Doran, 17 A. B. R. 803 (D. C. Ky.): "Under these circumstances, we are of opinion that a proper construction of the Kentucky law defeats his rights to any preference or priority in payment out of the \$1,000 which constitute the assets of the bankrupt, even though, as appears to be the case, a large portion

his own vigilance in pursuing his legal rights, but also upon the volition of the mortgagor. The mortgagor could have made a general assignment of its property for the benefit of its creditors, or surrendered possession of the mortgaged property to the mortgagee; and in either event the right of all creditors to impeach the lien would have been extinguished. * * *

"The Bankrupt Act does not vest the trustee with any better right or title to the bankrupt's property than belongs to the bankrupt or to his creditors at the time when the trustee's title accrues. The present act, like all preceding bankrupt acts, contemplates that a lien good at that time as against the debtor and as against all of his creditors shall remain undisturbed. If it is one which has been obtained in contravention of some provision of the act, which is fraudulent as to creditors, or invalid as to creditors for want of record, it is invalid as to the trustee; and if it is one which was invalid as to some particular creditor, though valid as to other creditors, the trustee is in certain cases subrogated to the rights of that creditor. The provisions which have been quoted do not necessarily touch a lien which at the date of the adjudication of bankruptcy was valid as to the bankrupt, and could not then be disturbed by any of his creditors. The lien of the present mortgage would not have been valid as against the claims of the creditors,' within the terms of subdivision 'a,' if the creditors had obtained the right to question it, but otherwise it was valid. * * *

"We conclude that, except as to the Reilly judgment, the lien of the mortgage was valid, and that the trustee is entitled only to the amount of that judgment out of the proceeds in the registry of the court."

For discussion of the *Economical Printing Co.* case, see criticism in *In re Beede*, 11 A. B. R. 387, and 14 A. B. R. 708, 138 Fed. 441 (D. C. N. Y.); interpretation by same court that rendered it, *In re Garcewich*, 8 A. B. R. 151, 115 Fed. 87; held to be binding in New York, *In re Hewitt v. Berlin Machine Wks.*, 11 A. B. R. 709, 194 U. S. 302; quoted with approval, *Receiver, etc., v. Staake*, 13 A. B. R. 281, 133 Fed. 717 (C. C. A. Va.); and followed by the U. S. Supreme Court in *York Mfg. Co. v. Cassell*, 15 A. B. R. 344; discussed in *In re Ducker*, 13 A. B. R. 760, 134 Fed. 43 (C. C. A. Ky.); also discussed in *In re Beede*, 14 A. B. R. 713, 138 Fed. 441 (D. C. N. Y.); distinguished in *In re Carpenter*, 11 A. B. R. 147, 152, 125 Fed. 831 (D. C. N. Y.); held, not to correctly state the law of New York, *Skilton v. Codington*, 15 A. B. R. 818, 185 N. Y. 80 (N. Y. Court of Appeals).

In re Cutting, 16 A. B. R. 752, 145 Fed. 388 (D. C. N. Y.); *In re Sewell*, 7 A. B. R. 133 (D. C. Ky.); *In re Kellogg*, 7 A. B. R. 270, 112 Fed. 52 (D. C. N. Y.); *In re McKay*, 1 A. B. R. 292 (Ref. Ohio); *In re Great Western Mfg. Co.*, 18 A. B. R. 261, 152 Fed. 123 (C. C. A. Neb.); *In re Hinsdale*, 7 A. B. R. 85, 111 Fed. 502 (D. C. Vt.); *In re Co-op. Shear Co.*, 2 A. B. R. 775 (Ref. Ohio); *In re Burnham*, 15 A. B. R. 548, 140 Fed. 926 (D. C. N. Y.); *In re Alden*, 16 A. B. R. 362 (Ref. Ohio); *In re Klingman*, 2 A. B. R. 44 (Ref. Iowa); *In re Wright*, 2 A. B. R. 364, 96 Fed. 187 (D. C. Ga.); *Drug Co. v. Drug Co.*, 14 A. B. R. 477, 136 Fed. 396 (C. C. A. Tex.); *In re Cavagnaro*, 16 A. B. R. 323, 143 Fed. 668 (D. C. N. H.); *In re Shirley*, 7 A. B. R. 299, 112 Fed. 303 (C. C. A. Ohio); *In re Schmidt*, 6 A. B. R. 150, 109 Fed. 267 (D. C. Ohio). Under old law of 1867, *Stewart v. Platt*, 101 U. S. 731 (distinguished in *In re Leigh Bros.*, 2 A. B. R. 606). See ante, § 1140.

thereof came from a sale of the mortgaged property. We think the proper construction of the law of Kentucky demands that as he deliberately withheld his mortgage from the record he thereby forfeited, in favor, at least, of the creditors whose claims were created while he did so, all right to priority over them, they having extended credit presumably upon the bankrupt's apparent ownership of the property. Certainly under these circumstances it is equitable for him to suffer the loss rather than those who were without fault."

Crosby v. Miller, 16 A. B. R. 805 (Ct. App. D. C.): "Creditors mentioned in the section of the Code just noted mean creditors who in the interval of time have fastened upon the property for the payment of their debts and not general creditors."

Compare, *In re Beede*, 14 A. B. R. 702 (D. C. N. Y.): "It is settled and elementary law that a creditor cannot take the property of his debtor either for him or any other person having possession and claiming it, however unfounded the claim, until he comes armed with some process authorizing the taking. It must be adjudged that he is a creditor."

But where the State law makes unfiled mortgages void as against assignees, it has been held the debtor's prior assignment will operate to "arm" the creditors, so that the trustee in bankruptcy will take the property free from the mortgage lien.¹⁴²

And a creditor is held by the State Courts of New York (notwithstanding the bankruptcy decisions) to be sufficiently "armed with process" if he has a judgment, even though he has not actually levied upon the property.¹⁴³

And compare, *In re Dry Dock Co.*, 16 A. B. R. 329, 144 Fed. 649 (C. C. A. N. Y.): "Under the authority of * * * it must be held, that as against general creditors (now represented by the trustee) the mortgage does not operate as a lien upon after-acquired property, and therefore does not cover the \$200 for which the trustee sold them."

§ 1210. Where "Arming with Process" Not Requisite by State Law, Not Requisite in Bankruptcy.—And where "arming with process" is not necessary by the state law, it is not requisite in bankruptcy, and if by state law the lien be void, though no creditor "armed with process" exist, it will likewise be void in bankruptcy.¹⁴⁴

Bradley, Alders & Co. v. McAfee, 17 A. B. R. 499 (D. C. Mo.): "Under the Missouri Statute it is not necessary, as under the Ohio statute, followed by the Supreme Court in *York Manufacturing Co. v. Cassell*, 201 U. S. 351, 15 Am. B. R. 633, that to enable the trustee to avail himself of the statute the creditors should, by levy or attachment anterior to the proceedings in bankruptcy, have taken steps 'to fasten upon the property for payment of the debt.' Nor does the case of *Hewitt v. Berlin Machine Works*, 194 U. S. 296, 11 Am. B. R. 709, apply, as that case arose under the New York statute, which avoided the sale only as to 'Subsequent purchasers in good faith,' and there was no evidence in the case of the creditors being such purchasers.

"As applied to the Missouri statute, the holding by the Court of Appeals of

142. *In re Andræ Co.*, 9 A. B. R. 137, 117 Fed. 561 (D. C. Wis.).

143. *Gove v. Morton Trust Co.*, 12 A. B. R. 297, 96 N. Y. App. Div. 177; *Zartman v. Nat'l Bk.*, 16 A. B. R. 158, 106 App. Div. 406. And, also, compare *Skilton v. Codington*, 15 A. B. R. 819, 185 N. Y. 80 (Court of Appeals).

144. *In re Doran*, 17 A. B. R. 799 (D. C. Ky.).

this Circuit in *In re Pekin Plow Co.*, 7 Am. B. R. 369, 112 Fed. 308, 310, is conclusive on this court, which is that:

"The institution of proceedings in bankruptcy amounts to an effectual sequestration for the benefit of all his creditors of all property of the bankrupt. By such a proceeding the creditors "are using the courts of law and their processes for the collection of their debts," and the creditors thereby make an effectual seizure of the property of the bankrupt."

And where void as to subsequent creditors but not as to prior creditors, the *York v. Cassell* case does not apply, because the contest then is between creditors under § 64 (b) (5).¹⁴⁵

§ 1211. Discussion of Certain Rejected Doctrines—First Rejected Doctrine—That Trustee's Title as to Property Not in Custody, Analogous to Receiver's or Assignee's in State Courts.—The doctrine has been held that, as to property not in custody of the bankruptcy court, the effect of the bankruptcy is to give the trustee whatever rights a receiver or assignee or similar officer acting in equity for the benefit of creditors would have had in the particular State as to property not in his possession; thus, if, by the State law, preliminary judgment against the bankrupt or prior actual levy upon the property involved were necessary, that such judgment or levy is likewise necessary in case the trustee in bankruptcy seeks to avoid a transfer; and on the other hand, if in such State such prerequisites were dispensed with in cases of similar equitable sequestrations of the debtor's property, that they would be dispensed with in suits by the trustee in bankruptcy.¹⁴⁶

§ 1212. Second Rejected Doctrine—That Bankruptcy Operates as "Equitable Levy," as to Property in Custody.—The second rejected doctrine is that bankruptcy itself operates as an equitable levy as to property in the custody of the bankruptcy court.

The rule that the word "creditor" as used in the Bankruptcy Act refers to the same kind of creditors meant by the State statutes in avoiding transfers and liens—i. e., in general, to creditors "armed with process"—is perfectly consistent, to be sure, with the theory that, as to property in the custody of the bankruptcy court itself, i. e., property in the possession or control of the bankrupt after adjudication, or of the marshal, receiver or trustee in bankruptcy, either before or after adjudication,¹⁴⁷ the bankruptcy itself operates as an equitable levy; so that, as to such property in States where equitable sequestration operates as a sufficient "arming with process," the bankruptcy itself would likewise operate to arm with process the trustee

^{145.} *In re Doran*, 17 A. B. R. 799 (D. C. Ky.).

^{146.} Compare, inferentially, *In re Beede*, 14 A. B. R. 702, 138 Fed. 441 (D. C. N. Y.); compare, suggestively, *Matthews v. Hardt*, 9 A. B. R. 380 (N. Y. Sup. Ct. App. Div.).

^{147.} See "What Constitutes 'Custodia Legis,'" § 1807.

for creditors in bankruptcy, and such was the apparent holding in many cases.¹⁴⁸

In *re* Rodgers, 11 A. B. R. 93, 125 Fed. 169 (C. C. A. Ills., reversed, on other grounds, sub nom. *Bank v. Title & Trust Co.*, 14 A. B. R. 102, 198 U. S. 280): "The filing of the petition, followed by seizure and by adjudication in bankruptcy, is a seizure of the property by the law for the benefit of creditors, and an appropriation of it to the payment of the debts of the bankrupt. It is a seizure of the property by legal process, equal in rank to and of the same force and effect as by execution or attachment."

In *re* Nat'l Bk., 14 A. B. R. 184, 135 Fed. 62 (C. C. A. Ohio): "But it is said that such a mortgage is good between the parties and good against creditors who do not obtain some lien upon it before the mortgagee takes possession, actual fraud out of the way, and that no creditor had seized upon this property prior to the adjudication in bankruptcy, and that the trustee's title is no better than that of the mortgagor. For this, *Hewitt v. Berlin Machine Co.*, 194 U. S. 296, 11 A. B. R. 709, is cited.

"But in that case the unrecorded conditional sale, with agreement that title should remain in the vendor of the machinery until the purchase price was paid, was good under the law of New York as against everybody except subsequent purchasers or pledgees or mortgagees in good faith.

"Being good against the bankrupt and his creditors under the law of the State where the property was situated, it was held good against the bankrupt and his trustee.

"But such is not the law of Ohio. * * *

"The proceedings in bankruptcy amounted to an effectual sequestration of the mortgaged property before the mortgagee had taken possession. It was a seizure for the benefit of all creditors."

Nevertheless see the Supreme Court's reaffirmation of the doctrine of the *Economical Ptg. Co.* case as being applicable to conditional sales in Ohio in *York Mfg. Co. v. Cassell*, 15 A. B. R. 633, 201 U. S. 344.

In *re* Pekin Plow Co., 7 A. B. R. 369, 112 Fed. 308 (C. C. A. Neb.): "Counsel for petitioner contends that the Supreme Court of Nebraska has interpreted the word 'creditor,' as employed in the foregoing statutory enactment, to mean a

¹⁴⁸. In *re* Emslie, 4 A. B. R. 128, 102 Fed. 291 (C. C. A. N. Y.); In *re* Breslauer, 10 A. B. R. 33, 121 Fed. 910 (D. C. N. Y.); *English v. Ross*, 15 A. B. R. 376, 140 Fed. 630 (D. C. Pa.); In *re* Hess, 14 A. B. R. 639, 136 Fed. 988 (Ref. Penn., affirmed by D. C.); In *re* Elmira Steel Co., 5 A. B. R. 487, 109 Fed. 456 (Special Master N. Y.); In *re* Adams, 1 A. B. R. 94 (Ref. N. Y.). Compare, to same general effect, In *re* Leigh Bros., 2 A. B. R. 606 (Ref. Colo.); In *re* Yukon Woolen Co., 2 A. B. R. 805, 96 Fed. 326 (D. C. Conn.); impliedly, In *re* Heckathorn, 16 A. B. R. 470, 144 Fed. 499 (D. C. Penn.), quoted ante, § 1207.

Also, to same effect, In *re* Thorp, 12 A. B. R. 195 (Ref. Va., affirmed by D. C.). But in this case the court speaks of the trustee as standing in the shoes of "an innocent purchaser." This is incorrect: the trustee does not occupy the position of an "innocent purchaser," but simply that of a levying creditor, who in fact he really is. Compare note to In *re* Wright, 2 A. B. R. 368, 96 Fed. 187 (D. C. Ga.); In *re* Grohs, 1 A. B. R. 465 (Ref. Ohio); In *re* Jacobs, 1 A. B. R. 518 (Ref. La.).

See In *re* Beede, 11 A. B. R. 387 (D. C. N. Y.), where the court, feeling constrained to follow the ruling of the Circuit Court of Appeals in *re* *Economical Printing Co.*, 6 A. B. R. 615, 110 Fed. 514 (C. C. A. N. Y.), although discussing the reasoning in that case, says the difficulty is obviated by permitting the creditors to reduce their claims to judgment after bankruptcy. This seems to be "whipping the devil around the stump." It is a doubtful expedient for obviating the improper effects of ruling deemed erroneous.

judgment, execution, or attachment creditor, or one who, by a lawful seizure of property while in the possession of the mortgagor, has acquired a lien thereon. * * * These decisions probably establish the doctrine that an unrecorded chattel mortgage is only voidable as to creditors, and that until they take steps to assert their claims, the mortgage is good as between the parties. * * *

"From the foregoing provisions of the act, it in our opinion clearly appears that the institution of proceedings in bankruptcy amounts to an effectual sequestration for the benefit of all his creditors of all the property of the bankrupt, including property transferred by the bankrupt, before proceedings were instituted, in fraud of his creditors. By such proceedings the creditors 'are using the courts of law and their processes for the collection of their debts,' and the creditors thereby make an effectual seizure of the property of the bankrupt within the true meaning of the decisions of the Supreme Court of Nebraska hereinbefore referred to."

In *re Smith & Shuck*, 13 A. B. R. 105, 132 Fed. 301 (D. C. Iowa): "It is strenuously urged, however, that the term 'creditors,' as used in this section (of the Iowa statutes) means only attaching or execution creditors, or others who have acquired a lien upon the property. That a general creditor who has no lien upon the property would not be protected against a sale of it by his debtor or its seizure or sale under judicial process by other creditors, may be conceded. * * * The filing of the petition in bankruptcy is, however, 'judicial process' and operates as an attachment or sequestration from that time, of the property of the bankrupt for the equal benefit of all of his creditors and as a restraint upon its disposition by him."

Chesapeake Shoe Co. v. Seldner, 10 A. B. R. 466, 122 Fed. 593 (C. C. A. Va.): "The trustee is the representative of creditors, who are, from the date of filing the petition in bankruptcy, in effect, attaching creditors."

In *re Kolin*, 13 A. B. R. 531, 134 Fed. 557 (C. C. A. Ills.): "A receiver or trustee stands in like plight with attaching creditors."

In *re Ducker* (Shuster), 13 A. B. R. 770, 133 Fed. 771 (C. C. A. Ky.): "This is a distinct recognition of the equivalency of the seizure in bankruptcy with the seizure in other forms of legal proceedings and upon this sufficient ground we are in accord with the opinion of that court."

In *re Press Post Printing Co.*, 13 A. B. R. 797 (D. C. Ohio): "The adjudication of this court that the vendee was bankrupt, and the transfer of the possession of the property to the trustee, constitutes legal process, and operated as a seizure of the property for all the creditors. It was, so to speak, an equitable execution in favor of all the creditors, including the vendors."

In *re Tweed*, 12 A. B. R. 651, 131 Fed. 355 (D. C. Iowa): "And, as the property remained in the possession of the bankrupt at the time of the filing of the petition in bankruptcy, that filing was an attachment or sequestration from that time of all the property of the bankrupt for the benefit of his creditors. * * * Such sequestration applies to property held by the bankrupt under conditional contracts of purchase, which conditions are invalid under statutes like § 2905 of the Code of Iowa, as well as to property unconditionally owned by him."

In *re Noel*, 14 A. B. R. 715, 727, 137 Fed. 694 (D. C. Md.): "By that Act (1867), while there passed to the assignee 'all property conveyed by the bankrupt in fraud of his creditors,' it did not contain the provision of § 70d of the Act of 1898, that the trustee may avoid any transfer which any creditor might have avoided, and (§ 67e) that it shall pass to the trustee as assets of the bankrupt's estate, without it being required that any creditors should have been in a position to attack the transfer by reason of having a judgment and execution."

In *re Fraizer*, 9 A. B. R. 21, 117 Fed. 746 (D. C. Mo.): "What was the claim of the creditors of the bankrupt as against the property sold and delivered to the bankrupt by the vendor under an instrument of writing unacknowledged and unrecorded? Admittedly, it was the right to institute legal proceedings, and, under writs, to seize such property and appropriate it to the payment of their debts. As against creditors, both prior and subsequent, who sought the aid of the courts and judicial process, such vendor's claim was void. The moment of the institution of the proceedings in bankruptcy, such creditors, as already stated, by operation of law, became adversary parties; and the clear expression of the act is that the claim of such vendor shall thereafter be no more a lien against the bankrupt's estate than he would have had against the claims of creditors, had they, prior to the institution of the bankruptcy proceedings, invoked the process of court for the collection of their debts. In other words, the intention of Congress was to as effectually cut off such lien in favor of creditors by the adjudication of bankruptcy as if the creditors had, prior to the recording of such contract of sale, sought the aid of a court for the collection of their debts. And this is emphasized by the language of Judge Adams in commenting upon this provision of the Bankrupt Act, in declaring that 'it means that any liens which would not have been valid if other creditors had a right, before bankruptcy, to avoid the same, either for want of record or otherwise, shall not constitute a lien against the estate in bankruptcy.' No matter what the form of the legal proceeding taken by the creditor, if it be instituted prior to the assertion of the lien by the vendor, the prior right of the creditor has attached."

In *re Furniture Co. (Metropolitan Store & Saloon Fixture Co.)*, 15 A. B. R. 119 (Ref. N. Y.): "The filing of a petition in bankruptcy, and the appointment of a receiver puts a trustee in bankruptcy in the same position as a judgment creditor, or one armed with legal process, at least so far as the failure to file a chattel mortgage is concerned."

To same effect, In *re Butterwick*, 12 A. B. R. 537, 131 Fed. 371 (D. C. Pa.): "That is to say, the trustee does not stand simply in the shoes of the bankrupt, but is invested with the rights of his execution creditors; and the question in the present instance therefore is, whether the show cases which are sought to be reclaimed could have been successfully subjected while in the hands of the bankrupt to levy and sale upon execution against him. This is to be determined by the local law."

In *re Bozeman*, 2 A. B. R. 809 (Ref. Ga.): "Under the Bankruptcy Act of 1898 the trustee takes the property of the estate subject to all equities, liens and encumbrances existing against it in the hands of the bankrupt, and takes no greater interest than the bankrupt himself had, except in the instances specified in the Act, viz. liens void for want of record or otherwise, liens ipso facto dissolved by the adjudication, and fraudulent and voidable (preferential) transfers." This case nearly correctly states the rule as to the trustee's title. It might be added that evidently recording is not necessary in order to make a lien valid as against levying creditors in Georgia. Were it otherwise the decision would be subject to the criticism of the editor's footnote to the report.

In *re Coffin*, 16 A. B. R. 689, 146 Fed. 181 (D. C. Conn.): "Now the trustee in bankruptcy has the property. His position is not precisely the one which Mr. Coffin occupied prior to the adjudication. He represents general creditors and counsel have made an apt illustration when they suggest the attitude of a sheriff pressing an execution."

Beasley v. Coggins, 12 A. B. R. 355, 57 So. Rep. 213 (Sup. Ct. Fla.): "A trustee in bankruptcy occupies a relation similar to that of a judgment creditor of the

bankrupt, and may file a bill in equity to set aside a fraudulent conveyance of real estate by the bankrupt, although neither the trustee nor any creditor has reduced any claim against the bankrupt to judgment."

And truly, what other seizure of property by legal process could be more effectual than that effected by the marshal, trustee or receiver in the bankruptcy proceedings? Certainly, in those states where unfilled chattel mortgages and unfilled conditional sales contracts are void as against a receiver appointed in a State Court in behalf of creditors or as against an assignee for the benefit of all creditors in possession of the rem, why not equally so as to a receiver or trustee appointed in the bankruptcy court likewise in possession?¹⁴⁹

§ 1213. Bankruptcy So Operating as Equitable Levy Precisely as Other Equitable Levies Operate in Same State.—It is a corollary of the rejected doctrine however, that the bankruptcy operates as such equi-

^{149.} Compare, inferentially, to same effect, *Crane Co. v. Smythe*, 11 A. B. R. 749, 750 (Sup. Ct. App. N. Y.).

And it makes no difference whether the bankruptcy is a voluntary bankruptcy or an involuntary bankruptcy.

In *re Frazier*, 9 A. B. R. 21, 117 Fed. 575 (D. C. Mo.): "Petitioner has filed a motion for rehearing, directing the attention of the court to the fact that the case ruled by the Court of Appeals was a proceeding in involuntary bankruptcy; whereas the case at bar is a voluntary proceeding. The contention is that the ruling of the Court of Appeals rested upon the proposition that a petition in involuntary bankruptcy is an adversary proceeding taken by the creditor against the bankrupt, and that the institution of such adversary action places the creditors in the position of 'using the courts of law and their process for the collection of their debts,' within the meaning of the term 'creditors,' employed in § 3412, Rev. St. Mo., 1899, quoted in the former opinion herein. It may be conceded that, as a general rule, courts are not concluded by a decision beyond the particular facts and principles of law arising therein. But it must likewise be conceded that, in applying the ruling of a court in a given case, its reasons assigned, and the underlying principles of law asserted, should guide in carrying them into another cause—especially so in construing the same statute in *pari materia*. Why should there be any difference in respect of a conditional sale, in effect fraudulent against creditors under the Missouri statute, when the bankrupt is declared to be bankrupt in a voluntary or involuntary proceeding? In both instances the bankrupt estate becomes amendable to the operation of the Bankrupt Act. The postulate announced by the court in *Mueller v. Nugent*, 184 U. S. 14, 7 Am. B. R. 224, 22 Sup. Ct. 269, 46 L. Ed. 405, 'that the filing of a petition is a caveat to all the world, and in effect an attachment and injunction,' in the very necessities of the whole scheme and spirit of the Bankrupt Act, must apply as well to a voluntary as an involuntary proceeding. The moment the petition is filed, the proceeding is in rem. It, in legal effect, sequesters all of his property interests for the benefit of all his creditors, *pari passu*, as if seized under attachment or a writ of execution. His whole estate passes into *custodia legis*. *Eo instante* every creditor of the bankrupt becomes an adversary party in a legal proceeding for the appropriation of the property of the bankrupt, and stands as a creditor seeking the aid of the court of exclusive jurisdiction. The trustee, representing the creditors, becomes antagonistic to such a creditor as the petitioner, who claims as a vendor of personal property under a conditional sale, not acknowledged and not recorded. So that after filing his petition in bankruptcy the bankrupt cannot dismiss the petition without notice to all of his creditors, with the consequent right on their part to appear and contest. It was of this right, under § 59, subsec. 'g,' Bankrupt Act, that the court, *inter alia*, in *In re Pekin Plow Co.*, asserted:

"These provisions evince an unquestionable intent on the part of Congress

table levy on titles in each state only as other equitable levies there operate. While, in accordance with the rejected doctrine under consideration it would be true that bankruptcy, being beyond question a proceeding in equity, would operate upon titles in each State as other equitable proceedings operate there, it correspondingly would be true that its operation in each State would be limited to that of similar equitable proceedings in such State. Thus, if, under State law, it requires some particular method of seizure by legal proceedings to nullify the particular lien or transfer involved, as by execution or attachment, and if any other method of sequestration by legal proceedings, as receivership, etc., is insufficient to such end, the first-named method alone would be effective in bankruptcy.¹⁵⁰

§ 1214. Accepted Doctrine—Bankruptcy Not an Equitable Levy.

—The doctrine adopted, however, is different; and bankruptcy is not to be considered as an equitable levy, whether the property be in the actual custody of the bankruptcy court or not. The bankruptcy proceedings, though equitable, are not, in this respect, analogous to a creditor's bill, but on the contrary the bankruptcy proceedings effect no change in and of themselves but merely give the trustee whatever rights the bankrupt and his creditors at the time of bankruptcy actually possessed under state law and were capable of asserting thereunder (save and except always as to the peculiar rights conferred by the Bankruptcy Act, upon bankruptcy, to avoid preferences and liens obtained by legal proceedings within the four months prior to the bankruptcy).

However much may be said for the discarded doctrine that bankruptcy operates (as to all property, at any rate, in the custody of the bankruptcy court), precisely as other equitable sequestrations of like nature so operate under the state law, yet such doctrine has been expressly and emphatically repudiated by the Supreme Court of the United States; and the contrary doctrine has been adopted as the law, namely, that bankruptcy does not operate as an equitable levy would operate under the State laws, even as to property in the actual custody of the bankruptcy court, and that bankruptcy

to make all creditors of the bankrupt parties to the proceeding, when once instituted. The effect of the institution of such proceeding is to forthwith sequester and appropriate all the property of the bankrupt to the payment of his debts pro rata and equally.'

"The trustee in bankruptcy acquires the same property rights and interests and privileges, and has the same duties and obligations imposed upon him, under a voluntary as under an involuntary proceeding. He acquires no less and no greater rights and interests than the trustee in an involuntary proceeding, under § 70a, 'to all the property which prior to the filing of the petition he (the bankrupt) could by any means have transferred or which might have been levied upon and sold under judicial process against him'. * * *

"It would be remarkable that an insolvent debtor, by anticipating a movement on the part of his creditors to throw him into bankruptcy, could file a voluntary proceeding, and by his act being about such inequality of right between the creditors of a voluntary and an involuntary bankrupt."

150. Impliedly, *In re Beede*, 14 A. B. R. 702, 138 Fed. 441 (D. C. N. Y.).

proceedings are not to be considered as analogous to a creditor's bill in this respect.¹⁵¹

York Mfg. Co. v. Cassell, 15 A. B. R. 633, 201 U. S. 344: "We come then to the question whether the adjudication in bankruptcy was equivalent to a judgment, attachment or other specific lien upon the machinery. The Circuit

151. *In re Foundry & Machine Co.*, 17 A. B. R. 294, 147 Fed. 828 (D. C. Wis.); *Eppstein v. Wilson*, 17 A. B. R. 591, 149 Fed. 197 (C. C. A. Tex.).

The case of *York Mfg. Co. v. Cassell*, as also the obiter of the case, *In re N. Y. Economical Printing Co.*, practically give creditors in the States wherein they respectively arose, less rights through the operation of the Bankruptcy Act than they would have had under a general assignment for the benefit of creditors or under a receivership of an insolvent estate, so far as unfilled instruments are concerned.

As to Ohio, *In re Nat'l Bk.*, 14 A. B. R. 195 (C. C. A. Ohio, citing *Hanes v. Tiffany*, 25 Oh. St. 549).

As to New York, *Skilton v. Codrington*, 15 A. B. R. 819, 185 N. Y. 80 (Court of Appeals): "It is true there is to be found in some cases a statement that the mortgage is void only as to judgment creditors. This statement, if construed in the light of the circumstances of the case before the court and with reference to the context of the opinion, is substantially correct, though not strictly accurate as a general proposition. The question is quite similar to that of the right of an attaching creditor to seize goods fraudulently transferred by his debtor. That he has such right is settled by authority. *Rinchey v. Stryker*, 28 N. Y. 45, 84 Am. Dec. 324; *Frost v. Mott*, 34 N. Y. 253; *Hess v. Hess*, 117 N. Y. 306. In the first of these cases the same argument was made as is now presented, that the transfer was void only as to judgment creditors, and numerous dicta of eminent judges were quoted in support of that position. This court held, that all that was meant by the expression was that a creditor could not attack the fraudulent transfer until he had obtained some process which authorized the seizure of the debtor's property. That is the true interpretation of the dicta relating to unfilled chattel mortgages. The rule that a creditor must first recover a judgment is simply one of procedure and does not affect the right. Therefore, where the recovery of a judgment becomes impracticable it is not an indispensable requisite to enforcing the rights of the creditor. So it was held, that an assignee in bankruptcy could, for the benefit of creditors, attack a fraudulent mortgage, though if a creditor had sought that relief in his own name it would be necessary that his claim be first put in judgment. *Southard v. Benner*, supra. Even where a statute, which secures to creditors liability of stockholders, provides in express terms for the recovery of a judgment and return of execution against the corporation, judgment and execution are unnecessary where they have become impracticable on account of the dissolution of the corporation or of an injunction restraining the prosecution of suits against it. *Hardman v. Sage*, 124 N. Y. 32; *Hunting v. Blun*, 143 N. Y. 511; *Lang v. Lutz*, 180 N. Y. 254. It is urged by the respondent that the unfilled mortgage was valid as between the parties and that the trustee in bankruptcy succeeds only to the rights of the bankrupt and, hence, cannot attack the mortgage for default in filing. This was the law under the Bankrupt Act of 1867. *Stewart v. Platt*, 101 U. S. 731. But by § 67 of the present Bankrupt Act it is expressly provided that 'claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate,' a provision which was not found in the earlier statute. This seems to cover the case. The respondent, however, relies on two cases in the Federal courts as authority to the contrary. *Hewitt v. Berlin Machine Works*, 194 U. S. 286, 11 Am. B. R. 709, and *In re New York Economical Printing Co.*, 6 Am. B. R. 615, 110 Fed. 514, 49 C. C. A. 133. The case in the Supreme Court is not in point. That arose under § 112 of the Lien Law which provides that reservations of title in contracts for the conditional sale of goods and chattels unless filed as directed by the statute shall be void as against subsequent purchasers, pledgees or mortgagees in good faith. But there is no provision that it shall be void as against creditors. This is the vital distinction between the law as applicable to such contracts and that prescribed as to chattel mortgages. The court held that the trustee in bankruptcy

Court of Appeals has held herein that the seizure by the court of bankruptcy operated as an attachment and an injunction for the benefit of all persons having interests in the bankrupt's estate.

"We are of opinion that it did not operate as a lien upon the machinery as against the York Manufacturing Company, the vendor thereof. Under the provisions of the Bankrupt Act the trustee in bankruptcy is vested with no better right or title to the bankrupt's property than belonged to the bankrupt at the time when the trustee's title accrued. At that time the right, as between the bankrupt and the York Manufacturing Company, was in the latter company to take the machinery on account of default in the payment therefor. The trustee under such circumstances stands simply in the shoes of the bankrupt and as between them he has no greater right than the bankrupt. This is held in *Hewitt v. Berlin Machine Works*, 194 U. S. 296, 11 Am. B. R. 709. The same view was taken in *Thompson v. Fairbanks*, 196 U. S. 516, 13 Am. B. R. 437. It was there stated that 'under the present Bankrupt Act, the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt.' See *Yeatman v. Savings Institution*, 95 U. S. 764; *Stewart v. Platt*, 101 U. S. 731; *Hauselt v. Harrison*, 105

was not a purchaser in good faith from the mortgagor and, hence, could not attack the contract, but observed in conclusion:

"We concur in this view which is sustained by decisions under previous bankruptcy laws and is not shaken by a different result in cases arising in States by whose laws conditional sales are void as against creditors."

"The case in the Circuit Court of Appeals is in point, and it was there held that a trustee in bankruptcy could not attack a chattel mortgage for default in filing. As appears by the opinion the result was reached on the assumption that by the law of the State of New York a nonfiled chattel mortgage was void only as to judgment creditors obtaining a lien, not as to general creditors. We think the very eminent judge who wrote in the case misconceived the law of the State in this respect. If it were a Federal question we would follow the decision regardless of our own opinion, but as the question is as to the law of this State we must adhere to the prior decisions of this court. It is to be further observed that in a subsequent case in the Circuit Court (*In re Kellogg*, 11 A. B. R. 710 note, 118 Fed. 1017), which arose under the conditional sale statute, the decision was placed on the ground that the statute did not render such contracts void as against creditors, and it was pointed out, that decisions in States where such sales are void as against creditors were not in conflict with the decision. In the case before us, it appears that almost all the debts of the bankrupt were incurred prior to the filing of the mortgage.

"Since the foregoing was written, the Supreme Court of the United States has decided the case of the York Manufacturing Co. v. Cassell, 15 A. B. R. 633, 201 U. S. 344, in which it was held, reversing the decision of the United States Circuit Court of Appeals of the Sixth Circuit, that under the laws of the State of Ohio an assignee in bankruptcy takes the property of the bankrupt subject to the lien of an unfilled contract of conditional sale, which in that State is void as against creditors as well as against subsequent purchasers. I understand by the opinion there delivered by Mr. Justice Peckham that the decision proceeds on the ground that under the State law as construed by the courts of the State in reference to chattel mortgages (*Wilson v. Leslie*, 20 Ohio 161) a conditional contract is void only as against those creditors who, before the contract or mortgage is filed or before the vendor or mortgagee obtains possession, seize the property on execution or attachment. This, as shown in the opinion delivered by Judge Peckham in the case of *Stephens v. Perrine*, already cited, is not the law of this State. With us the mortgage is void as to simple contract creditors, but such creditors cannot attack it until the recovery of a judgment and issue of execution. Then they can seize the mortgaged property whether the mortgagee has filed his mortgage or taken possession; though otherwise if the mortgagor has by subsequent action made a valid alienation. This principle has recently been reasserted by the court in *Russel v. St. Mart*, 180 N. Y. 355."

U. S. 401. The same doctrine was reaffirmed in *Humphrey v. Tatmer*, 198 U. S. 91, 14 Am. B. R. 74. The law of Ohio says the conditional sale contract was good between the parties, although not filed. In such a case the trustee in bankruptcy takes only the rights of the bankrupt, where there are no specific liens, as already stated."

"The remark made in *Mueller v. Nugent*, 184 U. S. 1, 7 Am. B. R. 224, 'that the filing of the petition (in bankruptcy) is a caveat to all the world, and in effect an attachment and injunction,' was made in regard to the particular facts in that case. The case itself raised questions entirely foreign to the one herein arising, and did not involve any inquiry into the title of a trustee in bankruptcy as between himself and the bankrupt, under such facts as are above stated.

"In this case, under the authorities already cited, the York Manufacturing Company had the right, as between itself and the trustee in bankruptcy, to take the property under the unfiled contract with the bankrupt, and the adjudication in bankruptcy did not operate as a lien upon this machinery in favor of the trustee as against the York Manufacturing Company."

Smith v. Mottley, 17 A. B. R. 867, 150 Fed. 266 (C. C. A. Ohio): "There would seem to be a valid distinction in the application of the rule that the misappropriated fund must be found in the assets, between the settlement of an estate in bankruptcy proceedings and proceedings upon a bill filed for the marshaling and appropriation of assets according to the principles of equity. In the latter case there is a seizure of the res for the direct purpose of fastening the inchoate rights of creditors. In the former the trustee takes the estate as he finds it."

In re Great Western Mfg. Co., 18 A. B. R. 261, 152 Fed. 123 (C. C. A. Neb.): "Agreements of this nature which are not filed or recorded in the proper public office are voidable by purchasers, attaching creditors, and judgment creditors only, under the statutes of Nebraska, * * * and there was none of either class when the petition in bankruptcy was filed in this case. The contract was therefore valid and enforceable against the bankrupt and against his ordinary creditors, and hence against the trustee, for he had no better right or title to the property than they, and he suffered no prejudice from the order of the court."

As previously observed the pendency of the bankruptcy proceedings ties the creditors' hands from helping themselves by their ordinary remedies; and it might be supposed that such interpretation would be given to the law as that its operation would be held not to lessen the rights of creditors in this particular. It may be that later consideration will induce the Supreme Court to modify the rule which it has enunciated in apparently broad and unqualified terms in the York Mfg. Co. case so that it may cover the situation existing where property is in the hands of the trustee, in those States where equitable sequestrations in behalf of all creditors are considered the equivalent of levies at law in respect to unfiled instruments.¹⁵²

152. In one of the States where equitable sequestrations are ineffective to annul unrecorded liens, the rule has been announced that the creditors may be permitted to proceed to judgment and even to levy after bankruptcy, if the suit was started before bankruptcy, and that the levy will redound to the benefit of all creditors, this rule being analogous to that suggested by the United States Supreme Court in *Lockwood v. Exchange Bk.* (10 A. B. R. 107), with reference to creditors holding notes waiving exemptions who have not levied before bankruptcy. In re Beede, 14 A. B. R. 697, 138 Fed. 441 (D. C. N. Y.). Perhaps the same distinction lies at the basis of the decision of the Supreme Court in *Thompson v. Fairbanks*, 13 A. B. R. 437, 196 U. S. 516.

§ 1215. **Maxim That "Filing of Petition a Caveat, Attachment and Injunction."**—The proposition that bankruptcy operates in each State on titles precisely as equitable levies in behalf of all creditors operate in such State, is somewhat involved in the maxim repeatedly enunciated in bankruptcy, that "The filing of the petition in bankruptcy is a caveat to all the world and in effect an attachment and injunction."¹⁵³

However, the maxim quoted is not to be taken as literally accurate. The filing of the bankruptcy petition, it is certain, may not operate as an attachment in all states nor upon all assets, at any rate. Even by the discarded doctrine above discussed, bankruptcy would not have the effect of an "attachment" nor "injunction" except in States and in cases where such effect is given to equitable actions in behalf of creditors. And even in such States it would not be correct to say in all instances that the mere "filing" of the petition is "in effect an attachment." The mere filing might, in such States, in accordance with the discarded doctrine above discussed, operate as an attachment, where the property is at the time of the filing already in the custody of the bankruptcy court, either through being then in the possession of the bankrupt, or of a receiver, or marshal appointed by the bankruptcy court (In re Tweed, 12 A. B. R. 648, 131 Fed. 355) but mere "filing" certainly would not so operate under any doctrine if the bankruptcy court had no such custody; and no well-considered case will be found so to hold.

Compare, In re Mullen, 4 A. B. R. 229, 101 Fed. 413 (D. C. Mass.): "If the rights of the trustee under § 70 (a), subd. 4, 5, and § 70 (e), are substantially those possessed by the creditors of the bankrupt under the law of Massachusetts, the trustee in this case cannot defeat the respondent's attachment unless the respondent shall be held, before the attachment, to have been affected with notice of the bankruptcy proceedings. I do not think that he was so affected. It has been said indeed, that bankruptcy proceedings affect with notice the whole world (Bank v. Sherman, 101 U. S. 403, 406, 25 L. Ed. 866): and this in spite of § 21 (e). See Hall v. Whiston, 5 Allen 126. But bankruptcy proceedings can hardly affect any one with notice that certain property standing in the name of a stranger belongs to the bankrupt."

153. In re Reynolds, 11 A. B. R. 760, 127 Fed. 760 (D. C. Mont.); Crosby v. Spear, 11 A. B. R. 615, 98 Me. 542; Mueller v. Nugent, 184 U. S. 1, 7 A. B. R. 224; In re Tweed, 12 A. B. R. 648, 131 Fed. 355 (D. C. Iowa); In re Smith & Shuck, 13 A. B. R. 103, 132 Fed. 301 (D. C. Iowa); In re Granite City Bk., 14 A. B. R. 406, 137 Fed. 818 (C. C. A. Iowa); In re Kolin, 13 A. B. R. 531, 134 Fed. 557 (C. C. A. Ills.); In re Schuster, 13 A. B. R. 760 (C. C. A. Ky.); Dolle v. Cassell, 14 A. B. R. 52, 135 Fed. 52 (C. C. A. Ohio, reversed in York Mfg. Co. v. Cassell, 15 A. B. R. 633, 201 U. S. 344). In re Mertens, 14 A. B. R. 226, 134 Fed. 104-5 (D. C. N. Y.), where the court held it operated to render null, and void a secured creditor's selling out of his security under the terms of the agreement of pledge, before adjudication. State Bank v. Cox, 16 A. B. R. 35 (C. C. A. Ills.); In re Breslauer, 10 A. B. R. 33, 121 Fed. 910 (D. C. N. Y.).

Obiter, In re Krinsky Bros., 7 A. B. R. 535, 112 Fed. 972 (D. C. N. Y.): "Those who deal with bankrupt's property after the filing of the petition and before the final adjudication, do so at their peril." In this case, however, a restraining order had actually been entered but the parties restrained had received only verbal notice thereof. In re Benedict, 15 A. B. R. 238, 140 Fed. 55 (D. C. Wis); In re Mertens, 15 A. B. R. 369, 144 Fed. 818 (C. C. A. N. Y.).

Compare, *In re Mertens*, 15 A. B. R. 369, 144 Fed. 818 (C. C. A. N. Y.): "While the filing of a petition in bankruptcy is a caveat to all the world, the notice ought not to have the effect of paralyzing all business dealings with the debtor, or to prevent lienors or pledgees from enforcing their contracts."

SUBDIVISION "A".

FRAUDULENT CONVEYANCES AND PROPERTY HELD ON FRAUDULENT TRUST.

§ 1216. **Fraudulent Transfers, and Property Held on Secret Trust, Recoverable.**—Property fraudulently conveyed or held on secret trust for the debtor so far as the same would have inured to the benefit of creditors without bankruptcy, is recoverable by the trustee in bankruptcy, and the transaction may be set aside.¹⁵⁴

Bush v. Export Storage Co., 14 A. B. R. 141, 136 Fed. 918 (C. C. Tenn.): "But besides this class of transfers made void by the Bankrupt Act itself, as being against its policy of equal and fair distribution the bankruptcy law (§ 70a, subsec. 4, 30 Stat. 566), provides that the trustee shall be vested by operation

154. Bankr. Act, §§ 70 (a) (4); 70 (e).

For pleadings and practice in actions by trustees to set aside fraudulent conveyances, see post, "Pleadings and Practice in Actions by Trustees," ch. XXXIII, div. 4, subdiv. "A."

Cases of fraudulent conveyances under Act 1 of acts of bankruptcy are in point here, see ante, § 104, et seq.

Barker v. Franklin, 8 A. B. R. 468 (Sup. Ct. N. Y.); *Small v. Muller*, 8 A. B. R. 448 (Sup. Ct. N. Y. App. Div.); *In re Grohs*, 1 A. B. R. 465 (Ref. Ohio); *In re Mullen*, 4 A. B. R. 224, 101 Fed. 413 (D. C. Mass.); *Schmidt v. Dahl*, 11 A. B. R. 226 (Minn. Sup. Ct.), in which case, however, there had been, previously to bankruptcy, a judgment obtained by a creditor. *Johnston v. Forsyth Mercantile Co.*, 11 A. B. R. 669, 127 Fed. 845 (D. C. Ga.); instance, *Hosmer v. Tiffany*, 17 A. B. R. 318, 115 App. Div. (N. Y.) 303; *Evans v. Staalle*, 11 A. B. R. 182, 92 N. W. 951 (Minn.).

Other instances of fraudulently conveyed property being held recoverable by the trustee:

1. *Schmitt v. Dahl*, 11 A. B. R. 226 (Sup. Ct. Minn.). Conveyance to daughter.
2. *Durack v. Wilson*, 13 A. B. R. 774 (N. Y. Sup. Ct.). Conveyance to sister.
3. *In re Lansaw*, 9 A. B. R. 167, 118 Fed. 365 (D. C. Mo.), where the court held that a claim for money paid to the bankrupt on an alleged sale and transfer, of goods at a time when he was insolvent to the knowledge of the purchaser, in circumstances tending to show the alleged transfer was a scheme to hinder and defraud creditors is properly rejected although the goods have been sold by the trustee.
4. *Barker v. Franklin*, 8 A. B. R. 468 (Sup. Ct. N. Y.), 75 N. Y. Supp. 305, where a firm apparently solvent suddenly determines to call itself insolvent, confesses judgments and transfers its accounts to favorite creditors, has a friendly receiver collusively appointed, conveys all individual real estate to a favored creditor and thus puts all its visible assets beyond the reach of unsecured creditors.
5. Bankrupt buying costly furniture and giving it to his bride as fast as bought. *Hosmer v. Tiffany*, 17 A. B. R. 318, 115 App. Div. (N. Y.) 303.
6. *In re Bartheleme*, 11 A. B. R. 67 (Ref. N. Y.). Payment of wife's mortgage.
7. *Small v. Muller*, 8 A. B. R. 448 (N. Y. Sup. Ct. App. Div.). Chattel mortgage and bill of sale.
8. *In re Rodgers*, 11 A. B. R. 79, 125 Fed. 169 (C. C. A. Ills.): This case was where the bankrupt had arranged with a storage company having no warehouse of its own, to issue to him warehouse receipts on his own goods purchased by him on credit and stored in his own warehouse on his own premises, with evident marks of design to deceive those dealing with him into the belief that the property was his own without notice of the secret lien of third parties to whom the warehouse receipts were pledged or sold; in which case the court

of law with any property transferred by the bankrupt in fraud of his creditors, the precise language of the Act being 'transferred' by him in fraud of his creditors.' There is no four months limitation on this class of transfers, and this provision includes fraudulent conveyances which are so by the common law, by statute law, and by any other recognized rule of law of the State. Loveland on Bankruptcy (2d Ed.), § 158, and cases cited. Of course, the fraudulent bankrupt is without right to set aside a conveyance made by him in fraud of his creditors. It is valid between the parties, but, by operation of the very terms of the Act, the right which before bankruptcy belonged to the creditors passed from them, and is vested in the trustee."

Beasley v. Coggins, 12 A. B. R. 355, 48 Fla. 215, 57 So. Rep. 213: "Section 70 (e) was intended to provide simply that the trustee in bankruptcy should have the same right to avoid conveyances as was possessed by creditors, or any

held the trustee would take the creditors' rights and the subterfuge would not avail.

9. Transferring practically all available property to relatives by different transfers, all within a week, *Horner-Gaylord Co. v. Miller & Bennett Co.*, 17 A. B. R. 267, 147 Fed. 295 (D. C. W. Va.).

10. *In re Chaplin*, 8 A. B. R. 121 (D. C. Mass.): Composition with creditors before bankruptcy, with a secret preference to one, although secret preference is given more than four months before bankruptcy, void under general equity principles as against creditors as being, 1st, an oppression of the debtor; and 2d, a fraud of the other creditor.

11. Relinquishment of dower as consideration for transfer. *Moore v. Green*, 16 A. B. R. 648 (C. C. A. W. Va., reversing *In re Porterfield*, 15 A. B. R. 11).

Instance where property held in the name of another on secret trust or resulting trust in favor of the bankrupt: *Evans v. Staalle*, 11 A. B. R. 182, 92 N. W. 951 (Minn.). Although in this case the court said the property did not belong to the trustee. Also, see *Fowler v. Jenks*, 11 A. B. R. 255, 90 Minn. 74; *Merrill v. Hussey*, 16 A. B. R. 816, 64 Atl. (Me.) 819, in which case title was fraudulently taken in the name of another.

Other instances, in some of which the facts have been held insufficient for recovery:

1. *In re Little River Lumber Co.*, 1 A. B. R. 482, 92 Fed. 585 (D. C. Ark.), affirmed in 4 A. B. R. 313.

2. *Jacobs v. Van Sickle*, 10 A. B. R. 519, 123 Fed. 340 (C. C. A. N. J.), affirmed in 11 A. B. R. 470, 127 Fed. 62.

3. *Pratt v. Christie*, 12 A. B. R. 1, 95 App. Div. (N. Y.) 282 (N. Y. Sup. Ct. App. Div.).

4. *Hackney v. First Nat'l Bank*, 11 A. B. R. 240, 68 Neb. 594 (Sup. Ct. Neb.).

5. *Fowler v. Jenks*, 11 A. B. R. 255, 90 Minn. 74 (Minn.).

6. *Ryttenberg v. Schefer*, 11 A. B. R. 652, 131 Fed. 313 (D. C. N. Y.): Bankrupts, commission merchants, by contract do all their commission business in the name of another firm of commission merchants to whom the bankrupts' lease is assigned and who guarantee the consignments and receive a commission for so doing; but the bankrupts continue to occupy the leasehold and attend to the actual management of the business; the other firm claiming, on bankruptcy, to have a factor's lien for advances on the property in the bankrupt's possession; held, not to be a fraudulent device to hinder creditors.

7. *Bryan v. Madden*, 11 A. B. R. 763, 78 N. Y. Supp. 220. This was an action, however, by a purchaser from the trustee, who had purchased the trustee's interest in certain contracts securing commissions as insurance agent which the bankrupt had transferred to his wife. The purchaser recovered on the ground of its being a preference but was refused relief on the other ground of fraudulent conveyance.

8. One partner of an insolvent firm selling out to the other operates to hinder and delay firm creditors and to subordinate their rights in the partnership assets to the claims of the individual creditors of the remaining partner. *In re Head & Smith*, 7 A. B. R. 556, 114 Fed. 489 (D. C. Ark.).

9. Property reconveyed to bankrupt by fraudulent grantee before petition in bankruptcy filed vests in trustee notwithstanding custody of State court receiver

of them, and this with especial reference to the statute of 13 Elizabeth. Under the Bankruptcy Act, when one is thereunder adjudged a bankrupt, creditors are not permitted to attack fraudulent conveyances of their debtor, made more than four months of the adjudication of bankruptcy; and, if the trustee could not do so, then the act would constitute 'a device to permit fraudulent conveyances to take effect with impunity in case they are successfully concealed for the specified four months.' *Lewis v. Bishop*, 47 App. Div. 554, text, 558, 62 N. Y. Supp. 618. It is only by holding that the trustee is subrogated to the rights of creditors against a fraudulent conveyance that full effect and operation can be given to the statute of 13 Elizabeth against fraudulent conveyances, from which our statute (§ 1991, Rev. St. 1892) is substantially taken."

In *re Carpenter*, 11 A. B. R. 147, 125 Fed. 831 (D. C. N. Y.): "The trustee in bankruptcy may take advantage of the invalidity of this instrument the same as a judgment creditor. It is not such a case as *In re N. Y. Economical Ptg. Co.*, 6 A. B. R. 615, 110 Fed. 514. As a mortgage it is void as against all creditors, because made in fraud of creditors. Section 70 of the Bankruptcy Act says that, not because of the omission to file or refile."

A sale, although for present valuable consideration, may be set aside if made with fraudulent intent participated in by the purchaser.¹⁵⁵

Obiter, In *re Pease*, 12 A. B. R. 68, 129 Fed. 446 (D. C. Mich.): "Even though a present, fair consideration be paid for property transferred to the hindrance, delay of, or in fraud upon creditors, it will not save the conveyance. 'A sale may be void for bad faith, though the buyer pays the full value of the

in suit to set aside the original conveyance, since the reconveyance divests the receiver. In *re Brown*, 1 A. B. R. 107 (D. C. Ore.).

10. Agreement to accept personal services and support as pay for notes, no new consideration being given therefor, is void against the trustee. In *re Powers*, 1 A. B. R. 432 (Ref. Vt.).

11. Bill of sale of all property, while insolvent, to wife and all future reacquired property for five years. In *re Hemstreet*, 14 A. B. R. 823 (D. C. Iowa).

12. In *re Porterfield*, 15 A. B. R. 11, 138 Fed. 192 (D. C. W. Va., reversed sub nom. *Moore v. Green*, 16 A. B. R. 648).

13. *North, Trustee v. Taylor*, 6 A. B. R. 233, 61 App. Div. 253, 70 N. Y. Supp. 338 (N. Y. Sup. Ct. App. Div.): Third persons innocent of fraud are not proper parties.

14. In *re Garner*, 6 A. B. R. 596 (D. C. Ga.): Wife's equitable interest in farm purchased jointly with her funds, but contract of purchase or bond for title taken in husband's name alone without her consent but finally acquiesced in on promise that deed should be jointly to her when executed; held, not to estop wife as against general creditors.

15. *Bryan v. Madden*, 11 A. B. R. 763, 78 N. Y. Sup. 220. This was an action, however, by a purchaser from the trustee, who had purchased the trustee's interest in certain contracts securing commissions as insurance agent which the bankrupt had transferred to his wife. The purchaser recovered on the ground of its being a conveyance, but was refused relief on the other ground of fraudulent conveyance.

16. Creditors organize corporation to take over all assets; the corporation itself goes into bankruptcy but not the original debtor; transfer to the corporation is not fraudulent. In *re Robert Shaw Mfg. Co.*, 13 A. B. R. 409, 133 Fed. 556 (D. C. Penn.).

17. Partners building, each, a home on property owned in common; after dissolution of firm and before bankruptcy of one partner, each house with half of land conveyed to respective wives; but no settlement of partnership affairs ever made, no proper books kept, etc., and facts too indefinite. *Ludvig v. Umstadtter*, 17 A. B. R. 774 (D. C. N. Y.).

155. *Johnston v. Forsyth Mercantile Co.*, 11 A. B. R. 669, 127 Fed. 845 (D. C. Ga.); *obiter*, *McNulty v. Wiesen*, 12 A. B. R. 342, 130 Fed. 1012 (D. C. Penn.).

property bought.' This is the consequence where his purpose is to aid the seller in perpetrating a fraud upon his creditors, and where he buys recklessly, with guilty knowledge."

Thus, the sale, hurriedly, by a retail merchant, of his entire stock of goods, throws the burden upon the purchaser of inquiring into the seller's financial condition.¹⁵⁶ And tender of the actual consideration received for the transfer is not necessary when the suit is in behalf of creditors.¹⁵⁷ The discharge of the bankrupt does not affect the right of recovery.¹⁵⁸

Property that never stood in the bankrupt's name may nevertheless be recovered, if title was taken and is held by another on secret trust for him.¹⁵⁹

§ 1217. Fraudulent Transfers before Four Months of Bankruptcy.

—Even fraudulent transfers made previously to the four months period may be set aside at the suit of the trustee and the assets held for creditors.¹⁶⁰

Beasley v. Coggins, 12 A. B. R. 355, 48 Fla. 215 (Sup. Ct. Fla.): "Under the Bankruptcy Act, when one is thereunder adjudged a bankrupt, creditors are not permitted to attack fraudulent conveyances of their debtor, made more than four months of the adjudication of bankruptcy; and, if the trustee could not do so, then the act would constitute 'a device to permit fraudulent conveyances to take effect with impunity in case they are successfully concealed for the specified four months.'"

Obiter, *Babbitt v. Kelly*, 9 A. B. R. 338 (St. Louis Ct. App.): "A trustee in bankruptcy may sue to set aside a conveyance made by a bankrupt in actual fraud of creditors earlier than four months prior to the instituting of the proceedings in bankruptcy, and in fact is only barred by the limitation period which would bar creditors whom he represents."

Thus as to "voluntary conveyances" by way of gift, to hinder and delay creditors.¹⁶¹

§ 1218. Fraudulent Transfers before Passage of Bankruptcy Act.

—Also fraudulent transfers made before the passage of the Bankruptcy Act itself may be set aside.¹⁶²

^{156.} In re Knopf, 17 A. B. R. 48 (D. C. S. Car.).

^{157.} *Johnston v. Forsyth Mercantile Co.*, 11 A. B. R. 669, 127 Fed. 845 (D. C. Ga.).

^{158.} *Evans v. Staalle*, 11 A. B. R. 182, 92 N. W. 951 (Minn.).

^{159.} *Evans v. Staalle*, 11 A. B. R. 182, 92 N. W. 951 (Minn.).

^{160.} *Bush v. Export Storage Co.*, 14 A. B. R. 141, 136 Fed. 918 (C. C. Tenn.); obiter, In re Schenck, 8 A. B. R. 727, 116 Fed. 555 (D. C. Wash.); *Skillen v. Endelman*, 11 A. B. R. 766, 79 N. Y. Supp. 413, 39 Misc. 261; *Pratt v. Christie*, 12 A. B. R. 1 (N. Y. Sup. Ct. App. Div.); In re Adams, 1 A. B. R. 94 (Ref. N. Y.); In re Grohs, 1 A. B. R. 465 (Ref. Ohio); In the bankruptcy court itself: In re Scrinopskie, 10 A. B. R. 221 (D. C. Kas.); In re Chaplin, 8 A. B. R. 121 (D. C. Mass.); contra (not in the bankruptcy court), In re Grohs, 1 A. B. R. 465 (Ref. Ohio); in the State Court: *Mueller v. Bruss*, 8 A. B. R. 442, 112 Wis. 406; *Andrew v. Mather*, 9 A. B. R. 299, 134 Ala. 358.

^{161.} In re Schenck, 8 A. B. R. 727, 116 Fed. 555 (D. C. Wash.); obiter, In re Toothacker Bros., 12 A. B. R. 99, 128 Fed. 187 (D. C. Conn.).

^{162.} In re Adams, 1 A. B. R. 94 (Ref. N. Y.); inferentially, In re Gaylord, 7 A. B. R. 1, 112 Fed. 668 (C. C. A. N. Y.); In re Brown, 1 A. B. R. 107, 91 Fed. 358 (D. C. Ore.); (1867) *Cady v. Whaling*, Fed. Cases No. 2,285, 7 Biss. 430.

§ 1219. **Complicity of Transferee to Be Shown.**—Unless complicity of the transferee in the fraudulent intent be shown, proof of the debtor's fraudulent intent alone is insufficient.¹⁶³

Bush v. Export Storage Co., 14 A. B. R. 142, 138 Fed. 914 (D. C. Tenn.): "It may be affirmed to be true, as a general proposition, that under any State system of jurisprudence it is necessary, in order to set aside a conveyance or transfer of property as fraudulent against creditors, that the fraud must have been participated in by the vendee or purchaser as well as the vendor. If there are some exceptions, or apparent exceptions, they are not important."

If the transfer were made within the four months preceding bankruptcy, then, under § 67 (e), proof solely of the bankrupt's fraudulent intent is sufficient to make a prima facie case, it being matter of defense to prove the transfer to have been made in good faith and for a presently passing consideration.¹⁶⁴

§ 1220. **Lien, Actually and Not Merely Constructively Fraudulent as to Part, Void as to All.**—A mortgage or other lien actually, and not merely constructively, fraudulent and void, as to a part of the property covered by it, is void as to the whole.¹⁶⁵

§ 1221. **Fraudulent Transfer Not to Be Confused with Preferential Transfer.**—Fraudulent intent is not to be confused with preferential intent, nor a fraudulent transfer with a preference.¹⁶⁶

§ 1222. **Mortgages Withheld from Record.**—Mortgages purposely withheld from record in order to give false credit are void in bankruptcy as against the trustee, where void by state law.

But where not recorded until after the mortgagor's bankruptcy, but not withheld to give false credit, they are good, where valid by State law.¹⁶⁷

Mortgages eventually filed before bankruptcy, but withheld for a period

163. In re Rosenberg, 10 A. B. R. 801 (D. C.); *Laundy v. Nat'l Bk.*, 11 A. B. R. 223 (Sup. Ct. Kans.); compare, *Barker v. Franklin*, 8 A. B. R. 468, N. Y. Supp. 305; obiter, *Jacobs v. Van Sickle*, 11 A. B. R. 470, 127 Fed. 62 (C. C. A. N. J.); obiter and inferentially, *McNulty v. Wiesen*, 12 A. B. R. 342, 130 Fed. 1012 (D. C. Penn.). Cases under act 1 of Acts of Bankruptcy would be pertinent here. Compare In re Gillette, 5 A. B. R. 119, 104 Fed. 769 (D. C. N. Y.).

164. See post, this chapter, division 3, subdivision "C," "Fraudulent Conveyances within Four Months of Bankruptcy."

165. *Skillen v. Endelman*, 11 A. B. R. 766, 39 Misc. 261, 79 N. Y. Supp. 413.

166. See ante, chapter 2, § 113. And see post, "Second Element of Preference," § 1305. But compare, In re Hill, 15 A. B. R. 499, 140 Fed. 984 (D. C. Calif.).

167. In re McIntosh, 18 A. B. R. 169 (C. C. A. Calif.). See also, post, § 1503. They are not void under § 67 (a) for "want of record," but, if void at all, are void for "other reasons," under § 67 (a) or as fraudulent transfers under § 70 (e), or as transferable property under § 70 (b) (4). Compare, *Gove v. Morton Trust Co.*, 12 A. B. R. 297 (N. Y. Sup. Ct. App. Div.). But whether void where no actual levy by a creditor has been made, see discussion ante, § 1208, et seq.

from record by agreement for the purpose of giving credit, are void in bankruptcy, where void under the State law.¹⁶⁸

Compare, *Rogers v. Page*, 15 A. B. R. 514, 140 Fed. 596 (C. C. A. Tenn.): "The mere fact that a mortgage has, by negligence been omitted from registration does not avoid it as between parties. But there is a distinction between a mere negligent failure to record a mortgage or deed and a deliberate agreement to do so, although the mere fact of an agreement to withhold from record is not of itself such evidence of a fraudulent purpose as to constitute fraud in law. It is, however, a circumstance constituting more or less cogent evidence of a want of good faith, according to the particular situation of the parties and the intent as indicated by all of the facts and circumstances of the particular case."

But in Iowa there must be showing made that it was withheld by agreement or that prejudice resulted from the withholding;¹⁶⁹ and in New York that the withholding resulted in inducing credit, such as to estop the mortgagee.¹⁷⁰

And such mortgages are void in Georgia only as to innocent parties becoming creditors meantime;¹⁷¹ and, apparently, in New York only "in case" such creditors exist.¹⁷²

In *re Hunt*, 14 A. B. R. 416, 139 Fed. 283 (D. C. N. Y.): "In short, it is not made to appear that the nonfiling of the mortgage either induced any person to give credit to Hunt or forbear suit or bankruptcy proceedings. If the evidence established that Honeywell, president of the bank, mortgagee, kept secret and withheld the mortgage from record for the purpose of allowing the four months to run so as to defeat the provisions of the Bankruptcy Act relating to preferences, and intended so to do when he took it, this court would hold that such acts were in fraud of the Act and rendered the mortgage void. * * *"

"I cannot find from this evidence that the failure to record the mortgage was accompanied by such acts on the part of the mortgagee or of its agents that a fictitious credit was given to Hunt, now the bankrupt, or that the acts of the defendant induced any creditor to forego any right. The defendant is not estopped from asserting the mortgage."

But such mortgages are not void in some states unless actual fraudulent intent is proved or actual levy has been made by some creditor before record.¹⁷³

168. *Obiter*, In *re Ronk*, 7 A. B. R. 31, 111 Fed. 154 (D. C. Ind.). See note to In *re Wright*, 2 A. B. R. 368, 96 Fed. 187 (D. C. Ga.); inferentially and *obiter*, In *re Ewald & Brainard*, 14 A. B. R. 269, 135 Fed. 168 (D. C. Iowa). Compare, inferentially, where it does not appear the withholding was for the purpose of giving credit, however, *Gove v. Morton Trust Co.*, 12 A. B. R. 297 (N. Y. Sup. Ct. App. Div.); compare also, In *re Shaw*, 17 A. B. R. 205 (D. C. Me.).

169. *Deland v. Miller*, 11 A. B. R. 744, 119 Iowa 368.

170. In *re Hunt*, 14 A. B. R. 416, 139 Fed. 283 (D. C. N. Y.).

171. *Clayton v. Exchange Bk.*, 10 A. B. R. 173, 121 Fed. 630 (C. C. A. Ga., reversing In *re Josephson*, 8 A. B. R. 423, 116 Fed. 404); impliedly, In *re Williams*, 9 A. B. R. 733, 120 Fed. 34 (D. C. Ga.).

172. In *re Furniture Co. (Metropolitan Store & Saloon Fixture Co.)*, 15 A. B. R. 119 (Ref. N. Y.).

173. In *re Shirley*, 7 A. B. R. 299, 112 Fed. 301 (C. C. A. Ohio, affirming In *re*

But, at any rate, the withholding from record is a circumstance to be considered as indicating fraud.¹⁷⁴

And the renewing of a real estate mortgage by giving a new one within every six months in order to comply with a statute requiring recording within six months of the date of execution, but the keeping of the entire series of renewals off the record, is a fraudulent scheme and is void as to creditors and the trustee, although the last renewal was recorded within the six months of its execution and before bankruptcy.¹⁷⁵

And chattel mortgages so withheld are, "a fortiori," void, where void by state law, as against simple contract creditors who become such during the interval.¹⁷⁶

But the debt itself may be proved, if otherwise correct, the claim upon the withheld mortgage being waived.¹⁷⁷

§ 1223. Mortgages to Cover Future Advances Good Though Made within Four Months.—Chattel mortgages to cover future advances, made within the four months, are not void.¹⁷⁸

Also, equitable liens made within the four months to cover future advances, are good.¹⁷⁹

§ 1224. Fraudulent Court Orders or Judgments.—Fraudulent court orders or judgments may be attacked by the trustee;¹⁸⁰ although not collaterally.¹⁸¹

§ 1225. Subsequent Creditors.—A conveyance may be avoided if made with the design of defrauding subsequent creditors, or perhaps if made with

Schmitt, 6 A. B. R. 150, cited in *Dolle v. Cassell*, 14 A. B. R. 59, C. C. A. Ohio). Similarly, in *re Wright*, 2 A. B. R. 368, 96 Fed. 187 (D. C. Ga.), where the recording was even done within the four months. *Rogers v. Page*, 15 A. B. R. 505, 140 Fed. 596 (C. C. A. Tenn.).

174. *Mitchell v. Mitchell*, 17 A. B. R. 388 (D. C. N. Car.).

175. In *re Noel*, 14 A. B. R. 715, 137 Fed. 694 (D. C. Md.).

176. In *re Furniture Co. (Metropolitan Store & Saloon Fixture Co.)*, 15 A. B. R. 119 (Ref. N. Y.).

177. In *re Ewald & Brainard*, 14 A. B. R. 267, 135 Fed. 168 (D. C. Iowa).

178. In *re Durham*, 8 A. B. R. 115, 114 Fed. 750 (D. C. Md.): In this case it was held, that chattel mortgages for present advances to carry on business made and duly recorded within the four months period, are not to be held void as hindering, delaying or defrauding creditors because of oral agreement that the goods covered are to be shipped to customers furnished by a particular commission house and billed in its name and the net proceeds to be applied upon the mortgage debt. Instance, in *re U. S. Food Co.*, 15 A. B. R. 329 (Ref. Mich.). See post, that mortgages to cover future advances are not preferences, division 3 of this chapter, subdivision "A," "Third Element of Preference," § 1319.

179. Instance, in *re Cramond*, 17 A. B. R. 23, 145 Fed. 566 (D. C. N. Y.).

180. Instance, *Stern, Falk & Co. v. Trust Co.*, 7 A. B. R. 305, 112 Fed. 501 (C. C. A. Ky.): This case was decided under allegations that it was a preference; the facts indicate even more than a preference. It was a case where an assignee for creditors, under cover of court orders, sold out stock at a purposely low price to the brother of one of the insolvents, under an arrangement that the brother sell the stock again and from the proceeds pay certain creditors 50 per cent., and the balance to the insolvents.

181. *Frazier v. Southern Loan & Trust Co.*, 3 A. B. R. 710, 99 Fed. 707 (C. C. A. N. Car.).

intent to defraud present creditors whose claims are subsequently paid, evidence of collusion against existing creditors under the circumstances being sufficient evidence of fraud against subsequent creditors.¹⁸²

§ 1226. **Either Property Itself or Its Value Recoverable.**—Either the property or its value may be recovered from the person to whom it was transferred.¹⁸³

§ 1227. **Bona Fide Holder for Value Prior to Adjudication, Protected.**—But if such person was a bona fide holder for value prior to the date of the adjudication, then neither the property nor its proceeds can be recovered from him.¹⁸⁴

Thus, the hurried purchase of an entire stock of a retail merchant at less than cost, the purchaser making no inquiries, indicates lack of good faith, although the purchaser paid the price and was actually ignorant of the seller's financial condition.

In *re Knopf*, 17 A. B. R. 49 (D. C. S. Car.): "Assuming-then that the money, was actually paid and that Sanders had no actual knowledge of or intentional participation in Knopf's fraudulent purpose with respect to his creditors, is he entitled to be protected as a bona fide purchaser? It is well settled that a conveyance made for a fraudulent purpose may be set aside, and that the fraud of the vendor from whom the vendee derives his title will vitiate it if the vendee has either actual or constructive notice of the fraud, and constructive notice is such a knowledge of facts as should excite the suspicions of a man of ordinary prudence, and such as ought to have put him upon inquiry as to the reasons and motives of the vendor, which inquiry if followed with ordinary diligence would have led to the discovery of the fraudulent intent."

SUBDIVISION "B".

ALLEGED OR PRETENDED CONSIGNMENTS, LEASES, AGENCIES, PLEDGES, BAILMENTS, ETC.

§ 1228. **Alleged "Consignments," "Leases," "Agencies," "Pledges," "Bailments," Where Really Sales.**—Transfers amounting

182. *Beasley v. Coggins*, 12 A. B. R. 355, 57 So. Rep. 213, 48 Fla. 213: Record of the conveyance is not notice to subsequent creditors of its fraudulent character. The fact that the conveyance complained of was recorded before the creditors became such, does not impart constructive knowledge of its voluntary or otherwise fraudulent nature: the creditor is not to suppose due consideration was lacking and that the debtor's estate was being depleted.

183. *Bush v. Export Storage Co.*, 14 A. B. R. 142, 136 Fed. 918 (U. S. C. C. Tenn.). But as to a conveyance to the bankrupt's wife it has been held, the trustee may pursue the property alone and may not sue for its value. *Sheldon v. Parker*, 11 A. B. R. 152, 66 Neb. 610. This would be different, probably, in States where a married woman is treated as a feme sole.

184. Bankr. Act, § 70 (e); *Bush v. Export Co.*, 14 A. B. R. 143, 136 Fed. 918 (U. S. C. C. Tenn.).

Instances where person held not a bona fide holder:

1. Chattel mortgagee who knows mortgagor is selling mortgaged chattels for his own use and acquiesces therein, is not a bona fide holder and the mortgage may be set aside. *Skillen v. Endelman*, 11 A. B. R. 766, 39 Misc. 261, 79 N. Y. Supp. 413.

2. *Lawrence v. Lowrie*, 13 A. B. R. 297, 133 Fed. 995 (D. C. Mass.).

to actual sales or conditional sales, wherein the condition is void for want of recording or otherwise, but pretended or claimed to be consignments, leases, agencies, pledges, bailments or conveyances of other interests; the property passes.¹⁸⁵

In *re Levin*, 11 A. B. R. 446, 127 Fed. 886 (D. C. Pa.): "It is undoubtedly true that the form of the transaction is of little consequence if the real purpose behind it is to cover up the vendee's interest in goods that have come into his possession, and thus to enable the vendor to get an advantage over other creditors to which he is not in truth entitled. As was said by the Supreme Court of Pennsylvania in *Thompson v. Paret*, 94 Pa. 275—and this statement was approved in *Peek v. Heim*, 127 Pa. 560—"whatever the form of the agreement, if its purpose was to cover up a sale and preserve a lien in the vendors for the price of the goods, it was void as respects creditors, whether the credit were given before or after the delivery of the goods. A consignment for such object was no better than any other device."

In *re Poore*, 15 A. B. R. 176, 139 Fed. 862 (D. C. Pa.): "By express agreement, the safe is to become the property of the bankrupt upon payment of the price named, and this is practically all there is to it, which makes it nothing more or less than a sale. And neither the calling of the payments rent, nor the provision that title shall not pass, nor the other conditions by which the transaction is supposed to be hedged about, are able to make it anything else. There is no occasion to be astute in upholding such instruments, which in nearly every case are intended to get around the law, and, for the mere purpose

185. In *re Galt*, 9 A. B. R. 682, 120 Fed. 443 (D. C. Ills., reversed, on the facts, in 13 A. B. R. 575).

In *re Leeds Woolen Mills*, 12 A. B. R. 136, 129 Fed. 922 (D. C. Tenn.): Consignor shipping goods to himself as consignee in care of bankrupt under circumstances indicating actual sale.

Compare, In *re Howland*, 6 A. B. R. 495, 109 Fed. 869 (D. C. N. Y.): Conditional sale with right in the conditional vendee to sell in the ordinary course of trade vests absolute title in the vendee.

In *re Dunn Hardware Co.*, 13 A. B. R. 147, 132 Fed. 719 (D. C. N. Car.): Conditional sales unfiled, but disguised under form of lease.

In *re Sheets Ptg. & Mfg. Co.*, 14 A. B. R. 668 (D. C. Ohio, affirmed sub nom. *Unitype Co. v. Long*, 16 A. B. R. 282): Conditional sale unfiled but disguised under form of lease.

In *re Martin-Vernon Music Co.*, 13 A. B. R. 276, 132 Fed. 983 (D. C. Mo., reversed sub nom. In *re Smith & Nixon Piano Co.*, 17 A. B. R. 636, C. C. A. Mo.).

In *re Rabenau*, 9 A. B. R. 180, 118 Fed. 471 (D. C. Mo.): Conditional sale disguised as bailment. Distinguished in *re Flanders*, 14 A. B. R. 27, 134 Fed. 560 (C. C. A. Ills.).

Bradley, Alderson & Co. v. McAfee, 17 A. B. R. 495 (D. C. Mo.): Conditional sale (void for lack of record) and not agency.

In *re Rasmussen*, 13 A. B. R. 462, 136 Fed. 704 (D. C. Ore.): Personal property delivered to the bankrupt for sale under contracts reserving title and containing various provisions relating to ownership and possession, which are mere contrivances to secure the purchase price: the transaction is not a conditional sale but a fraud on creditors and title vests in the trustee.

In *re Garcewich*, 8 A. B. R. 149, 115 Fed. 87 (D. C. N.): Pretended conditional sale but in reality a contrivance to deceive creditors.

In *re Carpenter*, 11 A. B. R. 147, 125 Fed. 831 (D. C. N. Y.): Pretended agency.

In *re Butterwick*, 12 A. B. R. 536, 131 Fed. 271 (D. C. Penn.): Pretended conditional sale.

In *re Miller & Brown*, 14 A. B. R. 439, 135 Fed. 868 (D. C. Penn.): A pretended consignment or sale on approval.

of securing the payment of the price, make that out a bailment which in the real negotiations between the parties was understood and intended to be a sale." Also see same case, 15 A. B. R. 407.

Troy Wagon Wks. v. Vastbinder, 12 A. B. R. 353, 130 Fed. 232 (D. C. Penna.): "The transfer is sought to be justified on the ground that the existing relation between the parties was one of agency only, the respondent merely taking the goods to sell on account, and turning over the proceeds after deducting his commission. Written orders on Childs & Co. are produced to verify this, signed by the respondent, in which he declares that he so receives and holds them; but this is materially qualified by the other evidence, and the court will go behind mere forms to get at the real transaction. Indeed, the orders themselves—aside from the fine print at the bottom—bear on their face the proof that they represent actual purchases, and not consignments. The goods are disposed of to the respondent for a specific price, and on definite terms of credit, with provision on most of them for a discount if paid within a certain time. And while it may be true, as stated by the respondent, that he was only required to pay for each lot as fast as he disposed of it, accounting to Childs & Co. for whatever he received in the way of notes or other securities, yet in making sales he did so in his own name, and was held directly responsible, the securities obtained being taken to himself personally, and guaranteed by him when they were turned over. His obligations to Childs & Co. were plainly regarded as a debt; and he so speaks of them in his testimony. There are too many indicia in this of an ordinary purchase, to warrant the conclusion that anything else was in fact intended."

In *re Tice*, 15 A. B. R. 97, 139 Fed. 52 (D. C. Pa.): "In Pennsylvania, where goods were delivered by claimant to a bankrupt, under an agreement 'to pay rent for the use of the same,' in certain installments, covering specified periods, and upon making a further specified payment, not designated as rent, a bill of sale to be given, the claimant 'to have the privilege of taking' the goods 'if the rent is not paid,' the transaction is a conditional sale and not a bailment, and subjects the property to the claims of the creditors of the bankrupt.

"The general rule in Pennsylvania is that the delivery of goods, with a provision that the title shall not pass until the purchase price has been paid, is void as to creditors of the party to whom they are delivered, and the essential character of the transaction is regarded rather than the particular form assumed."

In *re Wood*, 15 A. B. R. 411, 140 Fed. 964 (D. C. Pa.): Sale and not bailment: "The goods were billed to the bankrupt as though it was a sale, and while this is not conclusive it is of more or less persuasive force."

Thus, transactions that amount to conditional sales or chattel mortgages are frequently claimed to be pledges where the condition of the sale is rendered nugatory by failure to record the contract, or the chattel mortgage is void for want of record.¹⁸⁶

Of such class of subterfuges are attempted "warehousings" by insolvent debtors of their own property on their own premises, pretending the transaction to be pledges or bailments, but retaining control and substantial possession all the time.¹⁸⁷

Instance, In *re Rodgers*, 11 A. B. R. 79, 125 Fed. 169 (C. C. A. Ills.): "We are thus brought to the consideration of the real character and purpose of the

¹⁸⁶. In *re Rodgers*, 11 A. B. R. 79, 125 Fed. 169 (C. C. A. Ills.).

¹⁸⁷. *Warehousing Co. v. Hand*, 16 A. B. R. 49 (C. C. A. Wis.).

transaction between the bankrupt and the storage company. We are to ascertain the real intention of the contracting parties from the whole agreement read in the light of the surrounding circumstances. The bankrupt was largely engaged in purchasing seed upon credit, storing the property purchased in his warehouse. He occupied the premises as a place of business, maintaining an office there, with clerks to assist in the management of the business, and with porters to handle the seed. The premises were subject to a rental of \$250 a month. He arranged with the storage company, which had no warehouse of its own, that it would issue warehouse warrants or receipts to the bankrupt for property upon the bankrupt's premises for a certain small charge per month upon the value of the property covered by the receipts. He executed a lease of the premises to the storage company, to continue so long as the bankrupt should desire, and so long as property remained therein for which warrants or receipts had been issued; and this without any payment of rent by the storage company, the rental in fact being paid by the bankrupt. The storage company neither required, nor was it given any key to the premises. The bankrupt remained in possession of the premises as before the agreement, continuing to transact his business there as he had formerly done. There were certain signs placed upon the different floors of the building, indicating that the storage company controlled the premises. These were small and obscure signs, not likely to attract attention, and most of them hidden behind the piles of bags of seed. No sign was displayed upon the exterior of the building indicating any proprietorship of the storage company, or giving notice to the world that any other than the bankrupt had possession and control. There was no open, notorious manifestation of a change of possession, none was intended and there was none in fact. Upon each pile of bags of seed for which the warehouse receipts or warrants were issued there was placed a small tag, which might be discovered upon careful search. The bankrupt substantially treated this property as his own, at times going through the forms prescribed by the storage company, and, whenever he found it necessary, ignoring them. We do not find that the storage company had knowledge of this action of the bankrupt, but it certainly knew that it was possible under the circumstances for the bankrupt to do with the property as he would, since it was left within his control.

"It is difficult for us to look upon this transaction as a warehousing of property. The storage company assumed no liability to the bankrupt, and assumed only such responsibility as the law imposes upon it with respect to those advancing money upon the faith of its warehouse warrants or receipts. The name of the company is in itself, under the circumstances, a false pretense. It did not store property. It had no premises upon which to store property. The bankrupt stored the property. The bankrupt paid the rental of the premises. It is true that an agent of the storage company occasionally visited the premises and inspected the property in a sort of way, but exercised no supervision or control that would prevent the bankrupt from doing with it as his will might dictate or his financial necessities might require. We cannot but regard this arrangement as a subterfuge, a mere device to enable the bankrupt to hypothecate the warehouse warrants or receipts, and so to raise money upon secret liens upon property in his possession and under his control."

Thus, likewise, unfiled conditional sales and unfiled chattel mortgages are sometimes pretended to be property held in trust.¹⁸⁸

Again, it is often sought to make an absolute sale to the bankrupt, appear

¹⁸⁸. In re Tweed, 12 A. B. R. 648 (D. C. Iowa): Unfiled conditional sale. In re Jerstman, 17 A. B. R. 882 (D. C. N. Y.); unfiled chattel mortgage.

to be a bailment, in order that the property may be reclaimed. But the property affected will pass if the true nature of the transaction makes it a sale.¹⁸⁹

In *re Heckathorn*, 16 A. B. R. 467 (D. C. Pa.): "It is rather suggestive of an attempt, as is said above, to have the benefit of a sale without the responsibility for it, disposing of the goods at a price and at the same time retaining a hold upon them and upon the proceeds derived from their sale. But why this beating behind the bush when a direct course was open to them? If the intention was that the bankrupt should receive and sell the goods for and account of the petitioners, upon a commissic., it would have been easy, in so many words, to say so; and the failure to do it can but be regarded as significant."

Chisholm v. Earle Ore Sampling Co., 16 A. B. R. 423 (C. C. A. Colo.): "But whatever doubts arise from the face of the contract are dispelled by the conduct of the parties under it. It is a familiar rule that, where there is uncertainty as to the true meaning and intent of the contracting parties, the construction which they themselves have put upon it by their voluntary course of practice, when no controversy existed, is always to be given very great, if not controlling, effect. * * * The parties acted under the contract as though the transactions were sales of ore upon the basis of the assay value of the samples."

In *re Wells*, 15 A. B. R. 419 (D. C. Pa.): "There is no particular magic in the terms 'consigned' or 'consigned account.' In a sense all goods shipped to another are consigned to him. The question is what was the inherent character of the transaction, which depends upon the purpose of it."

But where the transaction amounts to a bona fide consignment to the bankrupt or bailment to him, and is not a concealed sale, the trustee does not acquire title.¹⁹⁰

Plow (Deere) Co. v. McDavid, 14 A. B. R. 664, 137 Fed. 802 (C. C. A. Mo.): "We think it was an agency contract. It is not a contract in which the consignee can sell at any price, or on any terms he may choose, but, as we understand it, it is a contract or consignment of goods to be sold on commission by the consignee, as agent for the consignor, for cash. The plow company had the right, under the contract, to require the goods returned, and in this it lacks one of the necessary elements of a contract of sale, namely, to pay money, or its equivalent, for the goods delivered, with no obligation to return."

In *re Galt*, 13 A. B. R. 575 (C. C. A. Ills., reversing 9 A. B. R. 682): "Applying to this contract the test stated, it is clear that here was a bailment and not a conditional sale. It was not contemplated that Galt should ever own these wagons. He was to sell them to others for the company, his commissions to be the amount which he might receive over the prices stated in the contract. The proceeds, whether in cash or in notes of the purchaser, were to be immediately returned to the company, the notes being guaranteed by Galt. This was

189. *Bush v. Export Storage Co.*, 14 A. B. R. 138, 136 Fed. 918 (U. S. C. C. Tenn.); In *re Wood*, 15 A. B. R. 411, 140 Fed. 964 (D. C. Penn.): Goods ordered for exhibition at a fair, but billed at regular prices and remaining in bankrupt's unquestioned possession for six months or more.

190. In *re Levin*, 11 A. B. R. 446, 127 Fed. 886 (D. C. Penn.); In *re Smith & Nixon Piano Co.*, 17 A. B. R. 636 (C. C. A. Mo., reversing In *re Marten-Vernon Music Co.*, 13 A. B. R. 276).

Instance, In *re Rubber Ref. Co.*, 15 A. B. R. 72 (D. C. Penn.): Bailment with option to purchase or "Sale on Approval," with disapproval signified.

Shipment of leather; bailment not conditional sale: In *re Flanders*, 14 A. B. R. 27, 134 Fed. 560 (C. C. A. Ills.).

a del credere commission and not a sale. The company could compel a return of the goods not sold. Galt had not the option to pay for them in money. Even with respect to the goods unsold within the twelve months, the option for their return or payment was with the company and not with Galt; and nowhere in the agreement does the latter covenant to pay for these goods as in the case of a sale."

In re Columbus Buggy Co., 16 A. B. R. 759, 143 Fed. 849 (C. C. A. Okla.): "A contract between a furnisher of goods and the receiver that the latter may sell them at such prices as he chooses, that he will account and pay for the goods sold at agreed prices, that he will bear the expenses of insurance, freight, storage and handling and that he will hold the merchandise unsold subject to the order of the furnisher, disclose an agreement of bailment for sale, and does not evidence a conditional sale. Such a contract is not affected by a statute which renders unrecorded contracts for conditional sales voidable by creditors and purchasers.

"An agreed price, a vendor, a vendee, an agreement of the vendor to sell and of the vendee to buy for and pay the agreed price are essential attributes of a contract of sale. The power to require the restoration of the subject of the agreement is an indispensable incident of a contract of bailment.

"The fact that a contract provides that the receiver of goods is to account for those sold at fixed prices and to retain the difference for insurance, storage, commission and expenses does not make the contract an agreement of sale."

And an executory contract of sale may be converted by verbal agreement made before delivery of the goods, later reduced to writing, into a bailment with alternative of future conversion into a sale.¹⁹¹

But an attempted conversion of an unrecorded conditional sale into a bailment by subsequent agreement will be ineffective.

In re Poore, 15 A. B. R. 407, 139 Fed. 863 (D. C. Pa.): "No doubt, while the matter was still executory, the conditions on which it was held could be readjusted. Goss Ptg. Co. v. Jordan, 171 Pa. 474; Stiles v. Seaton, 200 Pa. 114; In re Naylor Mfg. Co., 14 A. B. R. 284. But not to the detriment of those creditors who either were such at the time the machinery was obtained or had become so since then, as to whom it had passed beyond the executory stage."

SUBDIVISION "C."

UNRECORDED LIENS, UNRECORDED CHATTEL MORTGAGES, CONDITIONAL SALES, REAL ESTATE MORTGAGES, SALES OF PERSONALTY WHERE SELLER STILL HOLDS POSSESSION.

§ 1229. **Liens Void as to Creditors for Want of Record, Void as to Trustee.**—Claims, which, for want of record, would not have been valid liens as against the claims of any creditor of the bankrupt, are not liens against his estate.¹⁹²

191. In re Naylor Mfg. Co., 14 A. B. R. 284, 135 Fed. 206 (D. C. Penn.); In re Miller & Brown, 14 A. B. R. 443, 135 Fed. 868 (D. C. Penn.). Sale on approval; goods being disapproved and set aside for return before levy. In re Rubber Ref. Co., 15 A. B. R. 72 (D. C. Penn.).

192. Bankr. Act, § 67 (a); *obiter*, In re Runke, 7 A. B. R. 31, 111 Fed. 154 (D. C. Ind.); also, see post, § 1507.

§ 1230. **Unrecorded or Unfiled Chattel Mortgages Void.**—An unrecorded or unfiled chattel mortgage is void as against the trustee (in case a creditor “armed with process” exists) in states where recording or filing is required to preserve the lien as against creditors “armed with process.”¹⁹³

Some courts have held that such mortgages were void, even where no creditor had seized upon the property.¹⁹⁴

In *re* Metropolitan Store & Fixture Co., 15 A. B. R. 119, 121 (Ref. N. Y.): “In *re* N. Y. Economical Ptg. Co., holding a contrary view, proceeded on the theory that the New York statute made the mortgage good as against creditors at large as well as between the parties; an erroneous view, it seems to me as appears by the above cases which were not then before the court.”

Other courts have held that they were not void unless there existed a creditor armed with process.¹⁹⁵

The same rulings have been made also as to a bill of sale held as security;¹⁹⁶ also, as to a “deed of trust;”¹⁹⁷ although, in some States, if eventually filed before bankruptcy a chattel mortgage will not be void as against general creditors for long delay in filing.¹⁹⁸

§ 1231. **Unfiled Chattel Mortgages Not Void Where Filing or Recording Not Required.**—And unfiled chattel mortgages are not void

193. As to chattel mortgages void for other faults than nonrecord, see various other subjects.

194. In *re* Pekin Plow Co., 7 A. B. R. 369, 112 Fed. 308 (C. C. A. Neb.); In *re* Ducker, 13 A. B. R. 757, 133 Fed. 771 (C. C. A. Ky.); *Gueras v. Porter*, 9 A. B. R. 271, 118 Fed. 668 (D. C. Calif.). In this case a chattel mortgage upon property located in two different counties but recorded only in one county, was held void as to the property in the other county and the mortgagor had the burden upon him to prove how much was within the mortgage. In *re* Doran, 17 A. B. R. 799, 148 Fed. 327 (D. C. Ky., Ref. N. Y.); In *re* Beede, 14 A. B. R. 697, 138 Fed. 441 (D. C. N. Y.); In *re* Booth, 3 A. B. R. 574, 98 Fed. 975 (D. C. Ore.); In *re* Leigh Bros., 2 A. B. R. 606 (affirmed in 96 Fed. 806, Ref. Colo.); instance, In *re* Shaw, 17 A. B. R. 204 (D. C. Me.).

195. In *re* Economical Printing Co., 6 A. B. R. 615, 110 Fed. 514 (C. C. A. N. Y.); In *re* Cutting, 16 A. B. R. 752, 145 Fed. 388 (D. C. N. Y.); impliedly, *Eppstein v. Wilson*, 17 A. B. R. 592, 149 Fed. 147 (C. C. A. Tex.).

But compare In *re* Beede, 11 A. B. R. 387, 120 Fed. 853 (D. C. N. Y.). In this case the court criticises but follows the Circuit Court of Appeals, but obviates the difficulty by permitting creditors to proceed after the bankruptcy to get judgments. However, this is a poor expedient for obviating the effect of the erroneous ruling in In *re* Economical Printing Co., 6 A. B. R. 615, 110 Fed. 514 (C. C. A. N. Y.), and itself gives rise to perplexing problems, for example: mere judgment creditors until levy could hardly be meant. Again, suppose the bankrupt exercised his right to obtain a stay of the suits wherein the judgments are sought, etc., etc. Compare, *Gove v. Morton Trust Co.*, 12 A. B. R. 297, 96 N. Y. App. Div. 177 (N. Y. Sup. Ct. App. Div.).

196. *Marden v. Phillips*, 4 A. B. R. 566 (D. C. Mass.).

197. In *re* Thorp, 12 A. B. R. 195 (Ref. Va.): But the reasoning of this case is improper in that it is based on the erroneous theory that a trustee has the title of an “innocent purchaser for value.”

198. In *re* Shirley, 7 A. B. R. 299, 112 Fed. 301 (C. C. A. Ohio): Although in the case of In *re* Shirley the real issue was whether a mortgage kept from record by agreement and to give credit was void as to general creditors. In *re* Wright, 2 A. B. R. 364, 96 Fed. 187 (D. C. Ga.). Compare *Gove v. Morton Trust Co.*, 12 A. B. R. 297, 96 N. Y. App. Div. 177 (N. Y. Sup. Ct. App. Div.).

where filing or recording is not required by the State law in order to make them valid as against levying creditors.¹⁹⁹

In re Josephson, 8 A. B. R. 423, 116 Fed. 404 (D. C. Ga.): "The decision of the highest court of a State that recording is not essential to the validity of a chattel mortgage executed therein when the state law does not so require, must be followed by the bankruptcy court."

§ 1232. **Meaning of "Required."**—And the term "required," as thus used in recording statutes, means not that recording is compulsory nor that it is essential to validity between the immediate parties, but merely that recording is essential to validity as to creditors.²⁰⁰

First Nat'l Bk. v. Connitt, 15 A. B. R. 662, 142 Fed. 33 (C. C. A. Mo.): "Within the meaning of amended § 60a of the Bankruptcy Act, the Missouri law (Rev. St. 1899, § 3404) required the recording of chattel mortgages. To be sure an unrecorded mortgage is not pronounced void absolutely and under all circumstances, but it 'is required to be recorded' in the sense in which that phrase is customarily used, and the language of requirement is similar to that employed in the registry laws of most of the states. The word 'required,' found in the phrase 'the recording or registering of the transfer, if by law such recording or registering is required' of the amendment of § 60a, has reference to the character of the instrument of transfer required to be recorded by the State law rather than to the particular individuals who, by reason of adventitious circumstances, may or may not be affected by an unrecorded instrument. Thus an affirmative answer would unhesitatingly be given to the inquiry: 'Does the law of Missouri require the recording of chattel mortgages?'

"The Circuit Court of Appeals of the Fifth Circuit, in a case involving the registry statute of Texas, held that, as an unrecorded chattel mortgage was good between the parties thereto and against ordinary creditors, and as there were no intervening lienholders or purchasers, it could not be said that a registry or recording was required, and upon the facts of that case it accordingly concluded that a chattel mortgage given before but placed on record within the four months before the institution of bankruptcy proceedings could not be considered as a voidable preference. Meyer Bros. Drug Co. v. Pipkin Drug Co. (C. C. A.), 14 A. B. R. 477, 136 Fed. 396. In effect this is the adoption, without exception or qualification, of the old rule that whether and to what extent a chattel mortgage given before but recorded within the four months' period is valid against a trustee in bankruptcy should be determined exclusively by the State law. In our opinion, the amendment of 1903 has qualified this rule in respect of the question whether such a mortgage may constitute a voidable preference under subdivisions 'a' and 'b' of § 60. If this has not resulted, we fail to see that Congress has accomplished anything by the amendment."

§ 1233. **But, in Most States, Some Creditor Must Already Have Actually Levied or Been "Armed with Process."**—The doctrine seems to be firmly established that "creditor" means levying creditor and that some creditor must actually have levied before bankruptcy.²⁰¹

199. Inferentially, Hewitt v. Berlin Machine Wks., 11 A. B. R. 709, 194 U. S. 296.

200. Loeser v. B'k, 17 A. B. R. 631, 148 Fed. 975 (C. C. A. Ohio). Contra, and that it refers to validity between the immediate parties, see Drug Co. v. Drug Co., 14 A. B. R. 477, 136 Fed. 396 (C. C. A. Tex.). And see, also, In re Hunt, 14 A. B. R. 415, 139 Fed. 283 (D. C. N. Y.).

201. See discussion, ante, division 2 of this chapter.

§ 1234. Not Void for Simple Nonrecord in States Where Showing of Damage to Creditors or Other Additional Conditions Also Requisite.—A chattel mortgage is not void for nonrecord in States where the simple failure to file or record it is not enough to avoid it unless damage to creditors is shown or the failure was by agreement of parties.²⁰²

And is not void for nonrecord in certain other States except as to subsequent creditors without notice; thus in Kentucky;²⁰³ nor in Michigan except as to new creditors, or as to old creditors extending additional time between the date of the executing and the date of the filing;²⁰⁴ and is not void in South Carolina for nonrecord except as to subsequent creditors; and subsequent creditors alone may participate in the fund.²⁰⁵

§ 1235. Not Void in States Where Mere Equitable Sequestrations by Receivers, Assignees, etc., Insufficient.—And is not void where, under State law, mere sequestration of the property by legal proceedings is insufficient unless accomplished by some particular method of legal seizure as by levy of execution or attachment.²⁰⁶ Probably this distinction lies at the basis of many of the decisions contra to the general rule.²⁰⁷

See, inferentially, *In re N. Y. Economical Ptg. Co.*, 6 A. B. R. 619, 110 Fed. 514 (C. C. A. N. Y.): "When the mortgagor was adjudicated bankrupt, there was, so far as appears, but one judgment creditor. Whether any other creditor could have eventually entitled himself to the benefit of the statute was a matter of mere conjecture. It would have depended not only upon his own vigilance in pursuing his legal rights, but also upon the volition of the mortgagor."

§ 1236. Taking of Possession Curing Lack of Record.—But, if possession is taken by the mortgagee or conditional vendor before the bankruptcy petition is filed, such taking of possession operates as a filing and the lien will be good although bankruptcy follows within four months,²⁰⁸ unless the mortgage or conditional sale is otherwise void as a preference.²⁰⁹

202. *Deland v. Miller*, 11 A. B. R. 744, 93 N. W. Rep. 304, 119 Iowa 368.

203. *In re Sewell*, 7 A. B. R. 133, 111 Fed. 791 (D. C. Ky.); analogously, *In re Shuster (Ducker)*, 13 A. B. R. 760, 134 Fed. 43 (C. C. A. Ky.); *In re Doran*, 17 A. B. R. 799, 148 Fed. 327 (D. C. Ky.).

204. *In re Adams*, 2 A. B. R. 415 (Ref. Mich.).

205. *In re Cannon*, 10 A. B. R. 64, 121 Fed. 582 (S. Car.).

206. See ante, discussion of this subject, division 2 of this chapter.

And in such States the lien of the levy must be preserved by order of court to effect this object. *Thompson v. Fairbanks*, 13 A. B. R. 437, 196 U. S. 516.

207. See inferentially, *In re Beede*, 14 A. B. R. 697, 138 Fed. 441 (D. C. N. Y.); *Matthew v. Hardt*, 9 A. B. R. 373 (Sup. Ct. N. Y.); compare, *Skilton v. Codington*, 15 A. B. R. 819, 185 N. Y. 80.

208. See post, "Seventh Element of a Preference," § 1371. *In re Antigo Screen Door Co.*, 10 A. B. R. 361, 123 Fed. 249 (C. C. A. Wis.), criticised in *In re Ducker (In re Shuster)*, 13 A. B. R. 757, 118 Fed. 668 (C. C. A. Ky.); *In re Klingman*, 2 A. B. R. 44 (Ref. Iowa); compare, *Zartman v. Nat'l Bk.*, 16 A. B. R. 158, 106 App. Div. (N. Y.) 406; instance, where facts fail to show possession taken, *In re Shaw*, 17 A. B. R. 204 (D. C. Mo.).

209. *In re Ball*, 10 A. B. R. 564, 123 Fed. 164 (D. C. Vt.), rejected in *Humphrey v. Tatman*, 14 A. B. R. 74, 198 U. S. 91. Compare, as to similar subject, under "Preferences as Affected by Recording," § 1155.

Humphrey v. Tatman, 14 A. B. R. 74, 198 U. S. 91: "In Massachusetts, the taking possession of mortgaged chattels by the mortgagee within the four months period, under an unrecorded mortgage covering after-acquired property, made more than two years before the bankruptcy of the mortgagor, is good as against his trustee." Reversing 12 A. B. R. 62.

§ 1237. **Whether Lien Begins at Date of Taking Possession or Reverts, to Be Determined by State Law.**—The effect of taking possession as to whether the lien relates back to the date of the original instrument or takes effect as of the date of taking possession is to be determined by State law, as interpreted by its highest court.²¹⁰

§ 1238. **As to After-Acquired Property.**—The taking of possession of after-acquired property operates in some States to extend the mortgage lien thereto as of the date of the taking of possession, not as of the date of the original execution of the mortgage, and the same holding will prevail in bankruptcy.²¹¹ But in other states it operates to fasten the lien as of the date of the original execution of the mortgage, and in such States the lien will likewise be held to revert, in the bankruptcy court.²¹²

The identification and separation of chattels within the four months period where they were indefinitely described in the mortgage, itself operates to fix the lien as of the date of the identification.²¹³

§ 1239. **Permitting Creditors to Levy after Bankruptcy in Order to "Arm with Process."**—In some of the States where the rule is adopted that there must be an actual levy by execution or attachment, and that equitable sequestration is not sufficient, the creditors, by some holdings, are permitted to proceed to judgment *after* adjudication of bankruptcy and to levy execution, the levy being held to redound thereupon to the benefit of all creditors.²¹⁴

210. See ante, § 1139; *Thompson v. Fairbanks*, 13 A. B. R. 437, 196 U. S. 516; *Humphrey v. Tatman*, 14 A. B. R. 74, 198 U. S. 91; *In re Ball*, 10 A. B. R. 564, 123 Fed. 164 (D. C. Vt.); impliedly, *Zartman v. Nat'l Bk.*, 16 A. B. R. 158, 106 App. Div. 406 (N. Y.). But compare, *Christ v. Zehner*, 16 A. B. R. 790, 212 Pa. St. —, where it is laid down as general law that it is the date of the original execution and delivery of the instrument and not the date of the taking of possession of the goods that governs. Compare, on kindred subject of agreement for liens, post, "Seventh Element of a Preference," § 1373.

211. *In re Antigo Screen Door Co.*, 10 A. B. R. 361, 123 Fed. 249 (C. C. A. Wis.); compare, *In re Waterloo Organ Co.*, 9 A. B. R. 427, 118 Fed. 904 (D. C. N. Y.); compare, *Zartman v. Nat'l Bk.*, 16 A. B. R. 158, 106 App. Div. 406 (N. Y.); compare, also, *In re Rogers & Woodward*, 13 A. B. R. 82, 132 Fed. 560 (D. C. Vt.).

212. *Thompson v. Fairbanks*, 13 A. B. R. 437, 196 U. S. 516; *In re Rogers & Woodward*, 13 A. B. R. 82, 132 Fed. 560 (D. C. Vt.). Compare, *In re Ball*, 10 A. B. R. 564 (D. C. Vt.): This case is rejected on this point in *Thompson v. Fairbanks*, 13 A. B. R. 82, 132 Fed. 560 (D. C. Vt.), and *Humphrey v. Tatman*, 14 A. B. R. 74, 198 U. S. 516. Instance, *In re National Valve Co.*, 15 A. B. R. 524, 140 Fed. 679 (D. C. Ohio).

213. *First Nat'l Bk. of Holdredge v. Johnson*, 10 A. B. R. 208, 68 Neb. 641.

214. *In re Beede*, 14 A. B. R. 697, 138 Fed. 441, and 11 A. B. R. 387, 120 Fed. 853 (D. C. N. Y.). But compare, *Gove v. Morton Trust Co.*, 12 A. B. R. 300, 96 N. Y. App. Div. 177.

But it is apparently held in one case that this rule applies only where the suits have been started before bankruptcy.²¹⁵

Perhaps this rule is adopted in analogy to the course suggested in *Lockwood v. Exch. Bk.*, 10 A. B. R. 107, 190 U. S. 294, relative to the right of creditors holding notes waiving exemptions to proceed to judgment notwithstanding the bankruptcy.²¹⁶

§ 1240. **Defective Refiling of Chattel Mortgage.**—Failure to refile, properly, a chattel mortgage, where under State law such failure vitiates the mortgage as to creditors “armed with process,” will not vitiate it in bankruptcy if there is no creditor “armed with process.”²¹⁷

§ 1241. **Unrecorded or Unfiled Conditional Sales Contracts, Void.**—An unrecorded or unfiled (as the case may be) conditional sale contract is likewise void as against the trustee, in states where recording or filing is required to preserve the vendor's rights as against creditors.²¹⁸

§ 1242. **Provided There Exist Creditors “Armed with Process.”**—But such unfiled conditional sales contract is not, in most States, void as against the vendee's trustee in bankruptcy unless prior to the bankruptcy

²¹⁵. *In re Beede*, 14 A. B. R. 697, 138 Fed. 441 (D. C. N. Y.).

²¹⁶. See ante, § 1104, et seq.

²¹⁷. *In re Burnham*, 15 A. B. R. 549, 140 Fed. 926 (D. C. N. Y.); *In re Cutting*, 16 A. B. R. 751, 145 Fed. 388 (D. C. N. Y.).

²¹⁸. *Chesapeake Shoe Co. v. Seldner*, 10 A. B. R. 466, 122 Fed. 598 (C. C. A. Va.); *In re Sheets Ptg. & Mfg. Co.*, 14 A. B. R. 668 (D. C. Ohio, affirmed sub nom. *Unitype Co. v. Long*, 16 A. B. R. 282 (C. C. A. Ohio); *In re Yukon Woolen Co.*, 2 A. B. R. 805, 96 Fed. 326 (D. C. Conn.); *In re Ducker*, 13 A. B. R. 760, 118 Fed. 668 (C. C. A. Ky.).

In re Tweed, 12 A. B. R. 648, 131 Fed. 355 (D. C. Iowa): “The orders or contracts of March 31st and July 9th, whereby the bankrupt obtained possession of these carriages, were in effect conditional sales thereof by the carriage company to this bankrupt; and, not having been acknowledged and recorded, the conditions are void, under this section, as against creditors or purchasers from the bankrupt without notice.”

Unitype Co. v. Long, 16 A. B. R. 282 (C. C. A. Ohio, affirming *In re Sheets Ptg. & Mfg. Co.*, 14 A. B. R. 668 [D. C. Ohio]). *Bradley, Alderson & Co. v. McAfee*, 17 A. B. R. 495 (D. C. Mo.): Recorded after petition filed but before adjudication. *In re Smith & Shuck*, 13 A. B. R. 103, 132 Fed. 301 (D. C. Iowa); *In re Dunn Hardware Co.*, 13 A. B. R. 147, 134 Fed. 997 (D. C. N. Car.): This was a case of conditional sale disguised as a lease. *In re Press Post Printing Co.*, 13 A. B. R. 797 (D. C. Ohio); *In re Tatem, Mann & Co.*, 6 A. B. R. 426, 110 Fed. 519 (D. C. N. Y.); *In re Hess*, 14 A. B. R. 635, 136 Fed. 988 (Ref. affirmed by D. C. Pa.); *In re Fraizer*, 9 A. B. R. 21, 117 Fed. 575 (D. C. Mo.).

In re Gosh, 9 A. B. R. 610, 121 Fed. 604 (D. C. Ga.): Reversed in 12 A. B. R. 149, 126 Fed. 627 (C. C. A. Ga.), but upon the ground that it was recorded in time, being recorded within thirty days of the delivery of the property, that date being construed to be the “date” referred to in the statute, although it was not recorded within thirty days of the approval of the contract.

In re Franklin Lumber Co. (*In re Lumber Co.*), 17 A. B. R. 443, 147 Fed. 852 (D. C. N. J.); *In re Lumber Co. (Builders' Lumber Co.)*, 17 A. B. R. 449 (D. C. N. Car.); *In re Galt*, 9 A. B. R. 682 (D. C. Ills., reversed on ground that it was a bailment and not a conditional sale. *In re Galt*, 13 A. B. R. 575, 120 Fed. 64, C. C. A. Ills.); *In re Rabenau*, 9 A. B. R. 180, 118 Fed. 471 (D. C. Mo.); contra, *In re Hinsdale*, 7 A. B. R. 85, 111 Fed. 502 (D. C. Vt.); contra, *In re Kellogg*, 7 A. B. R. 270, 112 Fed. 52 (D. C. N. Y.); instance held properly filed, *In re Franklin*, 18 A. B. R. 218 (D. C. N. Car.).

some creditor had levied execution or attachment or otherwise was "armed with process."²¹⁹

In *re* Great Western Mfg. Co., 18 A. B. R. 261, 152 Fed. 123 (C. C. A. Neb.): "The agreement of conditional sale whereby the vendor retained the title to the machinery and material until its purchase price was paid did not create a preference voidable under the bankruptcy law because it was given for a present consideration, for the machinery and material which were and continued to be the property of the vendor, and because it was made more than four months before the petition in bankruptcy was filed. Agreements of this nature which are not filed or recorded in the proper public office are voidable by purchasers, attaching creditors, and judgment creditors only, under the statutes of Nebraska * * *, and there was none of either class when the petition in bankruptcy was filed in this case. The contract was therefore valid and enforceable against the bankrupt and against his ordinary creditors, and hence against the trustee, for he had no better right or title to the property than they, and he suffered no prejudice from the order of the court."

But it is void even though no creditor "armed with process" exist, in Missouri;²²⁰ and if fraud exists, is void in all the States.

Instance, In *re* Garcewich, 8 A. B. R. 151, 115 Fed. 87 (C. C. A. N. Y.): "We think that the court below erred in viewing the case as one in which there had been a valid conditional sale good as against creditors. If the same had been of that character, we think the decision would have been correct; but, being a fraudulent one, it was void as to the trustee."

And the mere sequestration of the property by the bankruptcy court taking possession does not constitute a sufficient "arming with process."²²¹

219. Instance, In *re* Cavagnaro, 16 A. B. R. 320, 143 Fed. 668 (D. C. N. H.); In *re* Co-Op Shear Co., 2 A. B. R. 775 (Ref. Ohio); obiter, In *re* Garcewich, 8 A. B. R. 149, 115 Fed. 87 (C. C. A. N. Y.).

In *re* Sewell, 7 A. B. R. 133, 111 Fed. 791 (D. C. Ky.): "Though in terms the statute refers to creditors generally, it is limited in its application to them. * * * But such are not the only limitations that must be placed upon the very general language of the statute as to creditors. In the very nature of things, it is only subsequent creditors without notice who have in some way got a hold on the property that are in the contemplation of the statute. Without such a hold, they are not in a position to raise an issue with the holder of the unrecorded deed or mortgage. A creditor having nothing more than his claim against the debtor will not and cannot be heard as to the validity of such deed or mortgage. * * *

"It being essential, then, that the contesting creditor shall have a hold of some sort on the property in order to be in position to call in the aid of the statute, we are brought up to the question whether creditors who have a hold thereon under and by virtue of a general deed of assignment for benefit of creditors or an assignment in bankruptcy are within the purview of the statute. Antecedent creditors certainly are not, because such creditors are not within the statute at all. Nor are subsequent creditors under such circumstances, because their sole hold upon or right in or to the property is under assignment which provides that the property passing by it shall be distributed ratably amongst all the creditors, antecedent as well as subsequent. To apply the statute in such a case, therefore, is to let in antecedent creditors, or to do violence to the terms of the assignment, neither of which is allowable."

220. *Bradley, Alderson & Co. v. McAfee*, 17 A. B. R. 499 (D. C. Mo.).

221. *York Mfg. Co. v. Cassell*, 15 A. B. R. 633, 201 U. S. 344 (reversing 14 A. B. R. 52); contra, In *re* Press Post Printing Co., 13 A. B. R. 797 (D. C. Ohio).

§ 1243. **But Not, Where Filing or Recording Not "Required."**—But such conditional sales contracts are not void in states where filing or recording is not necessary as against "creditors."²²²

§ 1244. **Distinction between Conditional Sales, as Mere Retentions of Title, and Chattel Mortgages, as "Transfers."**—The fundamental distinction between conditional sales whereby the seller never parts with title and the buyer never gets title, and chattel mortgages, which are "transfers," must be borne in mind and, if borne in mind, will help to reconcile apparently conflicting decisions as to the effect of failure to record instruments of "transfer."²²³

Compare, *In re Cavagnaro*, 16 A. B. R. 323, 143 Fed. 668 (D. C. N. H.): "The title of the property under the New Hampshire law thus remaining in the vendor, and the right of a particular creditor thus resulting upon principles of estoppel through the creditor's doing something without notice, like that of making an attachment under legal process, it is not influenced much if at all by § 67 of the Bankrupt Act or the decisions thereunder, which in a large sense relate to situations where the debtor has undertaken to place liens upon property, the title to which was in himself rather than in a vendor."

§ 1245. **Critical Analysis of State Statutes Requisite to Reconcile Decisions.**—And a critical analysis of the State statutes is requisite to reconcile the apparently conflicting decisions.²²⁴

In re Cavagnaro, 16 A. B. R. 322, 143 Fed. 668 (D. C. N. H.): "Much of the apparent conflict upon the authorities, in respect to the title of a trustee in bankruptcy to property in possession of the bankrupt under conditional sales, is relieved by a critical examination of the particular phraseology of the

^{222.} *Hewitt v. Berlin Machine Wks.*, 11 A. B. R. 709, 194 U. S. 296: This was a case arising in New York whose statutes make conditional sales void only as against subsequent purchasers, pledgees or mortgagees in good faith, the Supreme Court holding a trustee in bankruptcy not to be within such terms, the Supreme Court saying: "And the Circuit Court of Appeals adhering to that decision (*In re N. Y. Economical Ptg. Co.*) held in this case that, inasmuch as by the New York statutes, a conditional sale such as that in question was void only as against subsequent purchasers or pledgees or mortgagees in good faith, the District Court was right, and affirmed the judgment. * * *

"We concur in this view, which is sustained by decisions under previous bankruptcy laws and is not shaken by a different result in cases arising in States by whose laws conditional sales are void as against creditors."

In re Burkle (apparently), 8 A. B. R. 542, 116 Fed. 766 (D. C. Conn.); *In re Dixon* (apparently), 12 A. B. R. 191 (Ref. Ga.); *In re Bozeman* (apparently), 2 A. B. R. 809 (Ref. Ga.).

^{223.} Also, see post, § 1334.

^{224.} **Power of Sale in Conditional Vendee.**—But even in States where actual levy is thus required to invalidate the lien for mere nonrecording, if the vendee is given the right to sell in the ordinary course of trade it would seem the property passes to the trustee in bankruptcy regardless of levy or lack of levy. See next subdivision, post, § 1263.

In re Garcewich, 8 A. B. R. 151, 115 Fed. 87 (C. C. A. N. Y.): "When the property is delivered to the vendee for consumption or sale, or to be dealt with in any way inconsistent with the ownership of the seller, or so as to destroy his lien or right of property, the transaction cannot be upheld as a conditional sale, and is a fraud upon the creditors of the vendee. Even in the case of a chattel mortgage, when it is understood between the mortgagor and the mortgagee

statutes upon which the various decisions are founded. In some of the States it is declared by statute that unrecorded conditional sales are only good as between the vendor and vendee, while in others that they shall be void for want of record as against creditors, subsequent purchasers, pledgees, or mortgagees, and in others that the contract shall be recorded within thirty days of the delivery of the property, and in others that it shall be acknowledged and recorded in order to be binding as against others than the vendee and his heirs. Isaac on Conditional Sales in Bankruptcy, 9-12. Thus, it will be seen, under some of the State statutes creditors may hold against an unrecorded conditional contract of sale without regard to the question of actual notice, and under such circumstances trustees in bankruptcy reasonably enough hold a status, with respect to the title of the property, different from that which would exist under a State statute where the property could only be held under judicial process by an attaching creditor without notice. Hence, it becomes essential to look at the particular provisions of the New Hampshire statute and the New Hampshire authorities as to the status of the title under a conditional sale like the one in question."

But some of the cases have held that "arming with process" is not necessary, since the bankruptcy itself is a sufficient "arming";²²⁵ although this doctrine is now discredited in accordance with the ruling in *York Mfg. Co. v. Cassell*, discussed ante, § 1214.

§ 1246. **Disguised Conditional Sales, Void for Want of Record.**—Transfers amounting to conditional sales, unfiled but pretended to be consignments, leases or conveyances of other interests not requiring filing or recording—the property passes.²²⁶

§ 1247. **Chattel Mortgages or Conditional Sales Made in State Where Recording Not Required but Contemplating Delivery Where Required.**—A chattel mortgage²²⁷ or a conditional sale contract²²⁸ made in a State whose laws do not require the filing or recording of such mort-

that the mortgagor may sell the chattels in his business, and use the proceeds, the transaction is fraudulent in law as against the creditors of the mortgagor. Such an arrangement, if expressed in the instrument, defeats its essential nature and qualities as a mortgage, so that, in a legal sense, it is not a security, but merely the expression of a confidence by the mortgagee in the mortgagor; and, if made, but not expressed in the instrument, is equally vicious, if not more suggestive of fraudulent purpose."

In Pennsylvania conditional sales are void as to creditors (whether recorded or not). In *re Butterwick*, 12 A. B. R. 536, 131 Fed. 371 (D. C. Penn.).

In some States, conditional sales contracts are not void for nonrecord except as to subsequent creditors without notice. And the burden of proof rests on such creditors. In *re Sewell*, 7 A. B. R. 133, 111 Fed. 791 (D. C. Ky.).

Apparently some such qualification appears to be the law in Georgia. In *re Dixon*, 13 A. B. R. 191 (Ref. Ga.).

^{225.} In *re Hess*, 14 A. B. R. 635, 136 Fed. 988 (Ref. Penn., affirmed by D. C.); *Chesapeake Shoe Co. v. Seldner*, 10 A. B. R. 466, 122 Fed. 598 (C. C. A. Va.).

^{226.} See ante, subdivision "B", this division and chapter, § 1228.

^{227.} In *re Greene*, 13 A. B. R. 504, 134 Fed. 137 (D. C. Conn.).

^{228.} In *re Yukon Woolen Co.*, 2 A. B. R. 805, 96 Fed. 326 (D. C. Conn., citing *Hart v. Mfg. Co.*, 7 Fed. 543; *Pitts. Loco. & Car Wks. v. State Nat'l Bk. of Keokuk*, Fed. Cas., No. 11,198; *Heryford v. Davis*, 102 U. S. 235; *Chic. Ry. Eq. Co. v. Merchants' Bk.*, 136 U. S. 280).

gages or contracts, which contemplates delivery or use in another State whose laws do require such filing, is governed by the laws of the latter state, and if the chattel mortgage or conditional sale contract is not filed or recorded, and the purchaser goes into bankruptcy, then the trustee of the bankrupt purchaser takes the property free from the liens.

§ 1248. **Unrecorded Real Estate Mortgages.**—Unrecorded real estate mortgages are also void as against the trustee where the State statutes or decisions declare them void as against creditors;²²⁹ but are not void where the State law declares them good against creditors.²³⁰

§ 1249. **Unrecorded Sales of Personalty Where Property Still in Seller's Hands.**—Unrecorded sales of personalty where the property remains in the hands of the seller are void in some states.²³¹

§ 1250. **Other Liens and Contracts Not Requiring Record.**—Where the statute does not require filing a lien is good without it.²³²

§ 1251. **Owner's Lien on Material Left on Premises by Bankrupt Contractor.**—Thus, the owner's lien upon material left on the premises by a bankrupt contractor, which by contract the owner is entitled to use in completing the job, is not void, although the contract is not recorded.²³³

§ 1252. **Equitable Liens upon Property Already Pledged and in Fledgee's Hands.**—Likewise, a pledge without delivery of the article involved, may be made operative as an equitable lien, where definite enough, and will be good without recording, the Statute not requiring recording.²³⁴

§ 1253. **Agreement to Insure Operating as Equitable Assignment.**—Likewise an agreement, made at the time of the passing of the consideration, to procure and assign fire insurance policies on the goods to be purchased with the consideration, will operate as an equitable assignment and be valid in bankruptcy.²³⁵

^{229.} In re Lukens, 14 A. B. R. 683, 138 Fed. 188 (D. C. Pa.), although it does not appear in this case whether the State statute required real estate mortgages to be recorded in order to be valid against creditors. In re Noel, 14 A. B. R. 715, 137 Fed. 694 (D. C. Md.).

In re Thorp, 12 A. B. R. 195 (Ref. Va., affirmed by D. C.): An instance of an unrecorded "deed of trust" in Virginia. But this case is wrongly based on the theory that the trustee is an "innocent purchaser."

^{230.} In re McIntosh, 18 A. B. R. 173 (C. C. A. Calif.): In California unrecorded real estate mortgages are good even against levying creditors.

^{231.} In re Tweed, 12 A. B. R. 648, 131 Fed. 355 (D. C. Iowa).

^{232.} See ante, § 1144, division 1 of this chapter, "Trustee's Title, as Successor to Bankrupt."

^{233.} Duplan Silk Co. v. Spencer, 8 A. B. R. 367, 115 Fed. 689 (C. C. A. Penn., reversing Spencer v. Duplan Silk Co., 7 A. B. R. 564, 112 Fed. 638).

^{234.} Bank v. Rome Iron Co., 4 A. B. R. 441, 102 Fed. 755 (C. C. A. Ga.); compare, Ryttenberg v. Shefer, 11 A. B. R. 652, 131 Fed. 313 (D. C. N. Y.): In this case the court held the facts did not make out a case of equitable lien.

^{235.} See cases cited post, under "Voidable Preferences," "Seventh Element of a Preference," § 1370, et seq.

§ 1254. **But Liens Absolutely Void, Void Also in Bankruptcy.**—If the lien is void in any event, as conditional sales in Pennsylvania, which are void as to creditors, it is void in bankruptcy.²³⁶

§ 1255. **Mechanics' and Subcontractors' Liens Not Filed Till after Bankruptcy.**—Mechanics' and subcontractors' liens are not void for want of filing or recording before bankruptcy, if they are filed afterwards within the statutory time from the furnishing of the work or materials; because such liens are not void as to levying creditors under State law.²³⁷

§ 1256. **Recording, Where Lien on Both Real and Personal Property.**—Instruments recorded properly as chattel mortgages, but not as real estate mortgages, will not operate as liens upon buildings belonging to lessees and removable by them where leaseholds are regarded as real estate.²³⁸

SUBDIVISION "D".

LIENS INVALID AS AGAINST CREDITORS UNDER STATE LAW FOR OTHER REASONS THAN NONRECORD; POWERS OF SALE, IN CHATTEL MORTGAGES AND CONDITIONAL SALES CONTRACTS; MORTGAGES COVERING AFTER-ACQUIRED PROPERTY.

§ 1257. **Liens Invalid under State Law for Other Reasons than Lack of Record, Void.**—Claims which for any other reason (than for want of record) would not have been valid liens against the claims of any creditor of the bankrupt are not liens against his estate.²³⁹

§ 1258. **Chattel Mortgages with Power of Sale, When Void.**—Chattel mortgages with power of sale are void as against the trustee if there is no agreement that the proceeds be applied on the debt, where such mortgages are held void as to creditors by the law of the state.²⁴⁰

²³⁶. In re Butterwick, 12 A. B. R. 536, 131 Fed. 371 (D. C. Penn.).

²³⁷. See ante, division 1 of this chapter, subdivision "B," "Mechanics' and Subcontractors' Liens," § 1154, et seq.

²³⁸. In re Rogers & Woodward, 13 A. B. R. 82, 132 Fed. 560 (D. C. Vt.).

²³⁹. Bankr. Act, § 67 (a). See "Fraudulent Transfers and Property Held on Secret Trust," ante, div. 2, subdiv. "A," § 1216, et seq.

²⁴⁰. In re Hull, 8 A. B. R. 302, 115 Fed. 858 (D. C. Vt.). See analogous doctrine as to conditional sales, ante, preceding subdivision of this division. Dodge v. Norlin, 13 A. B. R. 176, 133 Fed. 363 (C. C. A. Colo.); In re Dry Dock Co., 16 A. B. R. 325 (C. C. A. N. Y.), modifying In re Marine Construction & Dry Dock Co., 14 A. B. R. 466 (D. C. N. Y.); In re Ditsch, 17 A. B. R. 912 (D. C. Kas.); obiter, In re Burnham, 15 A. B. R. 552 (D. C. N. Y.); compare, to same effect, in State Court in actions wherein the trustee is interested, Skilton v. Codington, 15 A. B. R. 820, 185 N. Y. 80; to same effect, Zartman v. Nat'l Bk., 16 A. B. R. 155, 106 App. Div. (N. Y.) 406; compare, to same effect: Mitchell v. Mitchell, 17 A. B. R. 389 (D. C. N. Car.).

One case has held them void even where held not void by State tribunals, the U. S. Supreme Court having held them void as a rule of general law. In re

The goods which the chattel mortgage thus authorizes the bankrupt to sell must pass to the trustee under § 70 as being property which the bankrupt might have transferred before the bankruptcy.

Skillen v. Endelman, 11 A. B. R. 768, 79 N. Y. Supp. 413: "Where there is an agreement or understanding between the parties, at the time of the execution of a chattel mortgage, that the mortgagor may sell or dispose of the mortgaged property, or any portion thereof, for his own use, the mortgage is void as to the creditors of the mortgagor, and this agreement or understanding may be proved by parol, or may be inferred from the fact that the mortgagee permits the sale to be made."

In re National Bank of Canton, 14 A. B. R. 180, 135 Fed. 62 (C. C. A. Ohio): "Under the settled law of Ohio, the question of good faith is not vital if, under a mortgage of a stock of merchandise, it is, expressly or impliedly, provided that the mortgagor shall remain in business as before until condition broken or the mortgagee in his own interest chooses to dispossess him."

"If the instrument has in fact been made in good faith it becomes an effectual security notwithstanding such a provision, from the time the mortgagee takes actual possession."

"But before possession taken such an instrument is void as matter of law as to purchasers and creditors of the mortgagor. * * *

"It is also noticeable that the mortgage contains no clause requiring the mortgagor to account for sales nor that the lien should extend to goods afterwards purchased. * * *

"But with reference to the effect of a mortgage upon a stock of goods with the right of the mortgagor to remain in possession and continue business, the instrument is fraudulent in law regardless of registration, and void as to creditors who acquire rights before the mortgagee takes actual possession. Here the mortgagee never took possession and the seizure under the bankruptcy proceedings, therefore, occurred before the mortgage was validated."

In re Construction & Dry Dock Co., 14 A. B. R. 466 (D. C. N. Y., modified, 16 A. B. R. 325): "As already stated, in the Roberts case, the mortgagor sold, and was permitted to sell, goods in a store; in the Benner case he was empowered to sell lumber; in the case at bar it was contemplated that it should sell material and ships, and it was free to use and consume its stock of materials on hand for the purposes of its business. A mortgage on a pound of sugar and one on a ship should be alike invalid where the same power of disposition is given to the mortgagor. The money was loaned for the very essential purpose of vitalizing the business, so that its stock and material might be made into ships, or other structures to be sold and repaired. Assume that money is loaned to a baker to enable him to conduct his business and to secure the loan

Hull, 8 A. B. R. 302, 115 Fed. 858 (D. C. Vt.). But see now, *Thompson v. Fairbanks*, 196 U. S. 516, 13 A. B. R. 437. Also, see In re Nat'l Bk., 14 A. B. R. 180, 135 Fed. 62 (C. C. A. Ohio).

Chattel mortgages with power of sale, where the proceeds of the sales are not applied on the debt, are void as to creditors under § 67 (e). In re Egan State Bk. v. Rice, 9 A. B. R. 437, 119 Fed. 107 (C. C. A. S. Dak., affirming In re Platts, 6 A. B. R. 568). See post, division 3 of this chapter, subdivision "C."

Facts held not to constitute chattel mortgage: Executory sale of bankrupt's entire season's output of lumber; lumber left on seller's premises and merely tagged with buyer's name; and permission given to seller to retail therefrom provided replacement be made; considerable more advanced on total purchase price than lumber up to that time manufactured; security taken for excess; held entire transaction does not amount to mortgage. *Stelling v. G. W. Jones Lumber Co.*, 8 A. B. R. 521, 116 Fed. 261 (C. C. A. Wis.).

a mortgage is taken on the flour constituting the baker's stock in trade, and he is empowered to convert such flour into loaves of bread and to sell the same, would any one contend that the mortgage was an effectual lien upon either the flour or the loaves? In such case the parties constitute the material, and whatever results therefrom, articles of commerce, and the manifest intention is that they shall be sold free from the mortgage. In principle, there is no difference between material in a shipyard, authorized to be converted into boats and ships, and thereupon sold, and flour which is authorized by the parties to be converted into loaves of bread and sold. The magnitude or qualities of the article, or the structure into which it is intended that they shall enter, should not mislead the reason. The law has a common application. If articles are left with the mortgagor to sell in the course of his business and for the purposes of his business, then, under the decisions considered, the mortgage is invalid. If a rule exists, it should be applied logically."

§ 1259. Not Void if Agreement to Apply Exists Though Agreement Disregarded.—But such mortgage is not void where there is an agreement that the mortgagor should so apply them.²⁴¹

And this is so even though the obligation is disregarded by the mortgagor, if without the mortgagee's consent.²⁴²

§ 1260. And Mere Remaining in Possession and Selling for Short Period without Reservation of Power of Sale, Does Not Vitiate.—And a chattel mortgage on a stock of goods not reserving power of sale, is not void because the mortgagors did remain in possession a short while and sell in the usual course of business.²⁴³

§ 1261. Power of Sale Not Reserved in Express Terms.—And they are void whether the power of sale be expressed in the mortgages themselves or be by outside agreement;²⁴⁴ and such agreement may be inferred from acquiescence with knowledge on the mortgagee's part;²⁴⁵ and the ordinary stipulation that the mortgagor may continue in full and free enjoyment has been held to mean, when applied to a stock of merchandise, the usual method of enjoyment, namely, sale.²⁴⁶

§ 1262. Whether Power of Sale Mortgage Void Only as to Goods to Be Sold or Void in Toto.—In some states a chattel mortgage, containing an agreement that the mortgagor may sell in the usual course of busi-

^{241.} In re Beede, 11 A. B. R. 387 (D. C. N. Y.), in which case, however, attention was not particularly called to the force of § 67 (e). In re Burnham, 15 A. B. R. 553, 140 Fed. 926 (D. C. N. Y.); obiter, In re Dry Dock Co., 16 A. B. R. 326 (C. C. A. N. Y.).

^{242.} In re Beede, 11 A. B. R. 387 (D. C. N. Y.); In re Burnham, 15 A. B. R. 553, 140 Fed. 926 (D. C. N. Y.).

^{243.} Davis v. Turner, 9 A. B. R. 704, 120 Fed. 605 (C. C. A. N. Car.).

^{244.} Skillen v. Endelman, 11 A. B. R. 766, 39 Misc. 261, 79 N. Y. Supp. 413; Mitchell v. Mitchell, 17 A. B. R. 389 (D. C. N. Car.); In re Ditsch, 17 A. B. R. 912 (D. C. Kas.).

^{245.} Skillen v. Endelman, 11 A. B. R. 766, 39 Misc. 261, 79 N. Y. Supp. 413; In re Ditsch, 17 A. B. R. 912 (D. C. Kas.).

^{246.} In re Nat'l Bk. of Canton, 14 A. B. R. 183, 135 Fed. 62 (C. C. A. Ohio).

ness for his own benefit, is void only as to the extent of the property to which such agreement applies; thus, in Indiana;²⁴⁷ also, in Vermont.²⁴⁸

But is void as to the whole in New York, by the State court rulings;²⁴⁹ also, in Colorado.²⁵⁰

§ 1263. Conditional Sales Contracts with Power of Sale, Subject to Same Rules as Chattel Mortgages.—Conditional sales contracts are ineffective in many States to reserve title in the vendor, where the conditional vendee has the power of selling in the usual course of business.²⁵¹

In *re Garcewich*, 8 A. B. R. 149, 115 Fed. 87 (C. C. A. N. Y.): "It is the settled law of this State that personal property may be sold and delivered under an agreement for the payment of the price at a future day, and the title by express agreement remain in the vendor until the payment of the purchase price. In such a case the payment is strictly a condition precedent, and until the performance the title does not vest in the buyer. It is one of the exceptional cases in which the law tolerates the separation of the apparent from the real ownership of chattels when the honesty of the transaction is made to appear. But when the purpose for which the possession of the property is delivered is inconsistent with the continued ownership of the vendor, the transaction will be presumed fraudulent as against purchasers and creditors. The transaction will be deemed merely colorable, and the title to have been vested absolutely in the buyer. *Ludden v. Hazen*, 31 Barb. 650; *Frank v. Batten*, 49 Hun 91, 1 N. Y. Supp. 705; *Bonesteel v. Flack*, 41 Barb. 435. When the property is delivered to the vendee for consumption or sale, or to be dealt with in any way inconsistent with the ownership of the seller, or so as to destroy his lien or right of property, the transaction cannot be upheld as a conditional sale, and is a fraud upon the creditors of the vendee. Even in the case of a chattel mortgage, when it is understood between the mortgagor and the mortgagee that the mortgagor may sell the chattels in his business, and use the proceeds, the transaction is fraudulent in law as against the creditors of the mortgagor. Such an arrangement, if expressed in the instrument, defeats its essential nature and qualities as a mortgage, so that, in a legal sense, it is not a security, but merely the expression of a confidence by the mortgagee in the mortgagor; and, if made, but not expressed in the instrument, is equally vicious, if not more suggestive of a fraudulent purpose."

^{247.} In *re Soudans Mfg. Co.*, 8 A. B. R. 45, 113 Fed. 804 (C. C. A. Ind.).

^{248.} In *re Ball*, 10 A. B. R. 564, 123 Fed. 164 (D. C. Vt.): "The referee has found that it was understood between the claimant and the bankrupt, when the mortgages were made, that he was to remain in possession of the goods, sell them in the ordinary course of the business, and use the proceeds as he needed the same. This provision is said to have rendered the mortgages fraudulent as to creditors, and void as to the trustee. But no wrongful intention is found, and the effect of the agreement itself would seem to be no more than a withdrawal of the property as fast as sold from the operation of the mortgages. * * * The mortgage appears to be valid as to the goods on hand when it was made."

^{249.} *Skillen v. Endelman*, 11 A. B. R. 766, 39 Misc. 261, 79 N. Y. Supp. 413; apparently, *Zartman v. Nat'l Bk.*, 16 A. B. R. 155, 106 App. Div. 406; compare, In *re Dry Dock Co.*, 16 A. B. R. 325 (C. C. A. N. Y.).

^{250.} *Dodge v. Norlin*, 13 A. B. R. 176, 133 Fed. 363 (C. C. A. Colo.).

^{251.} Inferentially, In *re Carpenter*, 11 A. B. R. 147, 125 Fed. 831 (D. C. N. Y.); In *re Howland*, 6 A. B. R. 495, 109 Fed. 869 (D. C. N. Y.); compare, *Dolle v. Cassell*, 14 A. B. R. 52, 135 Fed. 52 (C. C. A. Ohio, reversed sub nom. *York Mfg. Co. v. Cassell*, 15 A. B. R. 633, 201 U. S. 344).

§ 1264. **Mortgages on After-Acquired Property.**—This subject is involved in many other subjects elsewhere discussed.²⁵²

SUBDIVISION "E."

SPECIAL OR PECULIAR REMEDIES OR RIGHTS, GIVEN CREDITORS BY STATE LAW.

§ 1265. **Peculiar Rights or Remedies of Creditors by Special Statute, Trustee Succeeds Thereto.**—Where the peculiar laws of a state give creditors special rights or remedies, the trustee in bankruptcy succeeds to the same rights or remedies.²⁵³

^{252.} See various sub-titles: "Seventh Element of a Preference," § 1371; "Taking of Possession of After-Acquired Property Curing Lack of Record," ante, § 1236. As to general effect of the bankruptcy law upon the title to after-acquired property, see general discussion, ante, § 1139, et seq.; "After-Acquired Property Coming under Chattel Mortgage," ante, § 1199.

^{253.} In re Jacobs, 1 A. B. R. 518 (D. C. La.); *Andrews v. Mather*, 9 A. B. R. 296, 134 Ala. 358.

Instances of trustee's subrogation to creditor's peculiar rights:

1. **Statutory Provision That Property Consigned to Factor or Agent Who Does Not Designate His Capacity, Goes to All Creditors on Insolvency.**—Thus, where the State law says the property consigned to a factor, agent, etc., who does business in his individual name without adding "factor" or "agent" thereto, shall on his insolvency, go into the general estate for all creditors, such rights inure to the trustee in bankruptcy. *Chesapeake Shoe Co. v. Seldner*, 10 A. B. R. 466, 122 Fed. 593 (C. C. A. Va.).

2. **Conditional Sales Wholly Void.**—"Conditional Sales" are void in Pennsylvania as to creditors. In re *Butterwick*, 12 A. B. R. 536, 131 Fed. 371 (D. C. Pa.).

3. **Spendthrift Trusts.**—"Spendthrift Trusts" in New York: surplus of income beyond sum necessary for education and support of beneficiary, is liable to creditors on institution of equity suit: the trustee may institute such suit. In re *Tiffany*, 13 A. B. R. 310, 133 Fed. 799 (D. C. N. Y.); *Brown v. Barker*, 8 A. B. R. 450 (N. Y. Sup. Ct. App.); In re *Baudouine*, 3 A. B. R. 656, 101 Fed. 574 (C. C. A. N. Y.). But compare, In re *McKay*, 16 A. B. R. 238 (D. C. N. Y.).

But "Spendthrift" trusts in Massachusetts are held not to pass where the will directs that it shall not be assignable nor subject to levy nor seizure by creditors. *Munroe v. Dewey*, 4 A. B. R. 264 (Mass. Sup. Jud. Ct.).

4. **Vitiating of Execution Levy by Using It as Mere Security.**—In Pennsylvania an execution levy is vitiated by using it as a means of compelling payments on account from time to time, after levy made, using it thus as a security rather than as a means of satisfaction by sale and application of proceeds. In re *Thackara*, 15 A. B. R. 258, 140 Fed. 126 (D. C. Pa.).

5. **Preferential transfer in contemplation of insolvency under New York State Stock Corporation Law.** *Wright v. Gansevoort Bk.*, 17 A. B. R. 326 (N. Y. Sup. Ct.).

6. **"Void as to Creditors," Meaning in One State Judgment Creditors, Not Necessarily Levying Creditors.**—Chattel mortgages not recorded "void as to creditors" means judgment creditors but not necessarily levying creditors, in New York. *Gove v. Morton Trust Co.*, 12 A. B. R. 297, 96 N. Y. App. Div. 177 (Sup. Ct. N. Y. App. Div.); *Zartman v. Nat'l Bk.*, 16 A. B. R. 157, 106 App. Div. 406 (N. Y.); compare, In re *Beede*, 11 A. B. R. 387 (D. C. N. Y.).

7. **Simple Contract Creditors in Some States Competent to Set Aside Fraudulent Conveyance.**—Where State law permits simple contract creditor to maintain suits to set aside fraudulent conveyances, the trustee has the same right. *Andrews v. Mather*, 9 A. B. R. 300, 134 Ala. 358; *Grunsfeld Bros. v. Brownell*, 11 A. B. R. 601 (Sup. Ct. N. Mex.).

8. **Intermediate Creditors' Rights Where Chattel Mortgage Withheld from Record.**—Chattel mortgages eventually filed but meanwhile withheld from record are void as to simple contract creditors becoming such in the interval

§ 1266. **But Where Special Rights Dependent on Special Remedies Not Available Because of Bankruptcy.**—But where the property involved is already in the custody of the bankruptcy court and such special rights are not given as matter of substantive law but are wholly dependent upon the creditors' resorting to a certain form of litigation for remedy, as by statutory suits to set aside fraudulent or preferential conveyances, that must be brought and carried on in prescribed forms and within prescribed time in order to confer the rights, such rights, from necessity, cannot (unless such statutory suits are instituted) be applied in determining the validity of liens and interests on the property so in the custody of the bankruptcy court and in course of administration and distribution in the bankruptcy proceedings.²⁵⁴

Impliedly, *In re Terrill*, 4 A. B. R. 145 (D. C. Vt.): "They were mere preferences which would become void by insolvency proceedings if begun within a required time, and might not be, and in fact were not begun at all."

Compare, inferentially and apparently, but not really contra, *In re Boyd*, 10 A. B. R. 340, 120 Fed. 999 (D. C. Iowa): "It is a familiar rule that, when property comes under the control and custody of a court, all parties claiming interests or rights thereto will be permitted to assert such rights before the court having the custody of the property. It is equally well settled that in such cases regard will be paid and protection be granted to the substance of the right asserted, even though the court may not be able to adopt and follow

before the filing in New York, and are hence void as to the trustee where such creditors exist. *In re Metropolitan Co.*, 15 A. B. R. 119 (Ref. N. Y.).

9. **Rights as between Subsequent and General Creditors Where Mortgage, Voidable Only as to Subsequent Creditors, Is Set Aside.**—Subsequent creditors' rights on setting aside a mortgage void as to subsequent creditors alone, for non-record: Thus, where the State law makes a chattel mortgage invalid as to subsequent creditors, whether contract or judgment creditors, unless it is recorded within forty days of its execution or delivery the fund derived by the trustee from the sale of the chattels covered by it is to be divided pro rata amongst subsequent creditors, the balance to apply on the mortgagee's claim and remainder if any to preceding creditors. *In re Cannon*, 10 A. B. R. 64, 121 Fed. 582 (D. C. S. Car.).

10. **All Mortgages within Three Months of Failure, by State Statute Presumptively Fraudulent unless Rebutted by Proof of Present Real Consideration.**—Thus, where the Civil Code of Louisiana makes null and void as presumptively fraudulent all mortgages given within three months of a debtor's failure, unless the mortgagee shall prove that at the moment of the contract he gave a real and effective value for it, such provision is incorporated into the bankruptcy act. *In re Jacobs*, 1 A. B. R. 518 (D. C. La.).

11. **No Evasion of Statute Requiring Recording within Six Months of Execution, by Keeping Renewals Off Record.**—State statute requiring mortgages to be recorded within six months of execution cannot be evaded by giving renewals thereof within every six months and keeping the renewals off the record, even though the last one be recorded within the six months and before bankruptcy. *In re Noel*, 14 A. B. R. 715, 137 Fed. 694 (D. C. Md.).

12. **"Warehouse" Receipts—Insufficient "Warehousing" Where Merely Space in Bankrupt's Own Warehouse Rented.**—It is an insufficient "warehouse" under the Wisconsin Statute to secure the benefits of warehouse receipts, to simply rent space in the bankrupt's warehouse. *Warehouse Co. v. Hand*, 16 A. B. R. 49 (C. C. A. Wis.). Compare, ante, § 1146.

254. *In re Porterfield*, 15 A. B. R. 11 (D. C. W. Va., reversed sub nom. *Moore v. Green*, 16 A. B. R. 648, 145 Fed. 480); compare, also, *Pollock v. Jones*, 10 A. B. R. 616, 124 Fed. 163 (C. C. A. S. Car., affirming 9 A. B. R. 262).

the form of the remedy, which under the laws of the State, would be alone open to the claimant if the property was not in the custody of the court."

Compare, obiter and inferentially, *Goldman v. Smith*, 1 A. B. R. 271, 93 Fed. 182 (D. C. Ky.): "Where there is a preference prohibited by the Kentucky Statute, it does not of itself make the preference a general assignment but requires some proceedings in the State Court to have it so declared: hence we have not regarded it as applicable to the question under consideration."

But it has been held that if such special remedies have already been resorted to, or are still available, and are actually availed of, then the special rights thereby conferred are to be recognized in bankruptcy, and if the State statute confines the benefit to certain ones to the exclusion of all others such persons will have the same priority in bankruptcy.²⁵⁵

§ 1267. Maintaining Statutory Suits, to Perfect Special Rights, but for Benefit of All.—Perhaps in such cases the Bankruptcy Court might permit the creditors for the benefit of all to institute litigation or to continue litigation already instituted in the State court, retaining, itself, the custody of the res, under the analogous doctrine of *In re Johnson*, 11 A. B. R. 544 (D. C. Nev.); *In re Mundle*, 14 A. B. R. 680, 139 Fed. 691 (D. C. N. Y.); *Crosby v. Spear*, 11 A. B. R. 613, 98 Me. 542; *Chauncey v. Dyke Bros.*, 9 A. B. R. 444, 119 Fed. 1 (C. C. A. Ark.); *Vollkommer v. Frank*, 14 A. B. R. 695; *Small v. Muller*, 8 A. B. R. 448 and others; not confining the benefits to certain creditors, however, as seems to be the suggestion in *Moore v. Green*, 16 A. B. R. 648, 145 Fed. 480 (C. C. A. W. Va.), wherein the court say,

"As to whether the relief to which the petitioner herein is entitled should have been afforded him by proceedings in the bankruptcy court, or that court should have suspended its administration so far as the portion of the assets of the bankrupt is concerned, properly applicable to the lien of the deed of the 13th day of June, 1902, in favor of Mrs. Porterfield, is largely a matter of discretion in the view we take. Either course could have been adopted. No question of jurisdiction was involved. The bankruptcy court clearly had jurisdiction to proceed, and, if needs be, to have stayed the prosecution of the suit in the State court for the time being; but the State court likewise, at the time of the institution of the suit therein and the commencement of the bankruptcy proceedings, had and still has jurisdiction, and we think, as a matter of convenience, aside from any question of comity, the better plan would have been and is to proceed with the litigation in the State court, to the end that all creditors who

²⁵⁵. *Moore v. Green*, 16 A. B. R. 648, 145 Fed. 480 (C. C. A. W. Va., reversing *In re Porterfield*, 15 A. B. R. 11): In this case a mortgage to secure a pre-existing debt was made by an insolvent before four months prior to the institution of bankruptcy proceedings against the mortgagor; but between the time of its execution and the bankruptcy a creditor started suit in the State Court under a State statute declaring, upon suit instituted within a year, such conveyances should be held to inure to the benefit of all creditors joining. The court held that the legal proceedings in the State court did not create the lien but simply perfected the lien for all creditors joining and that the creditors thus joining were entitled to priority under § 64 (b) (5) and should have distribution made in accordance with the State statute.

may desire to do so may appear therein, and assert their rights to such fund, and in the meantime the bankruptcy proceedings would as to that portion of the estate remain in abeyance; the bankruptcy court carrying out the judgment of the State court, when duly informed thereof, in said proceeding."

But, of course, it is not bound to do so and it may refuse to permit such controversy over property in its own custody to be carried on elsewhere.²⁵⁶

§ 1268. And Where Bankruptcy Court Not in Custody of Property Involved.—Where the bankruptcy court has not the custody of the property involved, the question as to what rights the creditors will acquire under such statutes will depend upon several things: 1st, Undoubtedly, if the trustee or creditors would not be permitted by the State courts to turn the property or its proceeds on recovery over to the bankruptcy court for distribution in accordance with the Bankruptcy law, then the trustee and creditors would not be permitted to commence such suit, nor to maintain one already commenced. 2nd, Probably, also, if the state statute declares that the setting aside of such conveyance shall operate as an assignment for the benefit of creditors, then a substantive right would exist independently of the remedy, in which event the trustee probably would be subrogated to the rights of creditors under such a statute, even if not permitted to avail himself thereof because of the form of the remedy prescribed.²⁵⁷

§ 1269. Fraudulent or Preferential Transfers by State Law Inuring to Benefit of All Creditors, Whether So Inure in Bankruptcy.—Fraudulent or preferential transfers declared by State law, as matter of substantive law and not merely as remedial law, to inure to the benefit of all creditors, will operate to the benefit of all creditors in Bankruptcy.²⁵⁸

Impliedly, *Pollock v. Jones*, 10 A. B. R. 616, 124 Fed. 163 (C. C. A. S. C., affirming 9 A. B. R. 262): "In South Carolina it is declared that assignments by an insolvent debtor, giving priority or preference, are null and void. Code Civ. Proc. sec. 2647. Construing this act, the Supreme Court of the State has held that an instrument, although in form of a mortgage, if it disposes of the whole of the grantor's estate for the purpose of securing a creditor, is in fact an assignment for creditors, to be construed and controlled as such. * * *

"We are of the opinion that, both under the statute law of South Carolina and the provisions of the Bankrupt Law, A. H. Pollock cannot claim under this mortgage against the estate of the bankrupt."

Morgan v. Nat'l Bk., 16 A. B. R. 644, 145 Fed. 466 (C. C. A. W. Va.): "The trust deed, moreover, was void under the statute of West Virginia to the extent

^{256.} *In re Mertens*, 12 A. B. R. 698, 131 Fed. 507 (D. C. N. Y.); *In re Porterfield*, 15 A. B. R. 11, 138 Fed. 192 (D. C. W. Va., reversed on other grounds sub nom. *Moore v. Green*); *Moore v. Green*, 16 A. B. R. 648, 145 Fed. 480 (C. C. A. W. Va.).

^{257.} But compare, obiter (as to act of bankruptcy), *Goldman v. Smith*, 1 A. B. R. 271, 93 Fed. 182 (D. C. Ky.).

^{258.} Impliedly, see suggestion in dissenting opinion of Day, J., in *Keppel v. Tiffin Sav. Bk.*, 13 A. B. R. 552, 197 U. S. 356; instance, *Wright v. Gansevoort Bk.*, 17 A. B. R. 326 (N. Y. Sup. Ct.): Preferential transfer in contemplation of insolvency under New York State Stock Corporation Law.

that it sought to prefer one creditor over another, provided the same was assailed within four months of the recordation thereof, and by reference to § 67 (e) of the Bankruptcy Act such invalidity is expressly recognized."

Compare, however, *Moore v. Green*, 16 A. B. R. 648, 145 Fed. 480 (C. C. A. W. Va.).

§ 1270. **Prior General Assignment Whether Effective to Avoid Liens Recorded before Bankruptcy but Not until after Assignment.**

—Where the State law gives to a general assignment for the benefit of creditors the effect of a levy of execution or attachment so as to avoid unrecorded liens, such liens if not recorded at the time of the assignment although subsequently recorded before the bankruptcy have been held in one case to be void as against the trustee although the assignment itself is nullified by the bankruptcy.

In *re Andrae Co.*, 9 A. B. R. 135, 117 Fed. 561 (D. C. Wis.): "By statute, in Wisconsin, the assignee in such case represents the rights and interests of creditors in respect of transfers or liens which are fraudulent or void as to creditors, and such right is enforceable by a creditor if not enforced by the assignee. * * * As the mortgage was not a valid lien against creditors when their rights accrued under the assignment, it is plain that the subsequent filing gave it no better standing within the State Law. It was equally invalid, under this provision of the Bankruptcy Act, when the petition for involuntary bankruptcy was filed, March 15th, unless that act operates through some of its other provisions to divest the creditors of such right, and thus enables the parties to the void instrument to give it validity by their mere act of filing on the intermediate day. I am of opinion that neither the terms of the Bankruptcy Act nor intervention thereunder have such anomalous result. True, the making of the assignment was an act of bankruptcy within the act, * * * but the assignment was not void, and, except for the adjudication of bankruptcy, the assignment would have remained in force to be carried out under the State law. It was voidable only; in force when this petition was filed and until displaced by the adjudication thereupon. * * * So considered, the subsequent filing was nugatory, and the mortgage is within § 67a, and not a valid lien against the estate."

DIVISION 3.

TRUSTEE'S TITLE IN EXCESS OF BANKRUPT'S OWN TITLE AND IN EXCESS OF TITLE OF CREDITORS OUT OF BANKRUPTCY—HIS PECULIAR TITLE CONFERRED BY THE BANKRUPTCY ACT: VOIDABLE PREFERENCES AND INVALID LEGAL LIENS.

§ 1271. **Third, Trustee's Peculiar Title and Rights Conferred by Bankruptcy Act Itself.**—Third, then, as to cases where the title taken by the trustee is in excess of the bankrupt's own title, and also in excess of the title acquired by a levying creditor; where, in addition, it is the greater title conferred by the special provisions of the bankruptcy act itself.

In the orderly development of the treatise, the two subjects peculiar to bankruptcy law are now reached—the subjects of voidable preferences in

bankruptcy; and of the invalidity of liens obtained by legal proceedings, within the four months preceding bankruptcy; as well as the peculiar modification in the matter of proof of fraudulent transfers, permitted when the transfers occur within the four months preceding the bankruptcy.

§ 1272. **Cases under This Subject Must Have Arisen Since Passage of Act.**—Of course as to cases where the title is conferred by the special provisions of the bankruptcy act and is in excess of the bankrupt's own title, as well as of the title of creditors other than the trustee in bankruptcy, such cases can only be those that have arisen since the passage of the Bankruptcy Act.²⁵⁹

§ 1273. **General Discussion.**—As previously noted, bankruptcy law had its origin in the insufficiency of the ordinary remedies of English Common Law to protect creditors where there were a number of creditors owed by a common debtor. The old remedies were well enough adapted to the protection of the creditor where there were only one or two creditors involved, but they fell short of doing justice where there was a large body of creditors interested in one insolvent estate.

The common law, as naturally might have been expected from the fact that it took its origin in a primitive and simple state of society where large commercial businesses built up on credit were impossible and the existence of a large body of creditors was unheard of, satisfied itself with the maxim "The law favors the diligent creditor." This maxim was high sounding and had the appearance of embodying the right principle, and perhaps it did express the complete rule proper for those days. By the term "diligent creditor," of course, was not meant the "diligent worker," the one who worked from early dawn to late at night, who worked conscientiously and gave full measure. It would perhaps seem right to give such one the first chance. But by the term "diligent creditor" was meant the creditor who was quickest to resort to legal action, who was least forbearing, least trustful and confiding in his debtor's honesty, as well as those who were the most alert. Nowadays, indeed, the "diligent creditor" in commercial law practice has come to mean most generally the creditor whom the debtor himself most favors, perhaps a friend or relative. It is this kind of a diligent creditor who will generally be found first upon the field. And so, the maxim that "the law favors the diligent creditor," has come to be inadequate to the doing of justice in cases of insolvency in this period of large commercial dealings on credit. The maxim has lost its dignity in these modern commercial times. Indeed, precisely through this want has arisen bankruptcy law, which is founded upon entirely different principles, upon the broad and noble maxims of equity that "Equality is equity," and "He that asks equity must do equity." In bankruptcy law the creditor who first

²⁵⁹. *Batchelder v. Whitmore*, 10 A. B. R. 641, 122 Fed. 355 (C. C. A. Mass.).

resorts to legal proceedings to seize his debtor's property gets no advantage over his fellow creditors; nor does the creditor whom the debtor favors by paying him in full out of the insolvent estate to the loss of others. The maxim "Equality is equity" governs—not the maxim "the law favors the diligent creditor." The unseemly scramble to be first on the scene, that was the general incident to business failures a few years ago, no longer takes place. The wild race between the sheriff, with his attachments and executions, and the receiver, to get ahead of the inevitable preferred mortgagee and friendly assignee for the benefit of creditors is a thing of the past; under the regime of the Bankruptcy Act "equality is equity." No longer is it that "the law favors the diligent creditor."

In *re American Brewing Co.*, 7 A. B. R. 468, 112 Fed. 752 (C. C. A. Ills.): "The avowed purpose of taking the judgment notes, with power to enter judgment at any time by confession, was to secure appellants against the claims of other creditors, and to give them a preference. That would be legitimate and proper if no Bankrupt Law were in force, and a race of diligence in priority were allowable. But one purpose and effect of the Bankrupt Law is to put an end to such a race of diligence, and to divide the estate ratably among creditors. The essential ethics of that law is that 'equality is equity.'"

To use an illustration, it is as if a meagre table were set for a hungry crowd. Common law says to each one "Seize all you can, and as quickly as you can, no matter if the rest get nothing: 'first come, first served' is the rule." Bankruptcy law, on the other hand, says "No, let a fairer rule prevail: let considerateness govern. Let each one take his proportionate share. The meal is too scanty, to be sure, to satisfy all. No one can satisfy fully his wants; but, on the other hand, no one shall be crowded out, no matter how weak or poor he may be or how slow he may have been in getting to the table: each shall have his share." And so have been developed the two striking and distinguishing features of bankruptcy law—that creditors receiving (under certain qualifications and limitations) more than their proportionate share out of the debtor's insolvent estate must surrender the preference into the common fund for all; and that the seizure of property of the insolvent estate (under other certain limitations) by legal proceedings are also void and this property also must be surrendered to form part again of the common fund for all.

Compare, In *re Hopkins*, 1 A. B. R. 209 (Ref. Ala.): "The Bankruptcy Act of 1898 recognizes and affects two different classes of liens, 1st, those created by the acts of the parties (preferences): second, those acquired by creditors under and by virtue of legal proceedings."

Compare, *Farmers' Bank v. Carr*, 11 A. B. R. 733, 127 Fed. 690 (C. C. A.): "The essential principle of the bankrupt law is that all of the bankrupt's property be divided equally, without preference, to the payment of his debts. It abhors preferences."

§ 1274. "Trust Fund," Theoretical Basis of Peculiar Titles Conferred by Bankruptcy Act.—Now, what theory lies at the basis of these peculiar provisions of bankruptcy law? Why may not an insolvent debtor

pay in full whatsoever creditor he prefers to pay, notwithstanding the remainder may get nothing at all or only a small per cent. of their respective claims, so long as the debt paid is an honest and just debt? Why, also, may not a creditor seize and hold by legal process property of the insolvent debtor in satisfaction of his just and due claims? Why is it not permitted to the first creditor who levies to get all he can up to the amount of his full claim; then to the creditor who chances to be second and not first in levying, to get all the rest up to the amount of *his* claim; and so on with the third and fourth till all the property is exhausted? and why is it not right that those who do not act quickly enough, who happen to be fourth or fifth or tenth or twentieth in levying, get nothing at all to apply upon their claims? Common law has declared that all this really is right; and it says it is so because it is manifestly right that whatever the debtor owns he has on his part a perfect right to use in paying his debts and the creditor on his part to take in payment of his claim. But in the light of bankruptcy law the answer to these questions is different. The answer is simply this: In law the insolvent debtor does own the property belonging to his insolvent estate; but in equity, as developed in the bankruptcy law—at least, if we view the matter from the standpoint of the philosophy of the law—he does not absolutely own it. The insolvent estate is, in theory, a trust fund. While the courts have refused to announce such doctrine as an established principle of general law outside of bankruptcy jurisprudence, and have not enunciated it, in so many words even in bankruptcy jurisprudence, yet some such theory must be the principle of justice on which the peculiar rights conferred by the act really rest. It is only upon some such theory as this of the trust fund that the requirement of surrender of preferences and the return of property seized on legal process can be justified in cases of insolvent estates. Only so can the debtor's right to use what at common law is his own property in the payment of any just debt he may prefer to pay be restricted, and the creditor's right to seize his debtor's property in satisfaction of his just claim be thwarted.

The insolvent estate is, in the philosophy of the law, if not in the announced decisions, not his own—that is the answer.

He *is not* using his *own* property with which to pay his debts. He has used up all his own property, as equity looks at it, and this is precisely why he has become insolvent; he is now making use of the common fund contributed by all his creditors. As long as he remains solvent, he may do with his property as he sees fit, for it is his own both in law and also in equity; but the moment he becomes insolvent he ceases to be using up his own capital; and so at the moment of insolvency, equity, in the form of bankruptcy law, steps in and declares his property a trust fund belonging to all his creditors.

In *re McGee*, 5 A. B. R. 262, 105 Fed. 895 (D. C. N. Y.): "In either instance the property which theoretically at least belongs to all creditors is taken from them and given to a favored creditor—a situation which the Bankruptcy Act was passed to prevent."

This seems to be the theory underlying the treatment in bankruptcy of preferences and legal liens obtained within four months preceding bankruptcy.²⁶⁰

In re Keller, 6 A. B. R. 340, 109 Fed. 118 (D. C. Iowa): "The Bankrupt Act may be said to be based upon two fundamental propositions: First, that when a person becomes unable to pay his just debts, the property then remaining to him equitably belongs to his creditors, and should be distributed proportionately among them; and, second, that, if the insolvent debtor in good faith yields up to his creditors his property for distribution among them, he should then be relieved from the debts existing against him at the time he transfers his property to his creditors. The first proposition is not based upon the question of good faith on the part of the debtor, nor upon his knowledge or want of knowledge of his actual financial condition. It rests upon the fact of insolvency; and the equity in favor of the creditors grows out of the fact that it is ordinarily true that the estate possessed by the insolvent debtor represents the goods, property or money obtained by the debtor on credit from his creditors. If in fact the debtor is insolvent, and if in fact he has in possession property which he has bought on credit and which has not been paid for, is not the equity in favor of the creditors fully established, without reference to the mere belief which the debtor may entertain with respect to his ability to pay his debts? It is a matter of common knowledge that persons who are hopelessly insolvent will frequently cling to the belief that they can pay up if only allowed a little time, yet, if time be allowed them, they only become more heavily involved. It cannot, therefore, be successfully maintained that the equity of creditors to the estate of an insolvent debtor is in any true sense dependent upon or affected by his belief touching his actual condition. This equity cannot, however, be carried into effect except through legal machinery; and to that end, among others, the present Bankrupt Act has been adopted. When, through the provisions of that act, an estate of an insolvent debtor has been brought before the court of bankruptcy for distribution, is it not true that among the creditors the general rule is that 'equality is equity;' that is to say, that in the division of the estate each creditor shall receive only his proportionate share of the estate? It must be remembered that the institution of the proceedings in bankruptcy does not create the equity in favor of the creditors, but only sets in motion the machinery by which the equity can be properly enforced. The equity on behalf of the creditors comes into existence when the debtor becomes insolvent."

Swarts v. Fourth Nat'l Bk., 8 A. B. R. 677, 117 Fed. 1 (C. C. A. Mo.): "The dominant purpose of the prohibition of a preference was not to benefit or injure, or to prevent the benefit or injury, of any creditor or class of creditors, but to prevent the debtor from making any disposition of his property which would prevent its equal distribution—to prevent him from doing anything which would result in the payment out of his property of a larger percentage upon any claim than others of the same class would receive."

In re Schafer, 5 A. B. R. 149, 3 N. B. N. & R. 145 (Ref. N. Y.): "This view is supported by what I conceive to have been the intent of the Congress in the enactment of the bankruptcy law. The underlying idea appears to be that at the moment when a person becomes insolvent, that is, within the definition of the term at § 1, subdivision 15—'Whenever the aggregate of his property * * * shall not at a fair valuation be sufficient in amount to pay his debts'—the property then remaining with the insolvent belongs to his

260. White v. Bradley Timber Co., 9 A. B. R. 442 (D. C. Ala.).

creditors, and to all creditors of the same class pro rata, in equal proportion to their contributions thereto. No preferences among creditors in the same class are intended to be tolerated by the bankrupt law. The purpose of the act was to accomplish such equal distribution as nearly as practicable."

§ 1275. Efficiency of Facts to Create Passing of Title and Nature of Title Passing, Determined by State Law.—It must be reiterated that although the Bankruptcy Act itself creates new rights, those to preferentially transferred property and property seized by legal proceedings within the four months preceding the bankruptcy—yet the law of each state determines the sufficiency of the transaction to constitute a "pledge" or "mortgage," a "sale," a "legal lien," or other appropriation of property. The law of the State, it must not be forgotten, all the time, determines the nature or name, so to speak, of the transaction and the time of the passing of title thereby, whereupon the Bankruptcy Act steps in and declares that, having such name and title thus passing, it is or is not a voidable transaction.

All this has been previously covered—see ante, §§ 1139, 1140—but its pertinency is so great in connection with a discussion of the law of preferences that it bears repetition.

Compare, also, *In re Ball*, 10 A. B. R. 565, 123 Fed. 164 (D. C. Vt.): "The title to the other goods as well as these is governed by the laws of the State, although what is a preference under the Bankrupt Law must be controlled by that."

At the risk of some repetition, we have thus taken a preliminary survey of the general nature of these two peculiar and important provisions of bankruptcy law, and thus by understanding the theory and principles underlying them are in a better position, to take up their formal study in detail. And first, as to preferences:

SUBDIVISION "A".

VOIDABLE PREFERENCES.

§ 1276. Definition of Preference.—Section 60 as originally enacted defined a preference as follows:

"A person shall be deemed to have given a preference, if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditor of the same class."

Swarts v. Fourth Nat. Bk., 8 A. B. R. 673, 117 Fed. 1 (C. C. A. Mo.): "Section 60 (a) furnishes the legal and controlling definition of the preference specified in § 57 (g) and other parts of the Bankrupt Act."

By the amendment of February, 1903, the further limitation was added that, in order to constitute such judgment or transfer a preference it must

have been taken or made within four months preceding the bankruptcy; so that the section defining the term preference as used in bankruptcy now reads as follows:

"A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer if by law such recording or registering is required."

§ 1277. "Preferences," "Voidable Preferences" and "Preferences" That Are "Acts of Bankruptcy," to Be Distinguished.—It must be noted that a preference itself is one thing and a preference that amounts to an act of bankruptcy sufficient to throw a debtor into bankruptcy is the same thing and more; and that a preference, which can be avoided by the trustee, so that the property affected by it can be recovered for the benefit of all the creditors, is the same thing and also something more, but that that "something more" is still different.

Thus, a preference in fact may exist even if the debtor did not intend or know that his transfer would result in a preference and so be insufficient grounds for throwing him into bankruptcy; and it may also exist even if the creditor took it without any cause appearing to him for believing that the debtor was intending to give him a preference and so may not be sufficient grounds for the creditors to retake possession of the property transferred; for the question as to whether the transfer is or is not a preference is to be determined solely by results, independently of the debtor's intent and independently of the creditor's participation therein; and the questions of intent, etc., with which the preference was given or received simply touch the effect on the debtor's and creditors' rights.²⁶¹

Benedict v. Deshel, 11 A. B. R. 22, 177 N. Y. 1 (N. Y. Ct App.): "In unmistakable language Congress has said that when an insolvent debtor makes

²⁶¹. In re Bashline, 6 A. B. R. 194 (D. C. Pa.); In re Keller, 6 A. B. R. 334, 109 Fed. 118 (D. C. Iowa); In re Conhaim, 3 A. B. R. 251, 97 Fed. 295 (D. C. Dist. Wash.); In re Fixen & Co., 4 A. B. R. 10 (C. C. A. Calif.); In re Carson, Pirie, Scott & Co., 5 A. B. R. 814 (U. S. Sup. Ct.); compare *Western Tie & Timber Co. v. Brown*, 12 A. B. R. 111, 129 Fed. 728 (C. C. A. Ark.).

Elements of a Preference as Laid Down in Decisions.—*Sebring v. Wellington*, 6 A. B. R. 672 (N. Y. Sup. Ct. App. Div.): Where the court enumerates the elements of a preference that are recoverable from the creditor as being four. *Hastings v. Fithian*, 13 A. B. R. 678 (Ct. Errors & Appeals N. J.).

Baden v. Bertenshaw, 11 A. B. R. 309, 68 Kans. 32: "If a payment intended as a preference is made within four months before the filing of a petition in bankruptcy, and the creditor believed, or had reasonable cause to believe, that it is intended to give a preference, and such payment has the effect to enable such creditor to obtain a greater percentage of his debt than other like creditors, the trustee may recover the amount so paid, regardless of any fraudulent intent." In re Armstrong, 16 A. B. R. 592 (D. C. Iowa).

a transfer of property, the effect of which will be to enable any one of his creditors to obtain a greater percentage of his debt than any other creditor of the same class 'the debtor shall be deemed to have given a preference.' Shall this language be held to be meaningless? Shall it be expunged from the statute by judicial construction? * * * The statute deals with three distinct legal entities concerned in the administration of a bankrupt's estate: 1. The debtor. 2. The trustee. 3. The creditor. As to the debtor, the statute declares that a payment under certain conditions shall be held to be preferential. He is not to be heard upon the question of his intent. The effect of his act is fixed by law. That is the scope and purport of subdivision a. The next section, subdivision b, declares, in effect, that a preferential payment is not void per se, but voidable by the trustee upon a certain condition. And what is the condition? Simply that the trustee shall establish that the creditor had reasonable cause to believe that the payment to him was intended as a preference. In other words, the trustee's remedy is not absolute, but is made to depend upon proof of the knowledge or belief with which the creditor took the payment. * * * In each case the condition affixed to the remedy ignores the state of mind of one of the parties to the transaction and renders his act dependent upon the purpose of the other."

Swarts v. Fourth Nat'l Bk., 8 A. B. R. 677, 117 Fed. 1 (C. C. A. Mo.): "The meaning and effect of § 60 (a) are the same as though it declared every transfer of his property by an insolvent to be a preference which has the effect to 'enable any one of his creditors to obtain a greater percentage of his debt' out of the property of the insolvent 'than any other of such creditors of the same class.'"

Of course the classification here adopted is simply for the purpose of the author's analysis of the subject and does not pretend to be founded on any classification formally made by any court.

A preference itself has seven elements, which are as follows:

§ 1278. First Element of a Preference.—Some portion of the debtor's property must have been appropriated by the transaction and the insolvent estate thereby diminished. Preference implies appropriation of assets and depletion of the trust fund thereby.

§ 1279. Entirely Fictitious Transactions.—Thus, an entirely fictitious transaction, where no property is actually taken, cannot constitute a preference.

In re Steam Vehicle Co. of Am., 10 A. B. R. 385, 121 Fed. 939 (D. C. Pa.): "Neither, under the provisions of the Bankrupt Act, can the claimant be properly held to have received a preference. It never received a cent of money or any other consideration on account of the disputed items. No gain has come to it, and no loss has come to the bankrupt, because of what was done; and therefore, as it seems to me, it is impossible to hold that mere juggling with book entries amounts to payment. As I look at the matter, payment means at least that value has passed in some form or other; and the word does not properly embrace a fictitious transaction, such as this, where no value was intended to pass, and where none was actually transferred. Reprehensible as the conduct under consideration was, and whatever its effect might be in other proceedings, it did not do the slightest harm to the other creditors, and did not take from them any part of the bankrupt's assets."

§ 1280. **Performance of Labor in Payment of Debt.**—Likewise, the performance of labor in payment of a debt has been held not a transfer of property, hence, not a preference.²⁶²

In re Abraham Steers Lumber Co. (Steers Lumber Co.), 6 A. B. R. 315, 110 Fed. 738 (D. C. N. Y., affirmed 7 A. B. R. 332, 112 Fed. 406): "The labor, credited August 28, and amounting to \$37.17, may be offset, as it cannot be regarded as a transfer of property."

§ 1281. **Liens Given within Four Months in Fulfillment of Promise Made before.**—A chattel mortgage or other lien given within the four months, in fulfillment of a promise to execute one made before the four months period, constitutes a preference, for the mere promise to give the mortgage did not operate to appropriate the property, and so the appropriation took place within the requisite statutory period.²⁶³

§ 1282. **No Preference by "Judgment" unless Judgment Operates to Create Lien or Otherwise to Appropriate Property.**—A judgment even if "suffered or procured" by the bankrupt to be taken, nevertheless will not amount to a preference unless thereby some property is so sequestered, or a lien obtained upon it, that the enforcement of the judgment would deplete the estate, for the word "judgment" as used in this § 60 (a) means an effective judgment—a judgment whereby property of the bankrupt is in some way appropriated. Therefore, a merely personal judgment, where no lien results, would, of course, not amount to a preference, until levy of execution thereunder.²⁶⁴ It would not deplete the trust fund belonging to all the creditors, which is the touchstone of a preference.

§ 1283. **Giving of Check or Note Not Preference; but Paying of It Is.**—The giving of the debtor's check or note or other instrument of indebtedness is not the giving of the preference: but it is the payment of it

^{262.} Compare, analogously (as to not refusing discharge), In re Fitchard, 4 A. B. R. 609, 103 Fed. 742 (D. C. N. Y.). Compare, analogously (as to not refusing discharge), In re Adams, 4 A. B. R. 696 (D. C. N. Y.). See post, § 1333. Compare, analogously, In re Howe Security Co., 17 A. B. R. 181 (D. C. Ala.).

^{263.} See post, this subdivision, "Sixth Element of a Preference; Four Months Limit," § 1370.

Taking of possession under unrecorded mortgage—whether appropriation takes effect as of date of taking possession or date of execution of mortgage: Effect of mortgage to cover future-acquired property, acquired during the four months period: See *Humphrey v. Tatman*, 14 A. B. R. 74, 198 U. S. 91 (reversing *Tatman v. Humphreys*, 12 A. B. R. 62, 184 Mass. 361).

These subjects are involved in previous discussions (ante, §§ 1139, 1140, 1209) as to the Local Law governing in determining the Trustee's title as the successor of creditors, as also in determining his title as conferred by the peculiar provisions of the Bankruptcy Act.

A chattel mortgage executed in blank, before the four months period, but not filled in with the amount of the debt until within the four months period, takes effect only from the date of the filling in, and is a preference. In re Barrett, 6 A. B. R. 48 (D. C. N. Y.).

^{264.} Bankr. Act, § 60 (a); In re Pease, 4 A. B. R. 547 (Ref. N. Y.); instance, In re Metzger Toy & Novelty Co., 8 A. B. R. 307 (D. C. Ark.); inferentially, *Wilson Bros. v. Nelson*, 7 A. B. R. 142, 183 U. S. 191.

out of the bankrupt's estate that is the preference;²⁶⁵ and even where a purchaser of the bankrupt's stock gave his note to the creditor as part of the price it has been held not to be a preference until paid.

Compare, instance, *Off v. Hakes*, 15 A. B. R. 700, 142 Fed. 364 (C. C. A. Ills.): "The appellant has not been paid the amount of the note which constitutes the alleged preference, and, without proof of other circumstances to charge him with such amount, the equitable remedy is surrender of the note, if preferential, and not its assumed value." This decision seems to be wrong on principle, the giving of the note was part of the consideration paid for the transfer and, presumably, *pro tanto*, diminished the money payment.

§ 1284. Payment Actually Made Not to Be Applied to Evade Preference Statute.—A payment actually made afterwards, cannot be applied on an unpaid note or check made before a certain invoice was sold on credit to the bankrupt, so as to entitle the creditor to offset the invoice against the payment as being a "subsequent credit."²⁶⁶

§ 1285. Payment by Bankrupt of Own Note Discounted by Creditor, a Preference.—But where the creditor discounts the bankrupt's note at a bank its payment within the four months by the bankrupt constitutes a preference to the creditor, the bankrupt's estate being depleted thereby.²⁶⁷

§ 1286. Return of Loan Made for Specific Purpose, Not Preference.—The return of a loan made for a specific purpose, upon the purpose failing, is not a preference.²⁶⁸

§ 1287. Discounting of Bankrupt's Note, Not Preference.—And the discounting of the bankrupt's note by a third party does not constitute a preference, even though the discount money is applied upon the bankrupt's debt; the depletion of the bankrupt estate, and consequently the preference, not occurring until the bankrupt pays the note.²⁶⁹

^{265.} *In re Lyon*, 10 A. B. R. 25, 121 Fed. 723 (C. C. A. N. Y., affirming although on this point correcting, 7 A. B. R. 412). In this instance the check was post-dated and the insolvency was proved only as of the date of the payment. *In re Wolf & Levy*, 10 A. B. R. 153, 122 Fed. 127 (D. C. Tenn.); *In re Bailey*, 7 A. B. R. 26 (D. C. Vt.); *obiter*, *Upton v. Mt. Morris Bk.*, 14 A. B. R. 6 (N. Y. Sup. Ct. App. Div.).

^{266.} *In re Bailey*, 7 A. B. R. 26 (D. C. Vt.): Although this was a case of so-called "innocent" preference not cognizable since the amendment of 1903, yet the principle decided is not affected by the amendment. Compare analogous principle involved in *Hackney v. Hargreaves Co.* (Raymond Bros. Clark Co.), 13 A. B. R. 164, 68 Neb. 676. Also compare analogous principle where creditor applied payments on nonpriority part of his claim to leave priority part unpaid. *In re King Co.*, 7 A. B. R. 619 (D. C. Mass.).

^{267.} *In re Matthews & Rosenkrans*, 15 A. B. R. 721 (Ref. Mass.).

^{268.} *Dressel v. North State Lumber Co.*, 9 A. B. R. 541, 107 Fed. 225 (D. C. N. Car.).

^{269.} Inferentially, see *In re Lyon*, 10 A. B. R. 25, 121 Fed. 123 (C. C. A. N. Y.); compare *In re Meyer*, 8 A. B. R. 598 (D. C. Tex.); compare *In re Waterbury Furn. Co.*, 8 A. B. R. 79, 114 Fed. 225 (D. C. Conn.); *contra*, *In re Weissner*, 8 A. B. R. 177 (D. C. N. Y.).

§ 1288. **Payments by Sureties and Endorsers of Bankrupt, Not Preferences.**—Payments by sureties and endorsers for the bankrupt, of course, do not constitute preferences and need not be surrendered by the creditor.²⁷⁰ The creditor may prove his claim in full, and if his dividends together with the payments received from sureties or endorsers exceed the total amount due, he holds the excess for the benefit of the surety or endorser.²⁷¹

§ 1289. **Payment, by Maker, of Note Discounted by Bankrupt.**—Where the bankrupt discounts a third person's note at the bank, the maker's payment of it when due does not constitute a preference: the bankrupt's estate is not depleted.²⁷²

But if the insolvent fund is depleted by the payment or other transfer, it is a preference although third parties bound as sureties for the same debt would have paid the debt anyway.²⁷³

§ 1290. **Depletion of Partnership Assets Where Partnership Not in Bankruptcy but Assets Being Administered in Bankruptcy of Member.**—Where partnership property is being administered in the individual bankruptcy proceedings of one of the partners, a mortgage given by the partnership upon partnership property that would have operated as a preference as to partnership creditors had the partnership been in bankruptcy, will not be affected by the individual bankruptcy of the partner—the individual estate, which is the only bankrupt estate involved, has not been depleted.²⁷⁴

§ 1291. **Conversely, Depletion of Individual Estate Not Preference in Partnership Bankruptcy.**—Liens upon the individual property of a member of a bankrupt partnership that would have been voidable had he been individually in bankruptcy, are not voidable where merely the partnership is in bankruptcy.²⁷⁵

Nevertheless, the property of the partner is sub modo a fund for creditors.

§ 1292. **Whether Liens upon or Other Transfers of Exempt Property, Preferences.**—Whether liens upon or other transfers of exempt

270. *Swarts v. Fourth Nat'l Bk.*, 8 A. B. R. 673, 117 Fed. 1 (C. C. A. Mo.); *Doyle v. Milw. Nat. Bk.* (In re Harpke), 8 A. B. R. 535 (C. C. A. Wis.).

271. *Swarts v. Fourth Nat'l Bk.*, 8 A. B. R. 673, 117 Fed. 1 (C. C. A. Mo.).

272. *Dressel v. North State Lumber Co.*, 9 A. B. R. 541, 107 Fed. 225 (D. C. N. Car.).

273. *Swarts v. Fourth Nat'l Bk.*, 8 A. B. R. 673, 117 Fed. 1 (C. C. A. Mo.).

274. *McNair v. McIntyre*, 7 A. B. R. 638, 113 Fed. 113 (C. C. A. N. C.), reversing *In re Sanderlin*, 6 A. B. R. 384. But compare, *In re Keller*, 6 A. B. R. 334, 109 Fed. 118 (D. C. Iowa), which was also a case where a partner on dissolution of partnership assumed firm debts and afterwards went into bankruptcy: a payment by the firm that would have been a preference had the firm been in bankruptcy was held to be a preference as to the bankrupt partner.

275. *Impliedly. In re Lehigh Lumber Co.*, 4 A. B. R. 221, 101 Fed. 216 (D. C. Pa.).

property constitute preferences or not, since they do not diminish the creditor's assets (exempt property not belonging to the trustee), is not decided.²⁷⁶

§ 1293. Transfers of or Liens on Property That Might Have Been Claimed Exempt but Not Claimed.—Transfers of, or liens upon property that might have been claimed as exempt but is not so claimed, are none the less on that account preferences.²⁷⁷

§ 1294. Property Transferred to Be Such as Otherwise Would Have Belonged to Estate.—The property transferred must have been such as otherwise would have belonged to the estate, else there can be no depletion of the trust fund. Thus, although preferences may be given after the filing of the petition and before adjudication (§ 60a), yet they may only be accomplished as to property, or its proceeds, that was in existence at the time of the filing of the petition and that might then have been transferred by some means or levied on and sold under judicial process.

§ 1295. Mere Exchanges of Property, Changes in Form and Transfers Based on Present Consideration, Not Preferences.—“A fair exchange is no robbery.” Mere exchanges of property and changes in its form, as, likewise, transfers of it, for which are received at the same time, assets of equal value, do not deplete the estate nor constitute a basis of preference.²⁷⁸

City Nat'l Bk. of Greenville v. Bruce (Bank v. Bruce), 6 A. B. R. 311, 109 Fed. 69 (C. C. A. S. Car.): “This paragraph (§ 60 (a)) refers to existing debts as distinguished from a security or lien given upon the bankrupt estate to raise ready money whereby the value of the estate is increased to the extent of the amount raised.”

In re Manning, 10 A. B. R. 503, 133 Fed. 180 (D. C. S. C.): “There is nothing in the Bankrupt Law which forbids an exchange of securities, and if a person, even while insolvent, makes such exchange as will not diminish the value of his estate, it is unimpeachable.”

In re Shepherd, 6 A. B. R. 725 (D. C. Ills.): “The mere exchange of securities within four months is not a preference within the meaning of the Bankrupt Law; the reason being that the exchange takes nothing from the other creditors.”

In re Clifford, 14 A. B. R. 283, 136 Fed. 475 (D. C. Iowa): “And for such part of the mortgage the bankrupt then received a present consideration, and his estate was not diminished nor the rights of any of his then existing creditors impaired in the least.”

[1867] *Sawyer v. Turpin*, 91 U. S. 114: “The mortgage covered the same property. It embraced nothing more. It withdrew nothing from the control

²⁷⁶. See, analogously as to liens by legal proceedings on exempt property, § 1100, et seq.

²⁷⁷. *Obiter*, *In re Schuller*, 6 A. B. R. 278, 108 Fed. 591 (D. C. Wis.).

²⁷⁸. *In re Cutting*, 16 A. B. R. 753, 148 Fed. 388 (D. C. N. Y.); *In re Nicholas*, 10 A. B. R. 291 (D. C. N. Y.), in which case an exchange—under the terms of the bankrupt's contract—of old goods for new goods (eight old ones for seven new ones) was held not a preference. See post, “Third Element of Preference,” § 1320.

of the bankrupt, or from the reach of the bankrupt's creditors, that had not been withdrawn by the bill of sale. Giving the mortgage in lieu of the bill of sale, as was done, was therefore a mere exchange in the form of the security. In no sense can it be regarded as a new preference. The preference, if any, was obtained on the 15th of May, when the bill of sale was given, more than four months before the petition in bankruptcy was filed. It is too well settled to require discussion that an exchange of securities within the four months is not a fraudulent preference within the meaning of the bankrupt law, even when the creditor and the debtor know that the latter is insolvent, if the security given up is a valid one when the exchange is made, and if it be undoubtedly of equal value with the security substituted for it."

§ 1296. Net Result after Becoming Insolvent and within Four Months, the Test.—If the net result of the transactions between the debtor and creditor during the period of insolvency and within the four months of the bankruptcy has been to increase rather than to diminish the trust fund of the creditors, such creditor has not received a greater percentage of his claim out of the insolvent estate than some other creditor of the same class, and there is therefore no preference.²⁷⁹

Jaquith v. Alden, 9 A. B. R. 776, 189 U. S. 78: "In the present case all the rubber was sold and delivered after the bankrupt's property had actually become insufficient to pay their debts, and their estate was increased in value thereby to an amount in excess of the payments made. The account was a running account, and the effect of the payments was to keep it alive by the extension of new credits, with the net result of a gain to the estate of \$546.89, and a loss to the seller of that amount, less such dividends as the estate might pay. In these circumstances the payments were no more preferences than if the purchases had been for cash, and, as parts of one continuous bona fide transaction. The law does not demand the segregation of the purchases into independent items so as to create distinct pre-existing debts, thereby putting the seller in the same class as creditors already so situated, and impressing payments with the character of the acquisition of a greater percentage of a total indebtedness thus made up."

Gans v. Ellison, 8 A. B. R. 153, 114 Fed. 734 (C. C. A. Pa.): "Upon the true interpretation of paragraph 'a' of § 60, the preference in such case as this is the net gain to the creditor upon the transactions between him and the debtor. The net balance in favor of the creditor is the real preference under the law. For only to the extent of such net gain does the creditor 'obtain a greater percentage of his debt than any other creditors of the same class.' And so, on the other hand, only to the amount of the net gain to the creditor is the estate of the debtor impaired. If, then, a creditor innocently preferred has given return credits afterwards he has surrendered his preference to the extent of such return credits. To effectuate justice, both sides of the account are to be considered in the case of a creditor who innocently has received preferences, and afterwards in good faith has given the debtor further credit, without security,

²⁷⁹. In *re King Co.*, 7 A. B. R. 619 (D. C. Mass., citing *Jourdan-Dickson v. Wyman*, 7 A. B. R. 186, 111 Fed. 726, C. C. A. Mass.); *Morey Mercantile Co. v. Schiffer*, 7 A. B. R. 670, 114 Fed. 447 (C. C. A. Colo.); In *re Sagor & Bro.*, 9 A. B. R. 361, 121 Fed. 658 (C. C. A. N. Y.); *Kimball v. Rosenbaum Co.*, 7 A. B. R. 718, 114 Fed. 85 (C. C. A. Ark.). See further, as to this rule, post, "Subject of Offsets of New Credits against Preferences," § 1419; also see "Eighth Element of a Preference," post, § 1386.

for property which has become a part of the debtor's estate. Otherwise it is plain that such innocently preferred creditor would be compelled to surrender his preference a second time before he could prove his claim against the bankrupt's estate." Although this case was decided as to "innocent" preferences, so-called, before the Amendment of 1903, the reasoning is still applicable.

Peterson v. Nash, 7 A. B. R. 181, 112 Fed. 311 (C. C. A. Minn.): "The giving and receiving, under such circumstances, may properly enough be regarded as one transaction, resulting not in a preferential payment to the creditor, but, in reality, in the creation of an indebtedness in favor of the creditor for the difference between the two."

In re *Geo. M. Hill Co.*, 12 A. B. R. 221, 120 Fed. 315 (C. C. A. Ills.): "We think that in stating the accounts between the parties, within the rule declared in *Jacquith v. Alden*, all the transactions between the parties must be included, and that we are not limited to an account as it is stated or was kept by the bank, because we are to inquire, whether the net result of the transaction was to increase or decrease the estate of the bankrupt. If the account was stated including that amount, there remains no question that the net result of the dealings was to decrease the bankrupt's estate, and that the bank is therefore chargeable with the amount of that net decrease as a condition of proving its claim."

§ 1297. Deposits in Bank Subject to Check.—Deposits in bank, subject to check and not made to apply in payment of a debt, are not preferences, though subsequently offset by the bank against a debt owed it by the depositor. The deposit creates a corresponding credit against which checks may be drawn—the estate is not depleted by the making of the deposit, and the subsequent offsetting by the bank does not constitute later a "transfer" by the bankrupt.²⁸⁰

West v. Bk. of Lahoma, 16 A. B. R. 738, 16 Okla. 508: "The Bank of Lahoma, as shown by the averments in the petition, loaned to Streich the sum of \$1,800, and Streich executed his promissory note to the bank for said amount. The bank gave him credit on deposit account for the proceeds of the loan. The bank then became his debtor to the amount of the deposit. He became the debtor to the bank in the amount of the note. The deposit was subject to check, and the transcript of account from the bank's books, which accompanies the petition as an exhibit, shows that the bank paid out on his check \$500 of the deposit before the note matured. On the date the note fell due Streich had on deposit of the original sum borrowed \$1,300, and the bank applied this sum on his note, and gave him credit for payment of that sum, and charged the same to him on the account. The deposit in the first instance did not create a preference in favor of the bank, for the reason that the bank became his debtor for the full amount of the deposit. His available assets were not diminished by the deposit in the bank, and his other creditors of the same class were in as good a position as they were before. These mutual transactions brought about the exact conditions mentioned in § 68a, a case of mutual

²⁸⁰. See post, this subdivision, "Fifth Element of Preference—Transfer," § 1541; *N. Y. County Nat. Bk. v. Massey*, 11 A. B. R. 42, 192 U. S. 138; In re *Philip Semmer Glass Co., L't'd*, 14 A. B. R. 25, 135 Fed. 77 (C. C. A. N. Y., affirming 11 A. B. R. 665); In re *Geo. M. Hill Co.*, 12 A. B. R. 221, 120 Fed. 315 (C. C. A. Ills.); instance, In re *Medaris-Vine Carriage Co.*, 17 A. B. R. 879 (Ref. Ohio); In re *Scherzer*, 12 A. B. R. 451, 130 Fed. 631 (D. C. Iowa).

debts and mutual credits between the estate of the bankrupt and the creditor, and after the adjudication the bank would have been entitled to have had set off the amount of Streich's deposit against the amount due on his note to the bank, and the right to have the balance allowed against the estate."

But, of course, if it was agreed that the subsequent deposits should be applied, as they were made, upon pre-existing overdrafts or other debts, then they would not constitute simply "offsets" but would amount to "preferences."²⁸¹

§ 1298. Surplus of Collateral Applied by Pledgee on Other Claims.

—Where the lienholder appropriates the equity and applies it to another and pre-existing debt, as by selling the security for more than the debt secured and applying the surplus on another debt, the appropriation of the equity by virtue of a "banker's lien" constitutes a preference,²⁸² the lien being in the contemplation of both parties at the time of the pledging.

§ 1299. Any Kind of Property May Be Subject to Preference.—Any kind of transferable property may be the subject of a preferential transfer, so long as it depletes the estate.²⁸³

As noted, ante, § 1280, the performance of labor in payment of a debt is not a transfer of property nor does it deplete the estate.

§ 1300. Any Method of Depleting Assets, Sufficient: Indirect Preferences.—Any method of depleting the insolvent fund is sufficient: a preference may be accomplished indirectly.²⁸⁴

In re Beerman, 7 A. B. R. 431, 434, 112 Fed. 663 (D. C. Ga.): "If transactions of this sort are to be permitted, then, instead of a creditor taking a mortgage himself, when a debtor is in failing circumstances, he will get some one else to advance the money, agreeing that the person advancing the money shall suffer no loss, and thereby obtain by indirection a preference which he would be unable to get if he had acted directly with the debtor."

Crooks v. Bank, 3 A. B. R. 242, 46 N. Y. App. Div. 339: "It is the result or effect of the act done which is declared against, not the manner nor method by which it is done. No matter how circuitous the method may be if the effect of the transfer of property, etc."

²⁸¹. Obiter, Bank v. Sandheim, 16 A. B. R. 866 (C. C. A. Penn.); contra, obiter, Tomlinson v. Bk. of Lexington, 16 A. B. R. 632 (C. C. A. N. Car.).

²⁸². Inferentially, In re Belding, 8 A. B. R. 718 (D. C. Mass.). See post, § 1372.

²⁸³. Stern, Falk & Co. v. Trust Co., 7 A. B. R. 305, 112 Fed. 501 (C. C. A. Ky.). Instance, Troy Wagon Wks. v. Vastbinder, 12 A. B. R. 352, 130 Fed. 232 (D. C. Penna.): Transfer of notes given to bankrupt on sale of goods falsely claimed by him to have been left on consignment.

Instance, Dickinson v. Security Bk. of Richmond, 6 A. B. R. 551 (C. C. A. Va.): Return of note of third person transferred to creditor to apply on bankrupt's debt.

²⁸⁴. Compare, to same effect but relative to act of bankruptcy, In re McGee, 5 A. B. R. 262, 105 Fed. 895 (D. C. N. Y.). Compare, to same effect, but relative to act of bankruptcy, Goldman v. Smith, 1 A. B. R. 266, 93 Fed. 182 (D. C. Ky.).

§ 1301. Purchaser from Bankrupt Using Purchase Price to Pay Off Preferential Liens.—Thus, where the purchaser of the bankrupt's real estate uses the purchase price in paying off judgment liens suffered within the four months, he depletes the estate thereby and causes a preference.

Benjamin v. Chandler, 15 A. B. R. 443, 142 Fed. 242 (D. C. Pa.): "It does not matter that the bankrupt does not himself pay it. That is not to be expected from a failing debtor, and might never in consequence be realized. Neither does execution have to be issued. The lien obtained by virtue of the judgment, whereby payment is secured out of the property, is a sufficient enforcement of it within the meaning of the law. Neither does it change the character of the transaction, that payment is made by a purchaser from the bankrupt who appropriates the price he was to pay in clearing off the liens, in order to have an unencumbered title. The significant thing is, that, by virtue of the judgment which was given him for his debt, the creditor is paid out of the property of the bankrupt, while others not so favored have to wait. There can be no question that, if this was effected through the medium of a sheriff's sale, it would amount to a preference, and there is no essential difference that the sale is private. Otherwise, by a mere disposition of his property to a third party, after covering it with judgments, a failing debtor could prefer and make them all good. The law permits no such evasion of its terms. The payment of a judgment, secured in this way, is as much an enforcement of it as if execution issued and levy were made. By whomever paid, it comes out of the property of the bankrupt, against which it is a lien, and that is enough."

§ 1302. Return of Goods to Seller Where No Right of Rescission Exists, Preference.—Thus, the return of goods to the seller on account of the buyer's insolvency, will constitute a preference, if title had actually passed and no right of rescission existed;²⁸⁵ but will not be a preference if the right to rescind the sale for fraud exists.

Silberstein v. Stahl, 4 A. B. R. 626 (N. Y. Sup. Ct.): "The bankrupt law of 1898 would be very ineffective to protect the rights of creditors generally, and secure equality of distribution of the assets of an insolvent debtor, if each creditor who was lucky enough to find some of his goods on hand could take them, thus disposing of all the stock which was available for payment of any debts, and leaving the creditors whose merchandise had been entirely parted with by the debtor wholly unprotected; it would be equally as ineffective if the insolvent debtor could transfer his property to favored creditors, under the claim that the trustee took no title to such property."

§ 1303. Transfers to Indemnify Sureties and Other Indirect Preferences.²⁸⁶—Transfers to indemnify sureties may be an indirect means of

²⁸⁵ Inferentially, *Lumber Co. v. Taylor*, 14 A. B. R. 231, 137 Fed. 321 (C. C. A. Penn.); *Plummer v. Myers*, 14 A. B. R. 805, 137 Fed. 660 (D. C. Penn.); impliedly, *Silvey & Co. v. Tift*, 17 A. B. R. 9, 123 Ga. 804. Also see post, § 1307. As to pleadings in such cases, see post, "Pleadings in Action to Recover Preferences," § 1761, et seq.

²⁸⁶ **Other Instances of Indirect Preferences.**—1. Transfer of notes taken on resale by bankrupt of goods claimed to have been left on consignment; but in reality not left on consignment but sold to him originally. *Troy Wagon Wks. v. Vastbinder*, 12 A. B. R. 352, 130 Fed. 232 (D. C. Penn.).

2. Purchaser from bankrupt using purchase price to pay off judgment lien

suffered thereon within the four months. *Benjamin v. Chandler*, 15 A. B. R. 443, 142 Fed. 242 (D. C. Penn.).

3. Creditor, instrumental in effecting sale of bankrupt's business procuring assumption of his own debt by purchaser as part of the transaction, receives an indirect preference. *Opp v. Hakes*, 15 A. B. R. 696, 142 Fed. 364 (C. C. A. Ill.).

4. Return of goods to seller on pretended rescission of sale by seller where no right of rescission exists. *Silberstein v. Stahl*, 4 A. B. R. 626 (N. Y. Sup. Ct.); inferentially, *Lumber Co. v. Taylor*, 14 A. B. R. 231, 137 Fed. 321 (C. C. A. Penn.).

5. General assignment for benefit of those creditors only who assent thereto. *In re Harson Co.*, 11 A. B. R. 514 (D. C. R. I.).

6. Giving orders on third person in payment of a pre-existing debt may be a preference. *In re Dundas*, 7 A. B. R. 129, 111 Fed. 500 (D. C. Vt.); *In re Hines*, 16 A. B. R. 495, 144 Fed. 142 (D. C. Penn.).

7. Transfer to liquidator to pay all creditors assenting to the liquidation is a preference to those assenting. *In re Wertheimer*, 6 A. B. R. 187 (Ref. N. Y.); *In re Wertheimer*, 6 A. B. R. 756 (D. C. N. Y.).

8. Leasing to a creditor a manufacturing establishment to pay himself from the profits of operation. *Carter v. Goodykointz*, 2 A. B. R. 224, 94 Fed. 108 (D. C. Ind.).

9. Assignment of claim tainted with a preference, to the purchaser of the bankrupt's assets for use as offset to the purchase price; under arrangement whereby such purchaser offers to satisfy such account and assume such liability, contingent upon the purchase of the bankrupt's property, and the purchaser reserves from the purchase price an amount sufficient to satisfy the same. *Hackney v. Hargreaves Bros.*, 13 A. B. R. 164, 3 Neb. 676 (reversing *Hackney v. Raymond Bros. Clarke Co.*, 10 A. B. R. 213).

10. Transfer to any one who had guaranteed overdrafts of the bankrupt and had subsequently paid the overdrafts. This was, however, a case of a preference as an act of bankruptcy, not as a recoverable preference. *Goldman v. Smith*, 1 A. B. R. 266, 93 Fed. 182 (D. C. Ky.).

11. Clearing house association is the agent of each constituent bank, such that on recalling the checks presented by the bankrupt bank on the day of its failure it holds the resultant fund for the benefit of all and cannot appropriate it to the use of any particular creditor bank. *Rector v. City Deposit Bk. Co.*, 15 A. B. R. 336, 200 U. S. 405.

12. Payment of rent as part of a device to prefer. *In re Lange*, 3 A. B. R. 231, 97 Fed. 197 (D. C. N. Y.): "Payment of rent for leased premises where business is carried on is not usually a preference, but circumstances may render it such. * * * This will be the case where * * * the rent was paid for the purpose of continuing the business and that new debts were incurred, but that the proceeds of the business were not applied to the payment of debts, but were secreted by the alleged bankrupt." This case, however, exhibits rather a fraudulent scheme than a preferential payment.

Other instances, apparently of indirect preferences, but held not to be such:

1. Bankrupt removed from trusteeship on account of defalcation; ordered by court to make good the defalcation: transfers his store stock to wife who mortgages same and also her own property to raise the money to save husband from disgrace: held not a preference because person to whom payment was made was not a creditor. *Fry v. Pennsylvania Trust Co.*, 5 A. B. R. 51 (Sup. Ct. Penn.).

2. Insolvent debtor giving his attorney money to effectuate a preference but attorney giving his own check to the creditor for sum in excess. *Upson v. Mt. Morris Bk.*, 14 A. B. R. 6 (N. Y. Sup. Ct. App. Div.).

3. Construction Co. by arrangement with a storekeeper deducting amounts of supplies furnished laborers, out of pay roll, and sending check for same to storekeeper, suddenly stops sending checks to the storekeeper although still deducting from wages enough to pay for the supplies: held, an offset and not a preference. *Western Tie & Timber Co.*, 13 A. B. R. 447, 196 U. S. 502, reversing 12 A. B. R. 111 (C. C. A. Ark.).

4. One partner selling out to the other who thereupon goes into bankruptcy, attempting thereby to convert from assets into individual assets: held, not a preference to individual creditor but, rather, that individual creditors are not entitled to share in old firm assets until firm creditors are satisfied, being a case of marshaling partnership and individual estates under Sec. 5 and not a case

making a preference;²⁸⁷ thus, an assignment of money due on a building contract as indemnity to an accommodation indorser may be a preference.²⁸⁸

§ 1304. Second Element of a Preference—The Claim upon Which the Preferential Transfer Is Made Must Have Been the Claim of a Creditor—Preference Implies Advantage Accruing by the Transfer to a “Creditor.”

§ 1305. Preferential Transfer to Be Distinguished from Fraudulent Transfer.—If the claim is fraudulent or fictitious, the transfer is not a preference but is a fraudulent transfer.²⁸⁹

§ 1306. Paying Off Liens on Exempt Property—When Not Preference.—Paying off liens on exempt property within four months of bankruptcy, while the debtor is insolvent or otherwise converting nonexempt property into exempt property, will not entitle creditors to subrogation to the liens. The one receiving with knowledge the benefit, is not a creditor but is the bankrupt himself.²⁹⁰

§ 1307. Return of Goods to Seller Where Right of Rescission Exists, Not Preference.—Where a seller has the right to rescind a sale and recover the goods, such right being predicated upon the failure of the title to pass for lack of meeting of minds, a return of such goods will not constitute a preference; for the seller thereby is declared never to have been a creditor for the goods and title to them is not in the bankrupt.²⁹¹

But of course, where such right did not exist, the return of the goods would constitute a preference.

§ 1308. One Benefited Must Hold Provable Claim, Else Not Preference.—A transfer or judgment to constitute a preference must operate to give a “creditor” a greater percentage of his claim than other creditors.²⁹² Now, “creditor” is defined by § 1 (9) to include anyone who owns a demand or claim provable in bankruptcy. Hence it necessarily follows, that where

of preference under § 60. In *re Denning*, 8 A. B. R. 136, 114 Fed. 219 (D. C. Mass.).

5. Stockbroker turning over stock to customer on latter paying up: held no diminution of stockbroker's estate because customer owned stock and simply redeemed from the broker's lien. *Richardson v. Shaw*, 16 A. B. R. 842, 147 Fed. 659 (C. C. A. N. Y., affirmed in 16 A. B. R. 376); *Richardson v. Shaw*, 16 A. B. R. 876 (D. C. N. Y., affirming 16 A. B. R. 842).

287. *Crandall v. Coates*, 13 A. B. R. 712, 133 Fed. 965 (D. C. Iowa).

288. In *re O'Donnell*, 12 A. B. R. 621, 131 Fed. 150 (D. C. Mass.).

289. See ante, § 113; post, § 1397.

290. Apparently, In *re Wilson*, 10 A. B. R. 524, 123 Fed. 20 (C. C. A. Calif.); contra, In *re Boston*, 3 A. B. R. 388 (D. C. Neb.).

291. See ante, § 1302.

292. Bankr. Act, § 60 (a). As to what are provable claims, see ante, chapter XXI.

the one benefited does not hold a provable claim, a preference has not been given. And the date of the filing of the bankruptcy petition fixes the status of the creditor's claim.²⁹³

§ 1309. **Payments or Other Transfers on Claims for Personal Injury, etc., Not Preferences.**—Thus, payments or other transfers to persons holding claims for personal injuries are not transfers to "creditors," within the meaning of the Act, and do not constitute preferences.²⁹⁴

The making good of a defalcation has been held not to be a preference;²⁹⁵ yet, the claim on the defalcation certainly was a provable debt, for the tort was waivable and the claim could have been presented *ex contractu*.²⁹⁶

§ 1310. **Payments or Other Transfers Enuring to Benefit of Sureties, Endorsers, etc., of Bankrupt, Even before Principal's Default or before Payment by Sureties—Preferences.**—Thus, on the other hand, payments or other transfers to sureties, endorsers, etc., or enuring to their benefit, may be preferences to them even before the bankrupt principal's default and before any payment by the surety or endorser; for sureties, endorsers, etc., are "creditors" from the signing of the obligation and before default by the principal or payment by the surety.²⁹⁷

§ 1311. **Payment or Other Transfer to Present Owner of Claim, Preference to Both Present Owner and Also to Transferor, if Transferrer Remains Bound as Surety or Endorser.**—The payment of the bankrupt's note to the endorsee of the original creditor, or to the present owner, may constitute a preference to the endorsee or original creditor as of the date of the payment, notwithstanding the benefit of the payment may enure also to a surety or endorser.

In *re Geo. M. Hill Co.*, 12 A. B. R. 221, 120 Fed. 315 (C. C. A. Ills.): "It is insisted by the appellant that payment by the bankrupt of notes given by it to third parties and discounted by the bank were, under the law, preferential payments to those for whom the bank discounted the notes, and were not

²⁹³. See ante, §§ 629, 669.

²⁹⁴. See ante, chapter XXI, "Claims Ex Delicto," § 635.

²⁹⁵. *Fry v. Pennsylvania Trust Co.*, 5 A. B. R. 51 (Sup. Ct. Penn.).

²⁹⁶. See ante, § 636, and post under subject of "Discharge," § 2733.

²⁹⁷. In *re Stout*, 6 A. B. R. 505, 109 Fed. 794 (D. C. Mo.), quoted ante, § 644; *Livingston v. Heineman*, 10 A. B. R. 39, 120 Fed. 787 (C. C. A. Ohio, reversing In *re New*, 8 A. B. R. 566), quoted ante, § 644; *Swarts v. Siegel*, 8 A. B. R. 694, 695, 117 Fed. 13 (C. C. A. Mo.), quoted ante, § 644; In *re O'Donnell*, 12 A. B. R. 621, 131 Fed. 150 (D. C. Mass.), quoted ante, § 644; *Swarts v. Fourth Nat'l Bk.*, 8 A. B. R. 673, 117 Fed. 1 (C. C. A. Mo.); In *re Lyon*, 10 A. B. R. 25, 121 Fed. 723 (C. C. A. N. Y., affirming 7 A. B. R. 412); *Crandall v. Coats*, 13 A. B. R. 712, 133 Fed. 965 (D. C. Iowa); *Landry v. Andrews*, 6 A. B. R. 281, 48 Atl. 1036 (Sup. Ct. R. I.); In *re Matthews & Rosenkranz*, 15 A. B. R. 721 (Ref. Mass.); In *re Sanderson*, 17 A. B. R. 871 (D. C. Vt.). That sureties and endorsers are "creditors" from the date of signing, and even before default or payment by themselves, see ante, chapter XXI, "Provable Debts," div. 3. "Contingent Claims," §§ 642, 643.

preferential payments to the bank. We are not able to concur in this contention. * * * Within the definitions of the Bankruptcy Act the indorser has been held to be a creditor of the bankrupt, while his liability as endorser is contingent, so as to charge him with preferential payments made to the holder of the note. *Swarts v. Siegel*, 8 A. B. R. 689, 117 Fed. 13. But none the less is the owner of the note likewise subjected to the penalties of the act for receipt of such preferential payment. *Swarts v. Fourth Nat'l Bk. of St. Louis*, 9 A. B. R. 673, 117 Fed. 1. In these cases both the bank and the endorsers were held chargeable for receipt of preferential payment by reason of the amount paid to the bank which payment must be refunded before either party could prove an independent claim against the bankrupt with which the other party was in no wise connected. This would not result, as counsel supposed, that in such case the insolvent estate would recover twice what it lost. Only the amount by which the assets of the estate had been depleted must be returned."

On the other hand, the payment of the bankrupt's note to an endorsee of the original creditor likewise may constitute a preference upon the original debt, as of the date of the payment: it enures to the benefit of the endorser or original creditor (if the original creditor is still bound), and gives him a preference.²⁹⁸

In *re Meyer*, 8 A. B. R. 598, 115 Fed. 997 (D. C. Tex.): "The debt of Walshe & Co. (the original creditor) was reduced by the payments made by the bankrupt to Brooke, Smith & Co. (the endorsee), and therefore Walshe & Co. enjoyed the fruits of such payments as much as if they had been made direct to them. It would be inequitable and unjust to other creditors to say that they had received nothing on the \$350 note given them by the bankrupt."

But in one case it is held to be a preference as of the date of the receipt by the indorser of the consideration from the endorsee.²⁹⁹

The original transferrer or indorser, or (if still bound) the original creditor, must surrender the preference (if "received with reasonable cause" since the Amendment of 1903) before he can have his claim allowed; for the payment, though made to another, is nevertheless made to extinguish the original claim and the original claimant receives benefit thereby.³⁰⁰ And

298. In *re Lyon*, 10 A. B. R. 25, 121 Fed. 723 (C. C. A. N. Y., affirming 7 A. B. R. 412); *Landry v. Andrews*, 6 A. B. R. 281, 21 R. I. 597; In *re Matthews & Rosenkranz*, 15 A. B. R. 721 (Ref. Mass.); In *re Waterbury Furniture Co.*, 8 A. B. R. 79, 114 Fed. 255 (D. C. Conn.); (1867) *Bartholomew v. Bean*, 18 Wall. 635; (1867) *Ahl v. Thorner*, 3 N. B. R. 118, Fed. Cases, No. 103.

299. In *re Weissner*, 8 A. B. R. 177 (D. C. N. Y.).

300. In *re Matthews & Rosenkranz*, 15 A. B. R. 721 (Ref. Mass.); In *re Waterbury Furn. Co.*, 8 A. B. R. 79, 114 Fed. 255 (D. C. Conn.); obiter, In *re Wyly*, 8 A. B. R. 604 (D. C. Tex.); In *re Meyer*, 8 A. B. R. 598, 115 Fed. 997 (D. C. Tex.).

Contra, see obiter, In *re Bullock*, 8 A. B. R. 646, 116 Fed. 667 (D. C. N. Car.): This question was not necessary to be decided, for there was no proof of insolvency at the time of the payments, anyway.

Compare, apparently contra, In *re Weissner*, 8 A. B. R. 177 (D. C. N. Y.), where the court held, that money received from third party by creditor on discounting bankrupt's note constituted a preference as of the date the discount money was applied on the bankrupt's debt, although the bankrupt did not pay anything out of his estate until the note matured. This does not seem to be good law, however.

Compare, apparently contra, In *re Harpke*, 8 A. B. R. 535 (C. C. A. Wis.), where the court held, that the holder of the bankrupt's undorsed note is not debarred from proving his claim thereon, because within the four months period

the trustee may recover the payment from the endorser, if the payment was made at his request, to relieve him, and with reasonable grounds existing on the indorser's part to believe a preference was intended.³⁰¹

§ 1312. Partner Selling Out to Remaining Partner, Not Preference to Individual Creditors.—Where a partner sells out to his sole copartner, the partnership being insolvent, it has been held, that, in effect, a preference has been made by the partnership to the individual creditors.³⁰² But this clearly is not a case of preference, for the preference, to be such, must be to a creditor of the bankrupt, but such a transfer does not give any advantage to any creditor of the bankrupt partnership. It simply puts the property out of the reach of all partnership creditors until the individual creditors of the remaining partner have been paid. The true rule is that stated in *In re Denning*, 8 A. B. R. 133 (D. C. Mass.).

Similarly, the placing of a custodian in charge of a partnership store by agreement of all parties, to receive the proceeds of sales and to apply the same upon an execution on an individual judgment against one of the partners, the judgment and all the other proceedings occurring within the four months preceding the bankruptcy of both partners and of the partnership, has been held to constitute a preference.³⁰³

But here again it was not a preference because the transfer was not to a creditor of the bankrupt. It was simply a diversion of partnership funds to one receiving the funds with knowledge.

§ 1313. When Stock Broker's Customer Becomes "Creditor."—The various relations into which stock brokers and their customers get themselves by their different transactions has given rise to considerable discussion. As to a broker buying and selling stock on margin for customers, it has been held, that his relation to customers is that of debtor and creditor and not that of fiduciary and beneficiaries, and that a payment upon a running account between them may be a preference.³⁰⁴

On the other hand, it has been held, that where a stock broker pledges his customer's stocks in general loans, the customer for whom stocks are carried

he received from the endorser payment of another note, having reason to believe that the money therefor had come from the bankrupt, though in ignorance of his insolvency at the time of such payment. This would be good law now, since the amendment of 1903 exonerates from the necessity of surrender those receiving preferences without reasonable grounds, etc.; but, quære, whether it was good law when enunciated. The classification of unindorsed and indorsed notes into separate classes also is not correct.

³⁰¹ *Landry v. Andrews*, 6 A. B. R. 281, 21 R. I. 597.

³⁰² *In re Head & Smith*, 7 A. B. R. 556, 114 Fed. 489 (D. C. Ark.).

³⁰³ *In re Metzger Toy & Novelty Co.*, 8 A. B. R. 307, 114 Fed. 957 (D. C. Ark.). In this case there was no need of proof of reasonable grounds for believing a preference was intended to be given, because it arose upon the refusal of the court to allow a claim until preferences had been surrendered and arose before the amendment of 1903 made the existence of such reasonable grounds a necessary element in barring a claim on account of preference.

³⁰⁴ *In re Gaylord*, 7 A. B. R. 577, 111 Fed. 117 (D. C. Mo.).

by the broker is not a creditor and does not receive a voidable preference, although he knows the broker to be insolvent, when he closes the transaction, pays the balance owing the broker and receive stocks worth more in the market than the sum paid to take them up. The customer simply redeems his stock from the broker's lien by "paying up."³⁰⁵

§ 1314. Third Element of a Preference—Creditor's Claim Must Have Been Pre-Existing Debt.—The creditor's claim must have a debt—a pre-existing debt: and the transfer will not amount to a preference if made contemporaneously with (or before) the rising of the claim. Preference implies preceding credit.

Section 60 as before noted must be read in conjunction with § 67 (d), among other sections in *pari materia*. Section 67 (d) is a converse of § 60 so far as transfers by way of lien are concerned, and protects all bona fide liens, duly recorded, where recording is requisite, that are based upon a "present consideration." "Present consideration" in this connection must be given a broader construction than it usually possesses. As the term is commonly used, it is interchangeable with "valuable consideration." Thus, for instance, the extension of time for the payment of a pre-existing debt is commonly held to be a present or "valuable" consideration for a transfer based thereon. And well enough so when the debtor is solvent, for when he is solvent it makes no difference whether his liabilities are reduced or his assets increased—the net result is the same, for the payment of the debt is equivalent to an increase of his assets by just so much. But when a debtor becomes insolvent it is manifestly quite different—it makes a great difference then whether the transaction results in an increase of the common fund or merely in a reduction of the liabilities.

So it is that by the term "present consideration" as used in this connection in bankruptcy is meant not a reduction of liabilities, but an increase or exchange of assets; and thus a lien given merely to secure a pre-existing debt is not—even though not made nor accepted in contemplation of bankruptcy—a valid lien, but if given for money or property then and at that present time passing into the estate, it is valid, unless, of course, it is affected by bad faith.³⁰⁶

Tiffany v. Institution, 18 Wall. 375: "The preference at which this law is directed can only arise in the case of an antecedent debt."

Davis v. Turner, 9 A. B. R. 716, 120 Fed. 605 (C. C. A. N. Car.): "This

305. *Richardson v. Shaw*, 16 A. B. R. 842, 147 Fed. 59 (D. C. N. Y., affirmed in 16 A. B. R. 876); *Richardson v. Shaw*, 16 A. B. R. 876 (D. C. N. Y., affirming 16 A. B. R. 842); compare, analogously, *In re Bolling*, 17 A. B. R. 399, 147 Fed. 786 (D. C. Va.); also compare, analogously, *In re Berry & Co.*, 17 A. B. R. 468 (C. C. A. N. Y.).

306. *Lesser v. Bradford Realty Co.*, 15 A. B. R. 123, 47 N. Y. Misc. 463 (N. Y. Sup. Ct.); *In re Wright Lumber Co.*, 8 A. B. R. 345, 114 Fed. 1011 (D. C. Ark.); *In re Clifford*, 14 A. B. R. 283, 136 Fed. 475 (D. C. Iowa); *In re Little River Lumber Co.*, 1 A. B. R. 483, 92 Fed. 585 (D. C. Ark.); *Bank v. Bruce*, 6 A. B. R. 313, 109 Fed. 69 (C. C. A. S. C.).

Impliedly, *In re First Nat'l Bk. v. Penna. Trust Co.*, 10 A. B. R. 782, 124 Fed. 968 (C. C. A. Penn.): In this case, before the four months period a bank took

would seem to settle the point in question. The previous Bankrupt Act contained, substantially, a provision similar to that in the present law relative to the transfer of property in order to prefer a creditor, but did not make any exception for transactions based upon present consideration; and yet under that act it was held that, where the debtor in good faith makes a transfer for value given at the time, or in pursuance of an agreement made when the consideration passed, such conveyance will not be an act of bankruptcy."

Farmers' Bk. v. Carr, 11 A. B. R. 733, 127 Fed. 690 (C. C. A. S. C.): "The essential principle of the bankrupt law is that all of the bankrupt's property be divided equally, without preference, to the payment of his debts. It abhors preferences. But if bona fide an advance in præsenti be made to one who afterwards within four months becomes a bankrupt, that will be sustained, and a lien therefor held valid."

Stedman v. Bank of Monroe, 9 A. B. R. 4, 117 Fed. 237 (C. C. A. Iowa): "Aside from other provisions of the Bankrupt Act, this recorded chattel mortgage would have been valid security for the prior as well as for the then present loan, according to its terms and purport. It was not illegal, and its continued security of the prior loan merely failed because the bankruptcy of the mortgagor intervened within four months of the giving of the mortgage, and the security, under the terms of the act, became as to the prior loan a preference. But no such result followed in respect to the \$3,000 actually loaned when the mortgage was given."

In re Davidson, 5 A. B. R. 528, 109 Fed. 882 (D. C. Iowa): "So the question is, can a bank, knowing a merchant is hard pressed, loan the merchant money with which to pay his debts, the banker at the time, and as part of the same transaction, taking mortgage security, and but for which the money would not

a lot of billets as security for two notes. One note was paid within the four months period and thereafter a new loan was made on the strength of the same security. Meanwhile the sign that the steel billets had been pledged was taken down by mistake. On the discovery of the mistake the sign was replaced: held, not to constitute a preference.

In re Durham, 8 A. B. R. 115, 114 Fed. 750 (D. C. Md.); impliedly, *In re Rudnick*, 4 A. B. R. 531, 102 Fed. 750 (D. C. Wis.). See, however, *In re Mandel*, 19 A. B. R. 774, 127 Fed. 863 (Ref. N. Y.); *Morgan v. Nat'l Bk.*, 16 A. B. R. 645, 145 Fed. 466 (C. C. A. W. Va.); *In re Soudans Mfg. Co.*, 8 A. B. R. 45, 113 Fed. 804 (C. C. A. Ind.); *In re Cobb*, 3 A. B. R. 129, 96 Fed. 821 (D. C. N. Car.); *obiter*, *In re Pease*, 12 A. B. R. 68, 129 Fed. 446 (D. C. Mich.); *In re U. S. Food Co.*, 15 A. B. R. 329 (Ref. Mich.); *Crim v. Woodford*, 14 A. B. R. 302, 136 Fed. 34 (C. C. A. W. Va.); *In re Noel*, 14 A. B. R. 715, 137 Fed. 694 (D. C. Md.); *Young v. Upson*, 8 A. B. R. 377, 115 Fed. 192 (D. C. N. Y.); *Parker v. Black*, 16 A. B. R. 205, 143 Fed. 560 (D. C. N. Y.); *Iron & Supply Co. v. Roll Mill Co.*, 11 A. B. R. 200, 125 Fed. 974 (D. C. Ala.).

Instance, *In re Graff*, 8 A. B. R. 745, 117 Fed. 343 (D. C. N. Y.): Payment on day of assignment of balance due to stock broker's bookkeeper for money left on deposit to buy shares, is a preference that must be surrendered before his claim for stock converted can be allowed.

Instance, *Martin v. Hulen*, 17 A. B. R. 510 (C. C. A. Mo.): Practically contemporaneous transaction. At time of purchasing giving chattel mortgage on goods purchased which covered future additions and then immediately consolidating old stock with goods purchased—held, no preference.

Instance, compare, inferentially, *In re Graff*, 8 A. B. R. 744 (D. C. N. Y.): Stockbroker's customer leaving on deposit money for purchase of stock, stock purchased is not a preference.

Instance, *Sabin v. Camp*, 3 A. B. R. 578, 98 Fed. 974 (D. C. Ore.): Consummation of purchase within four months period.

Instance, *In re Gesas*, 16 A. B. R. 872 (C. C. A. Idaho): Banker's lien held not to cover stocks of merchandise, live stock, etc. but only securities, etc.

See post, § 1506.

have been loaned? * * * The bank did not receive a preference. Without the mortgage, and in the absence of the supposed right to receive the mortgage, the bank would not have parted with its money.

"It is a very different case where one is already a creditor and later insists upon and receives security. Then he may be held to have participated in the preference with all responsibilities. * * *

"The statute certainly cannot be invoked to put an end to legitimate business.

"And if the statute does mean, as is contended by the objecting creditors, then it is readily seen that no business can be transacted with a merchant from the moment he becomes embarrassed."

Furth v. Stahl, 10 A. B. R. 442, 205 Pa. St. 439: "A pledge or payment for a consideration given in the present or to be given in the future, whether in money or goods or services is not a preference. The object of prohibiting preferences is to prevent favoritism whether for secret benefit to himself or other reason among a debtor's creditors, who ought in fairness to stand on the same footing. A transaction by which a debtor parts with something now, in return for something he acquires or is to acquire in the future, is not within the mischief the act was aimed against."

In re Busby, 10 A. B. R. 650, 124 Fed. 469 (D. C. Penn.): "At the time a debt is created, the creditor has the right to dictate the terms on which he will part with his money or property and may, therefore, demand that he shall first be secured to such an extent as satisfies him. With this the Bankruptcy Law does not undertake to interfere, the creditor being allowed to retain without question whatever advantage he has acquired thereby. Bankrupt Act, § 57 e-h. But when a debt is once contracted, payment on account or the transfer of property for the purpose of better securing it, constitutes a preference if the debtor is insolvent at the time, and the result will be to enable the creditor to obtain a greater percentage of his claim than others of the same class. Section 60a. This, in case of the subsequent bankruptcy of the debtor, the law does not allow to go unchallenged. The creditor so preferred must surrender the preference if he desires to participate in the rest of the bankrupt's estate. Section 57g."

In re Belding, 8 A. B. R. 719 (D. C. Mass.): In this case a bank appropriated, under a "banker's lien," surplus collateral held for one loan upon another loan, the court saying, "In so far as this lien was given to secure a pre-existing debt, and was without present consideration it would be invalid as a preference."

In re Great Western Mfg. Co., 18 A. B. R. 261, 152 Fed. 123 (C. C. A. Neb.): The agreement of conditional sale whereby the vendor retained the title to the machinery and material until its purchase price was paid did not create a preference voidable under the bankruptcy law because it was given for a present consideration, for the machinery and material which were and continued to be the property of the vendor, and because it was made more than four months before the petition in bankruptcy was filed."

In re Union Feather & Wool Mfg. Co., 7 A. B. R. 472 (C. C. A. Ills.): "Nor do we think the payments to Goldman were preferences, within the meaning of the Bankruptcy Law. The company in the autumn of 1900, not being insolvent, was in need of ready money to pay its workmen their weekly wages. Goldman came to the assistance of the company, advancing to Peterson the necessary money to meet the pay roll on Saturday night, taking checks for the amounts advanced, which he presented when the company was in funds, and which were then paid to him by the bank. This course of business continued at intervals for some little time. It was rendered necessary by the circum-

stances, to keep the company a going concern. They were present advances of money upon the checks of the company."

In *re Wolf*, 3 A. B. R. 555, 98 Fed. 84 (D. C. Iowa): "As the security was given for a debt then created, it was a present security, and not a preference which was created by the mortgage."

In *re Porterfield*, 15 A. B. R. 18 (D. C. Va.): "Both the State and Bankrupt Act recognize the right to make a transfer giving preference for a new and not an existing consideration or debt, if made in good faith."

§ 1315. **Cash Transactions, Not Preferences.**—Cash transactions are not within the prohibition.

But if the transactions are really on credit, the mere calling them by usage of trade "cash" transactions will not take them out of the statute.

In *re John Morrow & Co.*, 13 A. B. R. 392, 134 Fed. 686 (D. C. Ohio): "A sale of goods to be paid for in 10 or 30 days is not, in fact, a cash transaction, and cannot, by agreement of the parties, or a usage of merchants, be regarded as such within the meaning of the Bankrupt Law."

§ 1316. **Bona Fide Sales, Whether for Cash or on Credit, Not Preferences.**—For the same reason, bona fide sales made by the bankrupt up to the very date of the adjudication are valid. To be sure the property sold is taken out of the trust fund, but the price, or the promise to pay the price, has taken its place; and the assets—the trust fund—are not depleted.³⁰⁷

§ 1317. **Payment of Current Rent, Not Preference.**—Payment of current rent as it accrues is not a preference; it is upon a contemporaneously arising consideration, rent from its peculiar nature arising out of the property itself, and, constructively at least, being merely a part of the profits from the land, though commuted in money.³⁰⁸

Compare, inferentially, In *re Arnstein*, 2 N. B. N. & R. 106 (Ref. N. Y., affirmed by D. C.): "A contract of lease is peculiar in its nature and differs in many respects from other contracts. Rent as such is an incident to and grows

307. Partner Selling Out to Co-Partner When Firm Insolvent.—Where a partnership is insolvent and one of the partners sells out to the other, so that the latter may claim exemptions that could not be claimed as long as the property remained partnership property, the transaction has been held to constitute a transfer to hinder, delay and defraud creditors and to be voidable as against the partnership creditors. See In *re Rosenbaum*, 1 N. B. N. 541. Also, see In *re Bergman*, 2 N. B. N. & R. 806; *contra*, see In *re Rudnick*, 102 Fed. 750, 4 A. B. R. 531 (reversing In *re Rudnick*, 2 N. B. N. & R. 769).

Compare, as to right to change nonexempt property into exempt property, *Huenergardt v. Brittain Dry Goods Co.*, 8 A. B. R. 341, 116 Fed. 31 (C. C. A. Kas.); compare, note to In *re Rennie*, 2 A. B. R. 182 (D. C. I. T.).

As to what constitutes bona fides, see In *re Moody*, 14 A. B. R. 276, 134 Fed. 628 (D. C. Iowa).

Bona fide sale of claim against insolvent debtor to one who afterwards buys debtor's business and applies claim on the price, *Hackney v. Hargreaves Bros. Co.*, 13 A. B. R. 164, 68 Neb. 624 (reversing 10 A. B. R. 213).

Partner selling out to third party and taking collateral for the purchase price, In *re Little*, 6 A. B. R. 681, 110 Fed. 621 (D. C. Iowa).

Partner selling out to copartner and then going into bankruptcy, using purchase money to pay creditors, In *re Kindt*, 4 A. B. R. 148 (D. C. Iowa).

308. Compare, obiter, In *re Lange*, 3 A. B. R. 231, 97 Fed. 197 (D. C. N. Y.).

out of the use and occupancy and is the consideration therefor. Unaccrued rent cannot be said therefore to be a fixed liability then absolutely owing, payable in the future, or indeed a debt of any kind as that word seems to be used in the Act. It is only an unmatured obligation to pay in the future a consideration for future enjoyment and occupancy. This cannot be said to be, properly speaking, a present debt, demand or claim at all, as these words are apparently used in the foregoing provisions, due regard being had to the context, and cannot come within either the clause as to fixed liability then owing, or a debt founded on contract."

But where used as a device for effecting a preference, the payment of current rent may constitute a preference.

In *re Lange*, 3 A. B. R. 231, 97 Fed. 197 (D. C. N. Y.): "Payment of rent by an insolvent is not necessarily a preference. But when it is done as a means and for the purpose of carrying on a business in fraud of creditors it should be so regarded."

And payment of past due rent may constitute a preference unless such rent were a lien on the leasehold, in which event the doctrine of releasing securities of equal value would apply.³⁰⁹

§ 1318. Payment of Interest in Advance Not Preference.—Payment of interest in advance is not a preference.³¹⁰

§ 1319. Present Transfers to Secure Future Advances, Not Preferences.—Likewise, present liens given or transfers made by the bankrupt to secure future advances are not preferences—but are valid to the extent, at least, of the advances actually made.³¹¹

§ 1320. Mere Exchanges of Property or Security, Not Preferences.—A mere exchange of one kind of property or security for another of equal value does not constitute a preference.³¹²

309. See post, § 1325. Also, see *In re Pearson*, 2 A. B. R. 482, 95 Fed. 425 (D. C. N. Y.). In *re Barrett*, 6 A. B. R. 199 (Ref. N. Y.): This case, *In re Barrett*, seems to be based on erroneous reasoning although the conclusion was right in its result. Landlords do not constitute a different "class" within the meaning of § 60 (a). See post, § 1387. Nor is it true that the closing of transactions obviates a preference. See post, § 1421.

310. *In re Keller*, 6 A. B. R. 621, 110 Fed. 348 (D. C. Iowa).

311. *Furth v. Stahl*, 10 A. B. R. 442, 205 Pa. 439; *In re U. S. Food Co.*, 15 A. B. R. 329 (Ref. Mich.).

Compare, as to such mortgage not being void as a transfer hindering, delaying and defrauding creditors, *In re Durham*, 8 A. B. R. 115, 114 Fed. 750 (D. C. Md.). See ante, § 1223.

312. See ante, "First Element of Preference," § 1295. *Sawyer v. Turpin*, 91 U. S. 114, quoted ante, under "First Element of Preference," § 1085; *In re Little River Lumber Co.*, 1 A. B. R. 482, 92 Fed. 585 (D. C. Ark.), and notes. This case was affirmed in 4 A. B. R. 313. *Bank v. Rome Iron Co.*, 4 A. B. R. 441, 102 Fed. 755 (U. S. C. C. Ga.); *In re Cutting*, 16 A. B. R. 753, 145 Fed. 388 (D. C. N. Y.); *In re Shepherd*, 6 A. B. R. 725 (D. C. Ills.).

Instance, exchange, as per contract, at the rate of 8 old patterns for 7 new ones, not a preference, *In re Nicholas*, 10 A. B. R. 291, 122 Fed. 299 (D. C. N. Y.).

Instance, renewal of insurance policies held as pledges, *In re Little River*

In re Manning, 10 A. B. R. 503, 123 Fed. 180 (D. C. S. C.): "There is nothing in the Bankrupt Law which forbids an exchange of securities, and if a person, even while insolvent, makes such exchange as will not diminish the value of his estate, it is unimpeachable; but the court is bound, when such a transaction is reviewed, to satisfy itself that the securities exchanged are of undoubtedly equal value."

Obiter, Iron & Supply Co. v. Rolling Mill Co., 11 A. B. R. 202, 125 Fed. 974 (D. C. Ala.): "An exchange of securities within four months of the proceedings in bankruptcy is not a preference, within the meaning of the Bankrupt Act, if the security given up is a valid one when the exchange is made and if it be of equal value with the security substituted for it, or of not greater value."

In re Noel, 14 A. B. R. 715, 137 Fed. 694 (D. C. Md.): "As to the question of preference under the Bankrupt Act, it is clear that a present loan on security is not a preference. * * * This loan was originally made on the security of the mortgage, and there never was a time in all the transactions when Noel had the money without the bank having in hand the mortgage as security. The loan, from its inception, was always secured by the execution of the mortgage, and was always intended to be. If a loan is made upon security, it is not forbidden in good faith to substitute a new security, for the old one."

Deland v. Miller, 11 A. B. R. 744, 119 Iowa 368: "Moreover, it is shown that the mortgage in question was a renewal of another instrument of like character which had been executed by Peterson to the defendants on November 8, 1889. The exchange of these securities did not constitute a preference under the bankrupt law."

§ 1321. But if New Securities Exceed Value of Old, Preference Arises.—If new securities of greater value are given or additional securities are given, the rule that an exchange of securities is not a preference does not apply;³¹³ or if the prior securities were of doubtful value, to the extent of the increase of value the transfer may be preferential.³¹⁴

And if the prior mortgage, in exchange for which the one in question was given, was not recorded and is therefore void the transfer has been held to be preferential.³¹⁵

Lumber Co., 1 A. B. R. 482, 92 Fed. 585 (D. C. Ark., affirmed in 4 A. B. R. 313).

Instance, renewal of notes and of pledges of collateral, Bank v. Rome Iron Co., 4 A. B. R. 441, 102 Fed. 755 (U. S. C. C. Ga.).

Instance held not to be such exchange: Iron & Supply Co. v. Rolling Mill Co., 11 A. B. R. 200, 125 Fed. 974 (D. C. Ala.): In this case material was pledged, before the four months period, with a bank for money loaned. In pursuance of an agreement made at the time, portions of the material were permitted to be sold from time to time as needed in the manufacture. Not simultaneously, but later, and within the four months period a lot of accounts were pledged to take the place of the material. The court held that this was not a mere exchange of securities, but was a preferential transfer within the four months period, for the effect of the use of the material was to withdraw it from the pledge weeks before the new security was given.

³¹³. In re Manning, 10 A. B. R. 500, 123 Fed. 180 (D. C. S. C.); In re Busby, 10 A. B. R. 650, 124 Fed. 469 (D. C. Penn.); (1867) Waring v. Buchman, 19 N. B. Reg. 502.

³¹⁴. In re Manning, 10 A. B. R. 500, 123 Fed. 180 (D. C. S. C.).

³¹⁵. Bank v. Bruce, 6 A. B. R. 311, 109 Fed. 69 (C. C. A. S. C.).

Contra, Deland v. Miller, 11 A. B. R. 744, 119 Iowa 368: "That the prior mortgage was not recorded is immaterial, save on the question as to whether the present one was executed for a present or past consideration."

§ 1322. **If Securities Remain Same but Indebtedness Secured Increased by Antecedent Debts, Preference as to Antecedent Indebtedness.**—And if the securities remain the same, but the indebtedness secured thereby is increased by the addition of antecedent indebtedness, to the extent that such antecedent indebtedness is secured thereby, a preference may exist.

§ 1323. **If Securities and Debt Both Increased but Increase of Debt Be for Present Consideration No Preference Arises.**—If additional securities are given and the debt also increased, there will be no preference if the increase of the debt was based on a corresponding presently passing consideration.³¹⁶

§ 1324. **Withdrawal of Old Security and Substitution of New Must Be Contemporaneous.**—The two transactions—the withdrawal of the old security and the substitution of the new—must be contemporaneous.³¹⁷

§ 1325. **Payment of Secured Debt, Thereby Releasing Securities.**—Payment of a secured debt, at any rate, where the securities released thereby go to swell the general estate of the debtor and the benefit from the payment does not accrue solely to other lienholders upon the property, would not be a preference, although this proposition with this precise qualification does not seem to have been decided.³¹⁸ Of course, if the benefit accrues solely to the other lienholders, it might be held to be pro tanto a preference.

Suggestively and inferentially, *In re Elm Brew. Co.*, 12 A. B. R. 625, 132 Fed. 299 (D. C. N. Y.): "The company's property, hence the bank's property, in the certificate, diminished with payment by Vienot. If Vienot paid her whole debt, the company's and bank's interest in the certificate ceased at once and Vienot could compel its surrender to her. Each dollar that the company collected from Vienot correspondingly shrunk the bank's property interest in the certificate."

316. *In re Cutting*, 16 A. B. R. 754, 145 Fed. 388 (D. C. N. Y.).

317. Inferentially, *In re Stedman v. Bank of Monroe*, 9 A. B. R. 4, 117 Fed. 237 (C. C. A. Iowa); inferentially, *In re Manning*, 10 A. B. R. 500, 123 Fed. 180 (D. C. S. C.); compare, *Iron & Supply Co. v. Rolling Mill Co.*, 11 A. B. R. 200, 125 Fed. 974 (D. C. Ala.). To same effect, inferentially, *Bank v. Rome Iron Co.*, 4 A. B. R. 441, 102 Fed. 755 (U. S. C. C. Ga.).

Instance, increasing the security with additional security during the four months will constitute a preference as to the additional security, *In re Busby*, 10 A. B. R. 650, 124 Fed. 469 (D. C. Penn.).

Instance, replacing depreciated collateral with collateral of no more value than the depreciated collateral originally had is nevertheless a preference to the extent of the depreciation, impliedly, *Iron & Supply Co. v. Rolling Mill Co.*, 11 A. B. R. 200, 125 Fed. 974 (D. C. Ala.).

318. Instance, *In re Elm Brew. Co.*, 12 A. B. R. 623, 132 Fed. 299 (D. C. N. Y.): Collecting collateral after bankruptcy of pledgor.

Instance, *In re Riddles' Sons*, 10 A. B. R. 204, 123 Fed. 559 (D. C. Penn.): Payment of interest on mother's dower estate in lands descended to bankrupt from father.

Instance, *In re Pearson*, 2 A. B. R. 482, 95 Fed. 425 (D. C. N. Y.): Payment of back rent which was a lien on a leasehold, thus increasing value of leasehold.

§ 1326. **Liens or Other Transfers, Partly on Present Consideration, Partly on Past, Not Wholly Void but Valid Pro Tanto.**—Liens given or other transfers made in part for present contributions to the debtor's assets or in exchange for securities of at least equal value, and in part for past contributions or for securities of less value, are not wholly void, but are good pro tanto, that is to say, are good to the extent of the present contributions or the value of the old securities released.³¹⁹

Bank v. Bruce, 6 A. B. R. 312, 109 Fed. 71 (C. C. A. S. C.): "To the extent, therefore, of the consideration paid at the time of the execution of the note and mortgage, there can be no doubt of the correctness of the decision of the lower court, and it would seem equally clear therefrom that the decision was correct as to the portion of the claim rejected, unless the mortgage of the 7th of October, also securing that portion, constituted a valid lien which entitled appellant, by reason of one security being a mere exchange for the other, to be paid that part of the claim."

Stedman v. Bank of Monroe, 9 A. B. R. 4, 117 Fed. 237 (C. C. A. Iowa): "Aside from other provisions [than 67 (d)] of the Bankrupt Act, this recorded chattel mortgage would have been a valid security for the prior as well as of the then present loan, according to its terms and purport. It was not illegal, and its continued security of the prior loan merely failed because the bankruptcy of the mortgagor intervened within four months of the giving of the mortgage, and the security, under the terms of the act, became as to the prior loan a preference. But no such result followed in respect to the \$3,000 actually loaned when the mortgage was given."

And the same rule applies where part of the consideration is otherwise improper, as for instance, for usury: as to the usury, the lien is void.³²⁰

§ 1327. **Protection of Liens Given on Presently Passing Consideration, etc.**—Liens given on a presently passing consideration, in good faith and not in contemplation of or in fraud upon the bankruptcy act and duly recorded where recording is necessary are protected.

For a discussion of this subject, see post, division 4 of this chapter.

§ 1328. **Fourth Element of a Preference.**—The debtor must have made a "transfer" of property or have "procured" or "suffered" the creditor to obtain a judgment operating

³¹⁹. In re Mandel, 10 A. B. R. 774, 127 Fed. 863 (Ref. N. Y.); In re Porterfield, 15 A. B. R. 19, 138 Fed. 192 (D. C. W. Va.); In re Cobb, 3 A. B. R. 129, 96 Fed. 821 (D. C. N. Car.); In re Wolf, 3 A. B. R. 555, 98 Fed. 84 (D. C. Iowa); In re Dismal Swamp Contracting Co., 14 A. B. R. 175, 135 Fed. 415 (D. C. Va.); obiter, impliedly, In re Clifford, 14 A. B. R. 281, 136 Fed. 475 (D. C. Iowa); obiter, *Crim v. Woodford*, 14 A. B. R. 311, 136 Fed. 34 (C. C. A. W. Va.); In re Hull, 8 A. B. R. 302, 115 Fed. 858 (D. C. Vt.); inferentially, *Farmers' Bk. v. Carr*, 11 A. B. R. 733, 127 Fed. 690 (C. C. A. S. C.); inferentially, In re Ronk, 7 A. B. R. 31, 111 Fed. 154 (D. C. Ind.).

Compare, In re Wright Lumber Co., 8 A. B. R. 345, 114 Fed. 1011 (D. C. Ark.), where a mortgage given in part for a pre-existing debt and in part for a present loan was held voidable in toto. See post, § 1506.

³²⁰. In re Sawyer, 12 A. B. R. 269, 130 Fed. 384 (D. C. Mass.).

to appropriate property of the debtor. Preference implies voluntary action on the debtor's part, and a change of title thereby, of the kind known as "transfer" or a seizure by legal proceedings with the debtor's assent or acquiescence.

In *re Hines*, 16 A. B. R. 500, 144 Fed. 543 (D. C. Pa.): "It is essential to a preference * * * that there should be a transfer by the bankrupt of certain of his property to the creditor preferred."

§ 1329. **Voluntary Action of Debtor Requisite to Preference by Way of "Transfer."**—Although perhaps intent to prefer may not be requisite to constitute a transfer a preference, yet there must be at least some voluntary action on the debtor's part or some assent or acquiescence, to constitute the transaction a "transfer;" seizure or appropriation of property by the creditor, or his receipt of it otherwise than by the voluntary act or assent of the debtor, will deprive the transaction of its character as a preference.

Thus, where the property was obtained from the bankrupt by a creditor through fraud or force a preference has not been perpetrated and a suit in replevin or for conversion is the proper remedy.³²¹

Thus, a bank's appropriation of a deposit to the payment of a loan made to the depositor lacks the element of the debtor's assent and is not a preference; it is not a "transfer."³²²

Likewise, authority given to a factory by a storekeeper to deduct from each laborer's wages each week the amount then owing to the storekeeper and to remit the same to the storekeeper, gives no authority to the factory to appropriate such deductions on a prior debt owed the factory by the storekeeper, and therefore such appropriation, lacking the element of the debtor's voluntary act, is not a "transfer" and hence not a preference.

Western Tie & Timber Co. v. Brown, 13 A. B. R. 451, 196 U. S. 502: "To give effect, therefore, to the finding that there was no intention on the part of Harrison to prefer, we must consider that the authority given by him to the tie company to collect from the laborers did not give that company the right,

³²¹ *Stern v. Mayer*, 16 A. B. R. 763 (N. Y. Sup. Ct. App. Div.).

³²² Impliedly, *N. Y. Co. Bk. v. Massey*, 11 A. B. R. 42, 192 U. S. 138 (reversing *In re Stege*, 8 A. B. R. 515, 116 Fed. 342, C. C. A.); instance, *West v. Bk. of Lahoma*, 16 A. B. R. 738, 16 Okla. 508.

Obiter, Bank v. Sundheim, 16 A. B. R. 866 (C. C. A. Penn.): "This is not the case of a deposit remaining to the credit of a bankrupt's estate at the time of the filing of the petition in bankruptcy, and which, under certain circumstances, and in the absence of collusion, might be the subject of set-off, but is rather that of a transfer to a bank of a portion of the bankrupt's estate by the bankrupt's own act prior to the bankruptcy, and which was accepted by the bank in partial payment of an unmatured claim, and concerning which transaction a jury has said that the bank had reasonable cause to believe at the time the payment was made that it was accepting a preference." Compare, *In re Davis*, 9 A. B. R. 670, 119 Fed. 950 (D. C. Tex.).

But see misapplication of the rule where the application of the deposits by overdrafts was by agreement. *Obiter, Tomlinson v. Bk. of Lexington*, 16 A. B. R. 632 (C. C. A. N. Y.).

or endow it with the option, when it had collected, to retain the money for its exclusive benefit, and to the detriment of the other creditors of Harrison.

"The result of the facts found, then, is this: Harrison sold his goods to the laborers, and agreed with the tie company that that company, when it paid the laborers, should deduct the amount due by the laborers from the wages which the tie company owed them, and, after making the deduction, should remit to Harrison the amount thus deducted, irrespective of any indebtedness otherwise due by Harrison to the tie company. Did this give rise to a voidable preference within the intendment of § 57g and § 60b of the Bankrupt Act.

"In view of the necessary result of the findings which we have previously pointed out, it is, we think, beyond doubt that the agreement was not a voidable preference within the meaning of the statute, since, considering the agreement alone, it brought about no preference whatever."

But, where a bank, by virtue of a "banker's lien," applies the surplus of collateral held for one debt upon another debt held by it, such appropriation does not lack the debtor's voluntary participation and may constitute a preference.³²³

But the transfer may be effected by an agent of the bankrupt acting within the scope of his authority although without the bankrupt's express instruction in the particular instance.³²⁴

§ 1330. **Definition of "Transfer."**—Transfer under the peculiar definition of the Bankruptcy Act includes the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security.³²⁵

§ 1331. **Payments of Money "Transfers."**—The word "transfer" has a broader meaning in this bankruptcy law than has been given it in many jurisdictions.³²⁶

^{323.} Instance, *In re Belding*, 8 A. B. R. 718 (D. C. Mass.).

^{324.} *Rector v. City Deposit Bk. Co.*, 15 A. B. R. 336, 200 U. S. 405: A clearing house association was held in this case to be the agent of each one of the constituent banks, such that on recalling the checks presented by the bankrupt bank on the day of its failure it held the fund for the benefit of all and could not appropriate it to the use of any particular creditor bank. Compare, *In re Davis*, 9 A. B. R. 670 (D. C. Tex.).

^{325.} Bankr. Act, § 1 (25).

^{326.} Compare, *Nat'l Bk. v. Gettinger*, 68 Oh. St. 389: "There is another reason why these creditors can not be compelled to repay the money so received by them. Said § 6343 (Ref. Stat.) makes no provision as to payments made in contemplation of insolvency or to create a preference, or with intent to hinder, delay or defraud creditors. * * * The word 'payment' is as familiar and as well understood, as the words, 'sale, conveyance, transfer mortgage or assignment' and if the general assembly had intended to legislate against payments, it would have used that word. The legislature having omitted the word 'payment' this court cannot read it into the statute by construction; and especially is this true when we never had any legislation in this State against receiving payment of honest claims, and when such a construction would render the constitutionality of the act doubtful."

"Transfer" under the present Bankruptcy Act includes a payment of money.³²⁷

Carson, *Pirie et al. v. Chic. Title & T. Co.*, 5 A. B. R. 818, 182 U. S. 438: "It will be observed that payments in money are not expressly mentioned. Transfers of property are, and one of the contentions of appellants is that by 'transfers of property,' payments in money are not intended. The contention is easily disposed of. It is answered by the definitions contained in § 1. It is there provided that 'transfer' shall include the sale and every other and different mode of disposing of or parting with property or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security.' It seems necessarily to mean that a transfer of property includes the giving or conveying anything of value—anything which has debt-paying or debt-securing power.

"We are not unaware that a distinction between money and other property is sometimes made, but it would be anomalous in the extreme that in a statute which is concerned with the obligations of debtors and the prevention of preferences to creditors, the readiest and most potent instrumentality to give a preference should have been omitted. Money is certainly property, whether we regard any of its forms or any of its theories. It may be composed of a precious metal, and hence valuable of itself, gaining little or no addition of value from the attributes which give it its ready exchangeability and currency. And its other forms are immediately convertible into the same precious metal, and even without such conversion have, at times, even greater commercial efficacy than it. It would be very strange indeed if such forms of property, with all their sanctions and powers, should be excluded from the statute, and the representatives of private debts which we denominate by the general term 'securities' should be included. We certainly cannot so declare upon one meaning of the word 'transfer.' If the word itself permitted such declaration, which we do not admit, the definition in the statute forbids it. 'Transfer' is defined to be not only the sale of property, but 'every other mode of disposing or parting with property.' All technicality, and narrowness of meaning is precluded. The word is used in its most comprehensive sense, and is intended to include every means and manner by which property can pass from the ownership and possession of another, and by which the result forbidden by the statute may be accomplished—a preference enabling a creditor 'to obtain a greater percentage of his debt than any other creditors of the same class.'"

§ 1332. **"Transfer" Includes, Also, Pledge, Mortgage, Gift, Security, etc.**—The word "transfer" as used in the Bankruptcy Act includes moreover not only a payment of money but also a pledge, a mortgage, a gift or security and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally.³²⁸ Therefore, a preference may be accomplished by the debtor's pledging his property or part of it, or by mortgaging it or giving it as security for a debt.

^{327.} *West v. Bk. of Lahoma*, 16 A. B. R. 733, 16 Okla. 508; *Landry v. Andrews*, 6 A. B. R. 281, 21 R. I. 597; *Knost v. Wilhelmy*, 2 A. B. R. 471 (Ref. Ohio); *Columbus El. Co. v. Worden* (In re Fort Wayne El. Corp.), 3 A. B. R. 634, 99 Fed. 400 (C. C. A. Ind.); In re Sloan, 4 A. B. R. 356, 102 Fed. 116 (D. C. Iowa); *Boyd v. Lemon, Gale Co.*, 8 A. B. R. 83, 114 Fed. 647 (C. C. A. Miss.); compare, analogously, In re Riggs Restaurant Co., 11 A. B. R. 508 (C. C. A. N. Y.); This was a case of act of bankruptcy. *Obiter, Peterson v. Nash*, 7 A. B. R. 181, 112 Fed. 311 (C. C. A. Minn.).

^{328.} Bankr. Act, § 1 (25).

It is unnecessary to multiply illustrations or citations. Any method of disposing of property to a creditor, or of parting with it or with its possession, even if conditionally, can afford the means of perpetrating a preference. However peculiar the species of property or devious or indirect the method of effecting the transfer, it may result in a preference.³²⁹

In *re Belding*, 8 A. B. R. 718 (D. C. Mass.): "An advantage given by the bankrupt to a creditor without present consideration does not cease to be a preference because it is given in the form of a lien, or of a sale of property without full consideration instead of in the form of a direct payment."

§ 1333. **Performance of Labor, Not "Transfer."**—But the performance of labor by the debtor is not a "transfer of property" within the meaning of the bankruptcy act.³³⁰

^{329.} See ante, "First Element of Preference," "Preferences by Indirect Means," § 1300. Also, see various citations, throughout the subject of Voidable Preferences, involving the different species of transfer. *Stern, Falk & Co. v. Trust Co.*, 7 A. B. R. 305, 112 Fed. 501 (C. C. A. Ky.); In *re Beerman*, 7 A. B. R. 431, 112 Fed. 663 (D. C. Ga.); *Hackney v. Hargreaves Bros.*, 13 A. B. R. 164, 68 Neb. 624.

Instances:

1. **By agreement of all parties the placing of a custodian in charge of a partnership's store to receive the proceeds of daily sales and apply them upon a judgment against one of the individual partners, where the judgment and all the other events occurred within the four months preceding the bankruptcy of the partnership and of each of its members: held, a preference.** In *re Metzger Toy & Novelty Co.*, 8 A. B. R. 307, 114 Fed. 957 (D. C. Ark.): Proof of knowledge on creditor's part was not necessary, the case being decided before the amendment of 1903.

2. **Depleting the assets by means of a fraudulent scheme between the assignee for creditors, the partners and some of the creditors involving the procuring of an order of court in the assignment proceedings ordering a sale, then the bidding in of the property at a low price by the brother of one of the partners for the benefit of the certain creditors and of the firm.** *Stern, Falk & Co. v. Trust Co.*, 7 A. B. R. 305, 112 Fed. 501 (C. C. A. Ky.).

3. **Services rendered by debtor to creditor in payment of a debt do not constitute a transfer of property within the meaning of the law.** In *re Abraham Steers Lumber Co.*, 7 A. B. R. 332, 112 Fed. 406 (C. C. A. N. Y.): But was not this a transfer of the chose in action arising from the doing of the work?

4. **Banker's lien upon collateral for other debts than those for which collateral is expressly pledged. Collateral expressly pledged for presently passing consideration during the four months, is sold and the excess applied upon an old debt. To the extent of such application it is a preference.** In *re Belding*, 8 A. B. R. 718 (D. C. Mass.).

5. **Obtaining preference by indirect means: Third person lending money to debtor to pay creditor, taking chattel mortgage on debtor's property therefor and knowing proposed use of the money, and even taking bond of indemnity from creditor: chattel mortgage void as a preference.** In *re Beerman*, 7 A. B. R. 431, 112 Fed. 663 (D. C. Ga.).

Mortgage given for money with which to make a preference is void although for presently passing consideration to the mortgagor, the mortgagee taking a bond of indemnity from the creditor therefor. In *re Beerman*, 7 A. B. R. 431, 112 Fed. 663 (D. C. Ga.).

Obtaining preference by indirect means: *Hackney v. Hargreaves Bros.*, 13 A. B. R. 164, 68 Neb. 624.

6. **Orders drawn by bankrupt on third persons for debts owing operate, when accepted, as transfers sufficient to constitute preferences. Also when they amount to assignments of the fund.** In *re Hines*, 16 A. B. R. 495, 144 Fed. 543 (D. C. Penn.).

^{330.} In *re Abraham Steers Lumber Co.*, 6 A. B. R. 315 (D. C. N. Y., affirmed in 7 A. B. R. 332, 112 Fed. 406). See also, ante, "First Element of Preference," § 1280. Compare, to effect that contract to labor is not "property," transferable, analogously, In *re Home Security Co.*, 17 A. B. R. 181 (D. C. Ala.).

§ 1334. **When "Transfer" Consummated, Where Recording "Necessary."**—In cases of transfers effected by instruments that require filing or recording to impart notice, the consummation of the transfer, so far as creditors are concerned, it would seem from principle, is not accomplished until the instrument is filed or recorded.³³¹

Matthews v. Hardt, 9 A. B. R. 383 (N. Y. Sup. Ct. App. Div.): "The trend of the decisions in the United States Supreme Court under the recent Bankruptcy Act upon the subject of the date of the transfer, is in support of the view that with respect to an instrument of transfer, it is the time when such instrument is recorded, or when possession is taken or notice is otherwise brought home to the creditors of the bankrupt that is controlling."

Contra, Rogers v. Page, 15 A. B. R. 506, 140 Fed. 596 (C. C. A. Penn.): "The preference over other creditors was given when the mortgage was executed and delivered. It follows that if the defendant has shown an appropriation of a part of the purchase price of the bankrupt's coal land in satisfaction of a valid indebtedness secured by an unrecorded lien made, accepted, and held in good faith, more than four months before the filing of the mortgagor's voluntary petition in bankruptcy, he may escape a decree against him to that extent."

But the recent decisions of the United States Supreme Court seem to indicate a contrary view.³³²

And where no transfer is effected at all, as in the case of conditional sales, where simply the entire title is not parted with, but is retained, the recording or filing could not operate as a transfer nor could the failure to file or record effect a transfer of the title to the conditional vendee.³³³

§ 1335. **"Procuring or Suffering" Judgment.**—Where the preference is not by way of a "transfer," it is essential, at least, that the bankrupt must have "procured or suffered" the creditor to obtain a judgment, under which levy or other seizure was made.³³⁴

"Judgment" probably applies to any court proceedings whereby the estate is depleted; thus, to a fraudulent scheme under cloak of court orders

331. But compare, *Bradley, Clark & Co. v. Benson*, 13 A. B. R. 170, 100 N. W. 670 (Minn.).

332. See discussions, ante, § 1244.

333. *Bradley, Clark & Co. v. Benson*, 13 A. B. R. 170, 100 N. W. 670 (Minn.).

334. *Instance, In re Metzger Toy & Novelty Co.*, 8 A. B. R. 307, 114 Fed. 957 (D. C. Ark.): This case does not appear clearly to involve the question of the suffering or procuring of a judgment, but is rather an authority upon the matter of a preference by way of "transfer."

Instance, In re Heinsfurter, 3 A. B. R. 109, 97 Fed. 198 (D. C. Iowa): Retaining possession of property under writ of replevin although application for surrender under claim of fraud disallowed by bankruptcy court.

Instance, In re Collins, 2 A. B. R. 1 (Ref. Iowa): Seeing certain creditors bringing suit and obtaining liens thereby which necessarily result in such creditors obtaining preferences is a "permitting" of preferences.

Instance, In re English, 11 A. B. R. 674, 127 Fed. 940 (C. C. A. N. Y.): Part of judgment valid as simply declaratory of rights given before the four months: rest of judgment void as creating liens and transferring property preferentially within the four months. Partnership, more than four months before bankruptcy, transfers, in full payment, to one creditor a part of its assets: dissolution proceedings are instituted, ending in judgment within the four months period, affirming the validity of the transfer and ordering certain of the general cred-

whereby the estate is depleted, as where an assignee in insolvency was to sell under order of court at a purposely low figure to the brother of one partner, who was to pay certain creditors 50 per cent. of their claims, the balance to the debtor firm, it was held a preference.³³⁵

§ 1336. **Warrants of Attorney to Confess Judgment, Continuing Consents.**—Judgment levies within the four months period on warrants of attorney to confess judgment executed before the four months, constitute continuing assent or acquiescence.³³⁶ But "continuing consent" is not necessary: mere passive nonresistance is sufficient.³³⁷

§ 1337. **Debtor's Voluntary Action Not Implied in Cases of Preferences by Way of Judgments.**—The debtor's positive action is not implied in case the preference be by way of legal proceedings. Mere passive nonresistance is all that is requisite.³³⁸

Contra, *Johnson v. Anderson*, 11 A. B. R. 302, — Neb. —: "In order to constitute a preference, the debtor must do some act to facilitate the proceedings: submissive inactivity is not enough. * * * It is certainly competent for a creditor to institute an attachment suit against a bankrupt, obtain judgment by default, and sell the attached property; and, unless the bankrupt does some act by which he has participated in some way in the act of the creditor, the preference otherwise acquired is a valid preference as against other creditors."

Contra, under law of 1867, *Wilson v. City Bk.*, 17 Wall. 488: "Something more than passive nonresistance of an insolvent debtor, to regulate judicial proceedings in which a judgment and levy on his property are obtained, when the debt is due, and he is without just defense to the action, is necessary, to show a preference of a creditor, or a purpose to defeat or delay the operation of the Bankrupt Act."

Contra, under law of 1867, *Brown v. Jefferson County Nat'l Bk.* (C. C. A. N. Y.), 9 Fed. 258: "The mere existence of a desire on the part of a debtor,

itors to be paid out of the residue: Held, judgment as to validity of transfer unimpeachable (because simply an affirmation of a previous transfer) but as to ordering payment of certain creditors to the exclusion of others, a preference within four months by "suffering" a judgment to be entered.

Inferentially, but obiter, *In re Porterfield*, 15 A. B. R. 11, 138 Fed. 192 (D. C. W. Va.): Statutory suits to set aside fraudulent or preferential transfers operating to give certain creditors or certain classes of creditors on recovery, different rights or priorities in the proceeds than those prescribed by the Bankruptcy Act may create voidable preferences.

Suffering a judgment whose necessary effect is to create a preference, is the suffering of the preference, *In re Collins*, 2 A. B. R. 1 (Ref. Iowa).

An attachment in New York is neither a "judgment" nor a "transfer" and need not be surrendered, *In re Schenkein & Coney*, 7 A. B. R. 162, 113 Fed. 421 (Ref. N. Y.).

335. *In re Stern, Falk & Co.*, 7 A. B. R. 305, 112 Fed. 501 (C. C. A. Ky.).

336. *Wilson Bros. v. Nelson*, 7 A. B. R. 142, 183 U. S. 191; impliedly, *In re Huffman*, 1 A. B. R. 587 (Ref. Penn.); analogously, *In re Moyer*, 1 A. B. R. 577, 97 Fed. 324 (D. C. Penn.). See cases cited under "Third Act of Bankruptcy," § 135.

337. See cases cited ante, under "Third Act of Bankruptcy," § 136.

338. See cases cited ante, under "Third Act of Bankruptcy," § 135; *In re Gallagher*, 6 A. B. R. 255 (Ref. Mass.).

however strong such desire, that a particular creditor may succeed by suit, judgment, execution and levy in obtaining a preference over other creditors, so that such preference may be maintained, even as against proceedings in bankruptcy which may be subsequently commenced, is not sufficient to establish that the debtor procured or suffered his property to be taken on legal process, with intent to prefer such creditor, if the proceedings of the creditor were the usual proceedings in a suit, unaided by any action of the debtor, either by facilitating the proceedings as to time or method, or by obstructing other creditors who otherwise would obtain priority."

§ 1338. Payment of Proceeds of Execution Sale to Creditor Sufficient without Debtor's Voluntary Action.—The payment of the proceeds of an execution or attachment sale to the levying creditor, if otherwise preferential, is none the less a preference because of the lack of the debtor's voluntary act.³³⁹

§ 1339. Fifth Element of a Preference.—Where the preference is by way of a transfer, the transfer must have been made by the transferror to satisfy a debt in whole or in part and the property must have been sought to be applied on a debt. Preference, by way of transfer, implies an intent of the transferror to apply the property on a debt, or obligation.

§ 1340. Intent to Apply on Debt to Be Distinguished from Intent to Prefer.—By this is not meant that the transferee must be proved to have intended the transfer as a preference: intent to pay a debt and intent by paying it, to prefer, are wholly different matters.

Property of the debtor not transferred to apply on a debt does not give rise to a preference, although it may be used as an offset.

Thus, the retaining, to apply on the creditor's own claim against a bankrupt storekeeper, funds deducted by arrangement from the wages of the creditor's employees to pay for supplies furnished the employees by the storekeeper, has been held an offset (although an improper one in this case) and not a preference, since the element of the debtor's application of the payment on the debt was lacking.³⁴⁰

§ 1341. Bankrupt's Deposit in Bank.—Thus, a bankrupt's deposit in bank, so long as it was made as a general deposit subject to check, is not a preference and may be offset: the relation is that of debtor and

339. See, impliedly, cases cited under "Third Act of Bankruptcy," § 135, et seq.; contra, *Johnson v. Anderson*, 11 A. B. R. 302, — Neb. —; contra (under law of 1867), *Wilson v. City Bk.*, 17 Wall. 488; contra (under law of 1867), *Brown v. Jefferson County Bk.*, 9 Fed. 258 (C. C. A. N. Y.).

340. *Western Tie & Timber Co. v. Brown*, 13 A. B. R. 447, 196 U. S. 502 (reversing 12 A. B. R. 111).

creditor, and the mutual debts may be offset, the depositing not having been made to pay a debt.³⁴¹

N. Y. County Nat'l Bk. v. Massey, 11 A. B. R. 42, 192 U. S. 138: "The money deposited becomes a part of the general fund of the bank, to be dealt with by it as other moneys, to be lent to customers, and parted with at the will of the bank, and the right of the depositor is to have this debt repaid in whole or in part by honoring checks drawn against the deposits. It creates an ordinary debt, not a privilege or right of a fiduciary character. * * *

"As we have seen, a deposit of money to one's credit in a bank does not operate to diminish the estate of the depositor, for when he parts with the money he creates at the same time, on the part of the bank, an obligation to pay the amount of the deposit as soon as the depositor may see fit to draw a check against it. It is not a transfer of property as a payment, pledge, mortgage, gift or security. It is true that it creates a debt, which, if the creditor may set it off under § 68, amounts to permitting a creditor of that class to obtain more from the bankrupt's estate than creditors who are not in the same situation, and do not hold any debts of the bankrupt subject to set-off. But this does not, in our opinion, operate to enlarge the scope of the statute defining preferences so as to prevent set-off in cases coming within the terms of § 68a. If this argument were to prevail it would, in cases of insolvency, defeat the right of set-off recognized and enforced in the law, as every creditor of the bankrupt holding a claim against the estate subject to reduction to the full amount of a debt due the bankrupt receives a preference in the fact that to the extent of the set-off he is paid in full."

§ 1342. **Sixth Element of Preference.**—The debtor must have been insolvent at the time of the transfer or other voluntary appropriation of property. Preference implies insolvency of the debtor. Of course there can be no preference among creditors if the debtor is solvent, for then he can pay all his debts in full.³⁴²

In re Veneer & Panel Co., 6 A. B. R. 271 (D. C. Wis., affirmed sub nom. *McDonald v. Daskam*, 8 A. B. R. 543, 116 Fed. 276): "It is true that the transaction on which the creation of a lien depends in each claim falls within the period of four months preceding the filing of the petition in bankruptcy; but it is equally true, under the testimony, that the corporation was solvent, within the definition of the act, up to the occurrence of the fire, on July 23rd. The inhibitions of § 60 apply only to preferences given when the debtor is

^{341.} *In re Ph. Semmer Glass Co.*, 11 A. B. R. 665 (D. C. N. Y.); *In re Elsasser*, 7 A. B. R. 215 (Ref. Penn.); *In re Geo. M. Hill*, 12 A. B. R. 221 (C. C. A. Ills.); *In re Scherzer*, 12 A. B. R. 451, 130 Fed. 631 (D. C. Iowa); *West v. Bk. of Lahoma*, 16 A. B. R. 738, 16 Okla. 508; obiter, *Bk. v. Sundheim*, 16 A. B. R. 866 (C. C. A. Pa.); compare, *In re Davis*, 9 A. B. R. 670 (D. C. Tex.).

But see for singular misapplication of the rule, where the application of deposits to pre-existing overdrafts within the four months by agreement was held not to be a preference; obiter, *Tomlinson v. Bank of Lexington*, 16 A. B. R. 632 (C. C. A. N. Car.); The case is, however, obiter, for "reasonable cause for belief" was lacking. See ante, § 1297.

^{342.} *Bankr. Act*, § 60 (a); *Cullinane v. State Bk.*, 12 A. B. R. 779, 123 Iowa 340; *In re Chappell*, 7 A. B. R. 608, 113 Fed. 545 (D. C. Va.); *In re Alexander*, 4 A. B. R. 376, 102 Fed. 464 (D. C. Ga.); *In re Clifford*, 14 A. B. R. 281, 136 Fed. 475 (D. C. Iowa); also, see cases cited in the following paragraphs, under "Sixth Element of a Preference."

insolvent in fact, and if a lien was perfected before the fire, in the case as presented, it is not affected by that section, although it may remain open to question under § 67, as to 'a present consideration.'"

Troy Wagon Wks. v. Vastbinder, 12 A. B. R. 352, 130 Fed. 232 (D. C. Pa.): "But it is essential to a preference that the debtor should have been insolvent at the time, and unless this appears there is no act of bankruptcy."

§ 1343. Definition of Insolvency under Present Act.—Insolvency, as the term is used in the present Bankruptcy Act, is different from what is usually meant in bankruptcy and insolvency law by the term. Its time-honored, legal meaning as used in insolvency proceedings, is inability of the debtor to meet his obligations as they mature in the usual course of business.

And this was what was meant by the law of 1867.³⁴³

Carson v. Chicago Title & Trust Co., 5 A. B. R. 824, 182 U. S. 438: "It is pointed out that insolvency has a different meaning under the Act of 1898 than it had under the Act of 1867. Under the latter, the debtor was insolvent when he was unable to pay his debts in the ordinary course of business. Under the former, when the aggregate of his property at a fair valuation is insufficient to pay his debts."

However, such a definition would make almost every merchant insolvent in the eyes of the law during seasons of panic and financial stringency such as occurred in the United States, for instance, during the dark days of 1893 and 1894, when the wealthiest and most prosperous business men were unable to pay their notes and bills as they became due. Money itself, the medium of payment, was hoarded. Banks had to resort to the artifice of clearing-house scrip—had to create a new kind of money in fact. It was next to impossible to raise money on the best collateral security, and real estate loans of so-called "gilt-edged" value went begging for takers. Almost every merchant was insolvent if the usual legal definition was the test, for everyone, almost, was unable to meet his obligations as they matured in the due course of business. The likelihood that such financial stringencies and industrial depressions are to be recurring and frequently recurring phenomena in the commercial world, undoubtedly was the reason that the framers of the present Bankruptcy Act, coming to their work only two or three years after the crisis of 1893, rejected as intolerable a definition of insolvency such as this, as a basis for bankruptcy proceedings. Indeed, this sweeping definition of insolvency was one of the causes of the popular hatred that grew up against the old Bankruptcy Law of 1867, and was one of the causes of the downfall of that law and of the reluctance of Congress to pass another Bankruptcy Act. Accordingly, Congress chose the more liberal definition and the definition most nearly approximating to the popular

³⁴³. *Hussey v. Dry Goods Co.*, 17 A. B. R. 513 (C. C. A. Kas.); *Stevenson v. Milliken-Tomlinson*, 13 A. B. R. 201 (Sup. Jud. Ct. Me.); *Upson v. Mt. Morris Bk.*, 14 A. B. R. 6 (N. Y. Sup. Ct. App. Div.); *In re Andrews*, 16 A. B. R. 390, 144 Fed. 922 (C. C. A. Mass.).

idea of insolvency that they set forth in § 1, clause 15, of the Statute, in the following words:

"A person shall be deemed insolvent within the provisions of this Act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not at a fair valuation, be sufficient in amount to pay his debts."³⁴⁴

Carson, etc., v. Chicago Title & Trust Co., 5 A. B. R. 824, 182 U. S. 438: "The other weakness in the argument is that it exaggerates the difference between the definitions of insolvency and overlooks an advantage to the creditor in the definition contained in the Act of 1898. Inability to pay debts in the ordinary course of business usually accompanies an insufficiency of assets. It may not, of course. At times a debtor's property, though amply sufficient in value to discharge all of his obligations, may not be convertible without sacrifice into that form by which payments may be made. The law regards that possibility. In this there is indulgence to the debtor, and through him to preferred creditors."

Martin v. Bigelow, 7 A. B. R. 220 (N. Y. Sup. Ct.): "To say of a man that he is in failing circumstances, or that he is unable to pay all his debts in full, which means presently unable so to do, is quite a different thing from alleging that his property, taken at a fair valuation, is not sufficient in amount to pay his debts."

And it is to be noted that the definition adopted in the present law is the same as that which for centuries has been the accepted meaning of the term insolvency as used in the law of fraudulent transfers. The term "insolvency," as understood in dealing with contracts and transfers challenged on the ground of fraud, actual or constructive, has always had reference to the insufficiency of the debtor's assets to cover his liabilities, although as understood in the administration of insolvent and former bankrupt laws, it has usually referred to the mere inability of the debtor to pay his debts as they matured in the usual course of business.³⁴⁵

Compare, *Grunsfeld v. Brownell*, 11 A. B. R. 601 (Sup. Ct. New Mex.): "The term insolvency as used in bankruptcy and insolvency laws means the inability of a person to pay his debts as they mature in the ordinary course of business, but as used in a general sense, it means a substantial excess of a person's liabilities over the fair cash value of his property."

It will be useful to explicate this definition in order to give a somewhat clearer idea of the meaning of bankruptcy insolvency.

§ 1344. Property Fraudulently Disposed of, Not to Be Counted as Assets.—Property fraudulently disposed of is not to be counted. In ar-

³⁴⁴. *In re Andrews*, 16 A. B. R. 390, 144 Fed. 922 (C. C. A. Mass.); *Hussey v. Dry Goods Co.*, 17 A. B. R. 513 (C. C. A. Kas.); *In re Rung Furn. Co.*, 10 A. B. R. 44 (Ref. N. Y.); *Stevenson v. Milliken-Tomlinson Co.*, 13 A. B. R. 206, — Me. —; *Upson v. Mt. Morris Bk.*, 14 A. B. R. 6 (N. Y. Sup. Ct. App. Div.).

³⁴⁵. *Marvin v. Anderson*, 6 A. B. R. 520, 87 N. W. 226 (D. C. Wis.); compare, *In re Doscher*, 9 A. B. R. 547, 556, 120 Fed. 408 (D. C. N. Y.); also, see *Martin v. Bigelow*, 7 A. B. R. 218 (Sup. Ct. N. Y.), and *Lavor v. Seiter*, 5 A. B. R. 576 (N. Y. Sup. Ct.).

living at the property that is to be counted in making up the aggregate, all property conveyed, transferred, concealed or removed or permitted to be concealed or removed with intent to defraud or hinder creditors, is to be excluded.³⁴⁶

Thus it is possible that a debtor who has plenty of property to pay all he owes, may make himself insolvent within the bankruptcy definition by fraudulently transferring or concealing so much of it that which is left will not be enough, even at a fair valuation, to pay all the debts. And so, under such circumstances, if the creditors succeed in recovering the property fraudulently disposed of, they may get their claims paid in full, notwithstanding the fact the bankrupt himself could not say he was not insolvent without confessing to the frauds he himself had perpetrated.

Thus it is possible that a man may be insolvent in bankruptcy under the present definition and yet his creditors ultimately get paid in full.³⁴⁷

§ 1345. But Equity of Redemption Counted, if Fraudulent Conveyance by Way of Security.—If the fraudulent conveyance be by way of mortgage or other security, the equity of redemption is, however, to be counted in.³⁴⁸

§ 1346. Property Preferentially Conveyed as Security Not to Be Excluded.—Property not fraudulently but merely preferentially transferred as security, however, is not to be excluded, but is to be counted in as part of the assets.³⁴⁹

In re Doscher, 9 A. B. R. 547, 554, 120 Fed. 408 (D. C. N. Y.): "Where property is transferred in fraud of creditors, the statute contemplates that the bankrupt shall not have the benefit of its valuation in determining whether he is insolvent. Where property is transferred in payment of or as security for a just debt, the mere fact that it may involve a preference in bankruptcy, should bankruptcy proceedings be instituted, does not exclude it from consideration in determining the debtor's solvency."

§ 1347. Exempt Property Counted.—Exempt property is to be counted.³⁵⁰

346. Bankr. Act, § 1 (15); In re Baumann, 3 A. B. R. 196, 96 Fed. 946 (D. C. Tenn.); obiter, In re Doscher, 9 A. B. R. 547, 556, 120 Fed. 408 (D. C. N. Y.); In re Hines, 16 A. B. R. 296, 144 Fed. 142 (D. C. Ore.).

347. Instance, In re Shoemith, 13 A. B. R. 645, 135 Fed. 684 (C. C. A. Ills.): Admitting possession of assets at time of filing of petition but declaring they were subsequently "invested" without disclosing where or how kept meanwhile.

348. Lansing Boiler, etc., Wks. v. Ryerson & Son, 11 A. B. R. 558, 128 Fed. 701 (C. C. A. Mich.).

349. Lansing Boiler & Engine Wks. v. Ryerson & Son, 11 A. B. R. 558, 128 Fed. 701 (C. C. A. Mich.); compare, impliedly, to same effect, In re Norcross, 1 A. B. R. 644 (Ref. Mo.); compare, analogously, as to counting in preferred creditors among liabilities, In re Cain, 2 A. B. R. 378 (Ref. Ills.); McMurtrey v. Smith, 15 A. B. R. 427, 142 Fed. 853 (Special Master Tex., affirmed by D. C.).

"Preferred" debt distinguished from "secured" debt.—A "preferred" debt is to be distinguished from a "secured" debt, In re Busby, 10 A. B. R. 650, 124 Fed. 469 (D. C. Penn.).

350. In re Hines, 16 A. B. R. 295, 144 Fed. 142 (D. C. Ore.).

In *re Baumann*, 3 A. B. R. 196, 96 Fed. 946 (D. C. Tenn.): "It is entirely true, as stated by Mr. Justice Bradley, in *re Bass*, 3 Woods 382, Fed. Cas. No. 1,091, 'that exempted property constitutes no part of the assets in bankruptcy, and that the assignee acquires no title to exempted property.' Nevertheless it does not follow that it is not to be counted when determining the question whether he be solvent or insolvent. * * * If Congress had intended to exclude from the terms of this definition property exempted by law from execution, the phrasing of the statute would have contained the exception either explicitly or by necessary implication—as if the statute had used the phrase 'the aggregate of his property subject to execution at law,' or 'the aggregate of his property available for the payment of his debts,' or 'the aggregate of his property, except such as is exempted by law,' and it is most natural that the language of the statute should have taken some such form if it had been the intention to exclude from the count the value of the exempted property. Although not leviable, it may be used voluntarily for the payment of these debts."

§ 1348. **Partnership Not Insolvent, unless All Partners Insolvent.**—A partnership is not to be deemed insolvent unless the aggregate of all its own property, together with all of the individual property of its members in excess of their respective individual indebtedness, is less than its liabilities.³⁵¹

§ 1349. **Property to Be Taken at "Fair Valuation."**—Again, it must be noted that the property counted in must be counted in at a fair valuation.³⁵²

What constitutes fair valuation is difficult to define.³⁵³ We can say, however, what it is not.

§ 1350. **"Fair Valuation" Not Value at Sacrifice Sale.**—It is not the valuation that would prevail at sheriff's sale, sacrifice sale or forced sale.

Thus, where the bankrupt is a going concern, the value of its assets after the levy of an execution and the consequent cessation of its business may not be the fair valuation.³⁵⁴

§ 1351. **Market Value, as "Fair Valuation."**—Moreover, even the market price probably would not be the fair valuation in all cases; for instance, property that has no market value at all and property whose

351. See cases cited ante, chapter III, "Who May Be Thrown Involuntarily into Bankruptcy," division 3, subdiv. "B;" "Partnerships," § 60.

352. Bankr. Act, § 1 (15); *obiter*, *Brittain Dry Goods Co. v. Bertenshaw*, 11 A. B. R. 630, 68 Kas. 734. See also, cases cited in succeeding paragraphs herein.

353. In determining the fair valuation in deciding whether an intent to prefer exists on the debtor's part so as to make the preference an act of bankruptcy, it would be permissible to show that the alleged bankrupt actually and bona fide thought a certain valuation would be a fair valuation that would make his assets appear to be sufficient to cover his liabilities, whether in fact they were sufficient or not. See ante, "Intent to Prefer as an Element of Second Act of Bankruptcy," § 132.

354. *Chic. T. & T. Co. v. Roebeling's Sons*, 5 A. B. R. 368, 107 Fed. 71 (U. S. C. C. Ill.); compare, to same effect, *In re Rung Furn. Co.*, 10 A. B. R. 51 (Ref. N. Y.).

market value is abnormally low owing to extraordinary circumstances or financial depression. However, the market valuation of property would usually be its fair valuation except in the instances cited and similar ones.³⁵⁵

Duncan v. Landis, 5 A. B. R. 649, 106 Fed. 839 (C. C. A. Pa.): "The words 'fair valuation' are equivalent to the present market value of the property in question, but such market value is not to be ascertained by what a purchaser would give who desires to take advantage of the necessities and embarrassments of the owner at a price less than its real value and a charge to the effect that such value should be fixed by the situation of the debtor the number and amount of the obligations owed by such debtor and the time when they were due, as elements to be regarded by the purchaser, is erroneous."

In *re Hines*, 16 A. B. R. 296, 144 Fed. 142 (D. C. Ore.): "As it respects property considered in a commercial sense, I can conceive of no better or surer standard by which to arrive at a fair valuation than the market value; that is, what the property will probably bring, or is worth in the general market, where everybody buys. It could not be what it is worth to one person or to another specially circumstanced, or having special use for a particular article, but what it is worth as a marketable commodity, at a given time, with no special conditions prevailing other than affect the market generally in the locality where the commodity is for sale."

§ 1352. "Fair Valuation" Where Bankrupt "Going Concern" Not "Scrap" nor "Wrecker's" Value.—Where the bankrupt is a "going concern" at the date of the commission of the act of bankruptcy, that fact must be taken into account in fixing "fair valuation;" and "scrap" values or "wrecker's" values will not suffice.³⁵⁶

Paper Co. v. Goembel, 16 A. B. R. 28 (C. C. A. Ills.): "The valuation for the test of solvency or insolvency under the issue must relate to the conditions, as a going concern, when the alleged preference was given, and not to the mere dead matter after bankruptcy intervened."

§ 1353. "Fair Valuation" of Choses in Action and Intangible Property.—The face value of choses in action is not to be taken if it is not the actual value.

Thus, the actual value of accounts must govern in determining the question of insolvency,³⁵⁷ likewise of insurance policies.³⁵⁸

³⁵⁵ Price obtained by purchaser at private sale, on resale of the goods shortly after the transfer, has been held incompetent, *Sebring v. Wellington*, 6 A. B. R. 671 (N. Y. Sup. Ct. App.). But see strong dissenting opinion.

³⁵⁶ Instance, *Motor Vehicle Co. v. Oak Leather Co.*, 15 A. B. R. 808 (C. C. A. Ills.); impliedly, *Chic. Title & T. Co. v. Roebling's Sons*, 5 A. B. R. 371, 107 Fed. 71 (C. C. Ills.).

³⁵⁷ In *re Coddington*, 9 A. B. R. 243, 118 Fed. 281 (D. C. Penn.); *Benjamin v. Chandler*, 15 A. B. R. 440 (D. C. Penn.).

³⁵⁸ *Rogen & Trummell v. Protter*, 12 A. B. R. 288, 129 Fed. 533 (C. C. A. Ohio); *Benjamin v. Chandler*, 15 A. B. R. 440 (D. C. Penn.).

Likewise, with the value of bonds, leases, patents, licenses and securities and of other intangible property, it is the actual, fair value that prevails.³⁵⁹

§ 1354. **Admissions of Insolvency by Bankrupt Not Competent against Creditor.**—Proof of admissions of insolvency itself, or of admissions of facts tending to show insolvency, made by the bankrupt, even before bankruptcy, are not competent evidence against the preferred creditor on a suit for recovery of the preference.³⁶⁰

The bankrupt's uncorroborated testimony as to the precise time of becoming insolvent has been held not sufficient to establish the fact.³⁶¹

§ 1355. **Bankrupt's Books Admissible.**—Books of the bankrupt are competent evidence on the question of his insolvency.³⁶²

Of course their competency is not on the basis of their being admissions, but rather of their being contemporaneous memoranda; except where the issue is the commission of an act of bankruptcy and not the recovery of a preference.

§ 1356. **Schedules Inadmissible against Preferred Creditor.**—The schedules filed by the bankrupt are inadmissible against the alleged preferred creditor to prove the bankrupt's insolvency. They are the admissions of a mere assignor after he has parted with his interest to the alleged preferred creditor.³⁶³

§ 1357. **Inventory and Appraisement in Bankruptcy, whether Admissible.**—It has been held that the inventory and appraisement taken by the bankruptcy court are competent evidence.³⁶⁴

^{359.} Instance, *First Nat'l Bk. v. Ice Co.*, 14 A. B. R. 448, 136 Fed. 466 (D. C. Penn.): Disputed liability of bondholders on bonus stock issued to them not counted in as assets.

Instance, *McGowan v. Knittel*, 15 A. B. R. 1, 137 Fed. 1015 (C. C. A. Penn., reversing *Knittel v. McGowan*, 14 A. B. R. 209, 137 Fed. 453): Record of a reopened judgment against the bankrupt should not be admitted before the jury; especially where opened generally and not specially to let in some particular defense.

Troy Wagon Wks. v. Vastbinder, 12 A. B. R. 352, 130 Fed. 232 (D. C. Penn.): Leases and securities, face value \$4,000.00 conceded actual value \$1,000.00.

Instance, *Motor Vehicle Co. v. Oak Leather Co.*, 15 A. B. R. 808 (C. C. A. Ills.): Patent.

Instance, *In re Foley*, 15 A. B. R. 832 (Ref. Pa.): Liquor license: Claimed to be worth \$10,000.00 but testimony that only made \$100.00 in 18 months.

^{360.} But of course are perfectly competent against the bankrupt on a petition for his adjudication as bankrupt, *In re Lange*, 3 A. B. R. 231, 97 Fed. 197 (D. C. N. Y.).

^{361.} *In re Linton*, 7 A. B. R. 676 (Ref. Penn.).

^{362.} *In re Coddington* (*Docker Foster Co.*), 10 A. B. R. 584, 123 Fed. 190 (D. C. Penn.); *obiter*, *Hackney v. Hargreaves Bros.*, 13 A. B. R. 164, 68 Neb. 624.

^{363.} *Hackney v. Raymond Bros. Clark Co.*, 10 A. B. R. 213 (Sup. Ct. Neb., reversed in 13 A. B. R. 164, Sup. Ct. Neb.); compare, same rule as to alleged fraudulent conveyances, *Halbert v. Franke*, 11 A. B. R. 620, 91 Minn. 204; *contra*, *Hackney v. Hargreaves*, 13 A. B. R. 164, 68 Neb. 634; *contra*, *In re Docker-Foster Co.*, 10 A. B. R. 584, 123 Fed. 190 (D. C. Pa.).

^{364.} *Hackney v. Hargreaves Bros. and v. Raymond Bros. Clark Co.*, 13 A. B. R. 164, 68 Neb. 634; *In re Docker-Foster Co.*, 10 A. B. R. 584, 123 Fed. 190 (D. C. Penn.); compare, *In re Soudans Mfg. Co.*, 8 A. B. R. 59, 113 Fed. 804 (C. C. A. Ind.).

But it is difficult to see how the preferred creditor can be thus bound. Of course, the testimony of the appraisers would likely be admissible, as throwing light upon the financial condition of the bankrupt at the time of the alleged preferential transfer; but the theory on which the appraisal itself, even though official, is admissible, is not plain.³⁶⁵

§ 1358. Whether Sale by Receiver in State Court or by Trustee in Bankruptcy, Competent.—Prices obtained by a receiver in the State Court before the bankruptcy, although somewhat subsequently to the transfer complained of, are admissible in proof of the fair value at the time of the transfer, and the exclusion of such prices from evidence has been held reversible error.³⁶⁶ Where the evidence shows that the value of the assets has not varied from the time of the alleged preference to the date of a sale by the trustee in bankruptcy, the sale price has been held competent evidence on the issue of insolvency.³⁶⁷ It has also been held that the referee's order confirming the report of the sale is also competent, but not conclusive.³⁶⁸ This ruling, however, though perhaps justifiable in the absence of better evidence, is treading on dangerous ground.

See discussion in preceding paragraph, § 1357.

§ 1359. Referee's Allowance of Claims, Whether Admissible.—And it has been held that the orders of allowance of claims by the referee are not admissible, as to the amount of the bankrupt's indebtedness, as against an alleged preferred creditor.

Cullinane v. State Bk., 12 A. B. R. 776, 123 Iowa 340: "To prove the amount of indebtedness of the firm, the plaintiff called as a witness the referee in bankruptcy, and he was permitted to testify in respect of the number and amount of claims filed with and allowed by him. This testimony was objected to by defendant as incompetent, in that defendant was in no sense a party to the bankruptcy proceedings, and was not bound thereby, or by any findings made therein. We think that under the issues as presented by the pleadings the objection should have been sustained. The defendant was relying upon its mortgage as a specific lien upon the property covered thereby, and under the Bankrupt Act it could be divested of that lien only upon proof of actual insolvency. The finding of the bankruptcy court upon that question, or of any fact involved therein, was not *res adjudicata* as against defendant, inasmuch as it was not in any sense a party to the bankruptcy proceedings."

But (at any rate, wherever the alleged preferred creditor is applying to the bankruptcy court for dividends) it would seem that he is bound, as a party, to the referee's adjudication as to the validity of claims. This involves quite a different principle from that of the admissibility of the bankrupt's own schedules.

^{365.} Compare, *In re Soudans Mfg. Co.*, 8 A. B. R. 50, 113 Fed. 804 (C. C. A. Ind.).

^{366.} *In re Block*, 6 A. B. R. 300, 109 Fed. 790 (C. C. A. N. Y.).

^{367.} *Bank v. Sundheim*, 16 A. B. R. 866, 145 Fed. 795 (C. C. A. Penn.).

^{368.} *Bank v. Sundheim*, 16 A. B. R. 866, 145 Fed. 795 (C. C. A. Penn.).

§ 1360. **Admissions of Agent, as to Insolvency of Principal.**—The admissions of an agent are not competent on the subject of insolvency unless within the scope of his authority; thus the admissions of the husband of the bankrupt, acting as the bankrupt's manager in the conducting of her business, have been held not competent to prove insolvency.³⁶⁹

§ 1361. **Return of Execution Unsatisfied, Whether Prima Facie Proof of Insolvency.**—It has been held, that the return of an execution unsatisfied in whole or in part is not prima facie proof of insolvency.³⁷⁰

§ 1362. **Adjudication of Bankruptcy as Res Adjudicata on Question of Insolvency.**—The adjudication of bankruptcy is held by some cases to be conclusively binding upon all creditors in subsequent actions between them and the trustee as to all points necessarily decided therein; from which it would follow that, where insolvency is a necessary element of the act of bankruptcy on which the adjudication is based, the adjudication itself will be res adjudicata as to insolvency at the time of the commission of the act.³⁷¹

§ 1363. **Ordinary Rules Apply in Proof of Insolvency.**—And, in general, the ordinary rules of evidence are to govern in the proof of insolvency.³⁷²

§ 1364. **Date of Insolvency and "Fair Valuation," Date Immediately Preceding Transfer.**—The proof must show the "fair valua-

369. *Duncan v. Landis*, 5 A. B. R. 675, 106 Fed. 839 (C. C. A. Penn.).

370. *Levor v. Seiter*, 5 A. B. R. 576, 34 Misc. (N. Y.) 382; *In re Rung Furu Co.*, 10 A. B. R. 51 (Ref. N. Y.).

371. See post, "Actions by Trustees," §§ 1774, 1776 and 1777; and ante, "Effect of Adjudication on Rights of Parties," § 444, et seq.

372. **Instance of Proof of Insolvency:**

1. Corporation put into the hands of a receiver by its own directors on the ground of insufficiency of assets, yet a schedule accompanying it showing excess of assets; also investigation shows surplus. The mere admission of insufficiency of assets not enough where rebutted by proof. *In re Doscher*, 9 A. B. R. 547, 120 Fed. 408 (D. C. N. Y.).

2. Inability to pay debts at a later time, suspension of business, negotiations with creditors for composition, etc., are admissible as evidence tending to prove insufficiency of assets, in the absence of other evidence. *In re Elmira Steel Co.*, 5 A. B. R. 488, 109 Fed. 456 (Special Master N. Y.).

But compare, *Martin v. Bigelow*, 7 A. B. R. 220 (Sup. Ct. N. Y.), where the adjudication of the debtor on March 11 was held not to relate back to establish his insolvency in the preceding November.

3. Offer of settlement made to creditors prior to bankruptcy on the basis of thirty cents on the dollar is evidence not to be overcome by mere estimates of the value of a lease, good will and fixtures. *In re Lange*, 3 A. B. R. 231, 97 Fed. 197 (D. C. N. Y.). It is to be borne in mind, however, that this case arose on proof of an act of bankruptcy and might be affected by the possible incompetency of admissions of the bankrupt as against a preferred creditor himself in a suit for recovery of the preference.

4. Instance, *In re Rodgers Milling Co.*, 4 A. B. R. 540, 102 Fed. 687 (D. C. Ark.).

5. Instances of insolvency not proved: *Hastings v. Fithian*, 13 A. B. R. 676 (Court Errors and Appeals N. J.); *In re Chappell*, 7 A. B. R. 608, 113 Fed. 545 (D. C. Va.).

tion" and insolvency at the time of the transfer, before the transfer; and not the valuation nor insolvency created by the transfer itself.³⁷³

In *re Hines*, 16 A. B. R. 297 (D. C. Ore.): " * * * the intendment being that the insolvency must exist at the time of suffering the preference to be taken; for, if the debtor is solvent, it would be perfectly proper and legitimate for him to make any sort of preference that he might see fit. The fact of suffering the preference, therefore, unless it might be under circumstances indicating that he intended to hinder, delay, or defraud certain of his creditors, could not be permitted to affect the value of his assets. If such were the case, then a person, who was before perfectly solvent, might be rendered insolvent by an action, accompanied by an attachment, and his insolvency would depend upon whether he could pay his debts under the stress of the occasion, and not, under the simple inquiry prescribed by the Bankruptcy Act, whether the aggregate of his property, at a fair valuation, is sufficient in amount to pay his debts."

And fractions of a day are to be taken into account.³⁷⁴

§ 1365. Debts Owing but Not Yet Due Included in Bankrupt's Liabilities.—It is doubtless true that debts owing, although not yet due, are to be included among the bankrupt's liabilities in determining his insolvency.

§ 1366. Whether Contingent Liabilities Counted in Determining Insolvency.—It does not appear to have been settled, however, whether contingent liabilities, as distinguished from debts owing but not yet due are to be included in the computation.³⁷⁵

§ 1367. Seventh Element of a Preference—Transfer or Recording within Four Months before Filing of Petition.—The transfer or other appropriation of property, or, when the transfer is such that the law requires the recording of it to make it effective against creditors, then the recording of the transfer, must have been made within four months before the filing of the bankruptcy petition.³⁷⁶

§ 1368. Preferences Obtained before Four Months, Not Voidable.—Preferences obtained before the four months period will not be disturbed³⁷⁷ except in one instance, namely, that mentioned in the last clause of § 60 (a):

^{373.} *Upson v. Mt. Morris Bk.*, 14 A. B. R. 11 (N. Y. Sup. Ct. App. Div.); *Chicago Title & Trust Co. v. Roebling's Sons*, 5 A. B. R. 368, 107 Fed. 71 (D. C. Ills.).

^{374.} *Upson v. Mt. Morris Bk.*, 14 A. B. R. 11 (N. Y. Sup. Ct. App. Div.).

^{375.} That they are not to be so included, see obiter, In *re Nassau*, 15 A. B. R. 303, 140 Fed. 912 (Ref. Penn.). Fact of contingency of debts is to be taken into account in determining the intent of the bankrupt, no doubt. See inferentially, *Merchants' Nat. Bk. v. Cole*, 18 A. B. R. 44, 149 Fed. 708 (C. C. A. Ohio).

^{376.} Bankr. Act, § 60 (a). Merely that a transfer occurred within the four months raises no presumption of a voidable preference, *Stich v. Berman*, 15 A. B. R. 466, 49 N. Y. Misc. 104 (N. Y. Sup. Ct. App. Div.).

^{377.} In *re Girard Glazed Kid Co.*, 12 A. B. R. 295, 129 Fed. 841 (D. C. Penn.).

"Where the preference consists in a transfer such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required."

In *re Dunavant*, 3 A. B. R. 41, 96 Fed. 542 (D. C. N. Car.): "A proceeding in bankruptcy does not affect liens accruing more than four months before bankruptcy."

§ 1369. **Nature or Limitation.**—This limitation before the Amendment of 1903 was evidently by way of a statute of limitations. In theory and in fact before the Amendment of 1903, a preference existed whenever a payment was made out of an insolvent estate whereby one creditor got more than his share of the trust fund, no matter how long before-hand it was that the payment was made, the four months limitation being merely a statute of limitations beyond which the court would not investigate transactions.³⁷⁸

But since the Amendment of 1903 inserted into the very definition of a preference itself that it must have been a transfer or judgment within the four months period, and that such four months should not begin to run until the date of the filing or recording of the instrument creating the preference, where such filing or recording is required by the State statute to impart notice, it is evident that the four months' qualification is no longer by way of a statute of limitations, but is an essential element of a preference itself; that is to say, since the Amendment of 1903, it is not merely that only preferences received within the four months are voidable but that a transaction is not even a preference unless occurring within the four months period.³⁷⁹

§ 1370. **Agreements for Liens Not Effective until within Four Months, Voidable.**—Agreements for liens made before the four months period, or at the time of the passing of the original consideration,

378. Before the amendment of 1903 changed the law so that so-called "innocently" received preferences no longer needed to be surrendered as a prerequisite to the proof of claims, it was held in several cases that as to "innocently" received preferences, there was no time limit, In *re Abraham Steers Lumber Co.*, 7 A. B. R. 332 (C. C. A. N. Y., affirming 6 A. B. R. 315, Jones, 4 A. B. R. 563, D. C. Mass.).

But in other cases it was held that, there being no express time limit fixed by the statute, the time limit expressly fixed as to preferences knowingly received would be adopted as an equitable rule, In *re Beswick*, 7 A. B. R. 395 (Ref. Ohio); In *re Dickinson*, 7 A. B. R. 679 (Ref. N. Y.).

379. But compare, *Loeser v. Bank & Trust Co.*, 17 A. B. R. 630 (C. C. A. Ohio, reversing In *re Chadwick*, 15 A. B. R. 528, 148 Fed. 975): "It must also be conceded that prior to the amendment of the bankrupt law by the amending Act of February 5, 1903, the preference, if free from actual fraud, would relate to the date of the making and delivery of the instrument creating it." Compare the reasoning in In *re Gallagher*, 6 A. B. R. 255 (Ref. Mass.). Also compare, the reasoning in *Tatman v. Humphrey*, 12 A. B. R. 62, 184 Mass. 361. Also compare, the reasoning in In *re Klingman*, 4 A. B. R. 254, 101 Fed. 691 (D. C. Iowa). Also compare, for history of the legislation, In *re Hunt*, 14 A. B. R. 416, 137 Fed. 694 (D. C. N. Y.). See post, § 1379, "Preferences as Affected by Recording."

but not effective until within the four months period, are voidable as preferences, if the other elements of a preference co-exist,

Thus, agreements at the time of making a loan or sale, to give a mortgage later, not executed until within the four months period, are voidable.³⁸⁰

In re Great Western Mfg. Co., 18 A. B. R. 263, 153 Fed. 123 (C. C. A. Neb.): "An agreement to mortgage or to transfer is not a mortgage or a transfer. The title remains in the owner unincumbered by the mortgage until the mortgage or transfer is effected. When the agreement is made before, and the mortgage or transfer within the four months, the title stands unincumbered by the latter at the commencement of the four months, and the proceeds of that title are pledged under the bankruptcy law for the benefit of all the creditors pro rata. Any subsequent mortgage or transfer withdraws that title or a portion of its value from these creditors, and a just and fair interpretation and execution of the act demands that such a mortgage or transfer should be adjudged voidable if it is otherwise so, and that the mortgagee or transferee should be remitted to his original agreement. In this way the property at the commencement of the four months and its value may be preserved for the general creditors, and the mortgagee or transferee may retain every lawful advantage his earlier contract confers upon him. Any other course of decision opens a new and enticing way to secure preferences, nullifies every provision of the law to prevent them and invites fraud and perjury. Hold that transfers within four months in performance of agreements to make them before that time do not constitute voidable preferences, and honest debtors would agree with their favored creditors before the four months that they would subsequently secure them by mortgages or transfers of their property, and just before the petitions in bankruptcy were filed they would perform their agreements. Dishonest men who made no such contracts might falsely testify that they had done so and thus by fraud and perjury sustain preferential transfers, and mortgages made within the four months to relatives or friends. The great body of the creditors would be left without share in the property of their debtor and without remedy, and a law conceived and enacted to secure a fair and equal distribution of the property of debtors among their creditors would fail to accomplish one of its chief objects. This court will hesitate long before it approves a rule so fatal to the most salutary provisions of the bankruptcy law, and our conclusion is:

"A mortgage or transfer of his property by an insolvent debtor within four months of the filing of a petition in bankruptcy against him, which otherwise constitutes a voidable preference, is not deprived of that character or made valid by the fact that it was executed in performance of a contract to do so, made more than four months before the filing of the petition."

Forbes v. Howe, 3 A. B. R. 475, 102 Mass. 427: "A mortgage given by an insolvent debtor to secure advances previously made is not purged of its character as an unlawful preference because it was given in pursuance of an agreement on which the advances had been made; nor because the debtor was induced to give it by the hope of obtaining further credit or means for the continuance of his business; nor because it was intended to make up security which had been

380. Pollock v. Jones, 10 A. B. R. 616, 124 Fed. 166 (C. C. A. S. Car., affirming 9 A. B. R. 262; In re Ronk, 7 A. B. R. 31, 111 Fed. 154 (D. C. Ind.); In re Dismal Swamp Contracting Co., 14 A. B. R. 175, 135 Fed. 415 (D. C. Va.); Morgan v. Nat'l Bk., 16 A. B. R. 645, 149 Fed. 466 (C. C. A. W. Va.). See ante, § 1281. The following are apparently contra, under the law of 1867: In re Jackson, 15 N. B. Reg. 438; Burdock v. Jackson, 15 N. B. Reg. 318; Douglass v. Voegeler, 12 N. B. Reg. 493, Fed. Cas. 5271.

reduced by the sale, with the consent of the mortgagee, of property included in a previous mortgage to him, under an understanding that new security should be given."

Thus, agreements for repayment out of a particular fund not consummated until within the four months are voidable.³⁸¹

Torrance v. Winfield Nat'l Bk., 11 A. B. R. 185 (Kas.): "An agreement made, while negotiating for a loan, to make repayment out of a certain fund, or the proceeds of a particular enterprise, does not create a lien upon the fund or the proceeds of the enterprise, and, where repayment is made out of the designated fund within four months of proceedings in bankruptcy, such payment shall be deemed to be preferential, and voidable at the suit of a trustee."

[1867] *In re Connor*, 1 Low 532, 6 Fed. Cases 315: "By our law, it is not sufficient answer that an oral agreement to give security at some indefinite future period, if demanded, was made at the time the debt was contracted. Such an agreement, resting only in oral contract, without possession of the property, or any such circumstances as would create a legal or equitable lien, cannot be enforced against the assignees after bankruptcy, nor make a conveyance, before bankruptcy but after insolvency, legal, which would otherwise be a preference."

Thus, a depositor's agreement for a lien is thus voidable, if it takes effect within the four months.³⁸²

Thus, also, as to the identification and separation of chattels within the

381. Compare, *Christmas v. Russell*, 14 Wall. (U. S.) 84: "An agreement to pay out of a particular fund, however clear in its terms, is not an equitable assignment. A covenant in the most solemn form has no greater effect. The phraseology employed is not material provided the intent to transfer is manifested. Such an intent and its execution are indispensable. The assignor must not retain any control over the fund, any authority to collect, or any power of revocation. If he do, it is fatal to the claim of the assignee. The transfer must be of such a character that the fund holder can safely pay, and is compellable to do so, though forbidden by the assignor. When the transfer is of the character described, the fund holder is bound from the time of notice."

Compare, *Trust v. Child*, 21 Wall. 441 (U. S.): "It is well settled that an order to pay a debt out of a particular fund belonging to the debtor gives to the creditor a specific equitable lien upon the fund, and binds it in the hands of the drawee. * * * But a mere agreement to pay out of such fund is not sufficient. Something more is necessary. There must be an appropriation of the fund pro tanto, either by giving an order or by transferring it otherwise in such a manner that the holder is authorized to pay the amount directly to the creditor without the further intervention of the debtor."

382. *In re Mandel*, 10 A. B. R. 774 (D. C. N. Y.): A depositor in a bank, on opening his deposit agreed that all deposits should be subject to a lien in favor of the bank for any money that might be loaned to him. The date of the bank's taking possession under the agreement not the date of the agreement itself controls on the question of preferences. This case is distinguished in *In re Hunt*, 14 A. B. R. 425 (D. C. N. Y.). Contra, obiter, *Tomlinson v. Bk. of Lexington*, 16 A. B. R. 632 (C. C. A. N. Car.).

But see *First Nat'l Bk. v. Penna. Bk.*, 10 A. B. R. 782, 124 Fed. 968 (C. C. A. Pa.): "The effect of a remarking of the billets was not to create a new lien, nor to acquire a preference for an antecedent debt between the parties. The lien acquired August 30, 1901, had not been lost, because no rights of third parties had intervened. The bank, under its contract, had a right of possession to the billets as security for the payment of debt, and could not be held guilty of securing a preference by exercising that right within four months preceding bankruptcy."

four months to bring them under a chattel mortgage executed before the four months.

First Nat'l Bk. of Holdrege *v.* Johnson, 10 A. B. R. 208, 68 Neb. 641: "If the cattle seized and sold were—as there is much in the evidence to suggest—merely part of a larger number of cattle in the feed lots of the mortgagor at the time the instrument was executed, and were not at that time in any way separated or identified, but afterwards and within four months of bankruptcy, and while the mortgagor was insolvent, they were separated or identified through the seizure made by the bank, and the mortgagor acquiesced in such separation and identification, and expressly or by acquiescence agreed that the mortgage should apply to them, it is obvious that the lien was created then for the first time, and that there was a preference within the meaning of § 60 of the Bankruptcy Act."

Agreements for lien for future advances to help keep the business afloat, the same to become operative on failure to repay, becoming operative within the four months, give rise to voidable preferences.³⁸³ A chattel mortgage executed in blank before the four months period, but not filled in with the amount of the debt until within the four months period, does not take effect until the filling in and is voidable as a preference.³⁸⁴

Thus, as to agreements for pledge:³⁸⁵

In *re* Sheridan, 3 A. B. R. 554, 98 Fed. 406 (D. C. Pa.), distinguished in *In re* Hunt, 14 A. B. R. 424 (D. C. N. Y.): "The goods here were never actually pledged until the exceptant, for the first time, took them into his possession a few days before the petition was filed. Before that time there was a mere agreement to pledge. The goods were never delivered to the exceptant, nor (assuming, for present purposes, that this would have been good against the other creditors) were they even set apart and continuously treated as his property. Under the facts proved, the pledge was not completed until the date of removal. *Lucketts v. Townsend*, 49 Am. Dec. 730, note. This being so, the exceptant's title attached upon that date, and the transfer created a preference in violation of the act."

Iron & Supply Co. v. Rolling Mill Co., 11 A. B. R. 200, 125 Fed. 974 (D. C. Ala.), distinguished in *Wilder v. Watts*, 15 A. B. R. 60, 138 Fed. 426 (D. C. S. C.): "They were never actually pledged to the bank until the transfer on the 28th day of February, 1903. Before that time there was a mere agreement to pledge. The accounts were never delivered to the bank, or set apart and treated as its property, until that day. The pledge was not completed until the date of the transfer."

Thus, also, as to agreements to insure, or to assign insurance policies, or insurance money.³⁸⁶

^{383.} *Matthews v. Hardt*, 9 A. B. R. 373, 76 N. Y. Sup. 134, distinguished in *In re* Hunt, 14 A. B. R. 424, 137 Fed. 694 (D. C. N. Y.).

^{384.} *In re* Barrett, 6 A. B. R. 48 (D. C. N. Y.). To same effect, *Forbes v. Howe*, 3 A. B. R. 475, 102 Mass. 427.

^{385.} *Matthews v. Hardt*, 9 A. B. R. 373, 76 N. Y. Sup. 134, distinguished in *In re* Hunt, 14 A. B. R. 416, 137 Fed. 694 (D. C. N. Y.).

^{386.} *In re* Klingman, 4 A. B. R. 254, 101 Fed. 691 (D. C. Iowa); apparently contra, *In re* Veneer & Panel Co., 6 A. B. R. 271, 108 Fed. 593 (D. C. Wis., affirmed sub nom. *McDonald v. Daskam*, 8 A. B. R. 543, 116 Fed. 276); apparently contra, *In re* Grandy & Son, 17 A. B. R. 206 (D. C. S. C.). See ante, § 1253.

Long v. Farmers' Bk., 17 A. B. R. 103 (C. C. A. Iowa): "It does not purport to assign the policies of insurance, but agrees to assign an amount as collateral security sufficient to liquidate the indebtedness to the bank, 'to be applied for this purpose in case of loss by fire.' By the last paragraph it was clearly contemplated by the parties that Wells should retain possession of the policy, and in case of loss he should make the proofs, settle with and collect from the insurance company, and pay over so much of the amount collected as would be sufficient to liquidate the debt to the bank, with authority to compromise with the insurance company, but at a sum not less than the amount of the bank's claim against him. Clearly this did not constitute an assignment of the policies in presenti. This contract was no more than the personal agreement or undertaking of Wells that he would keep the property insured, and in case of loss he would collect and pay over to the bank sufficient to liquidate the debt. The contract conveyed nothing. At most it was but an executory agreement to create a lien upon a fund to arise in case of loss and collection made from the insurance company, when for the first time an equitable lien on the fund would attach. In other words, its effect was a direction to pay in case of loss. Such an agreement, while enforceable inter partes, was not binding upon either the insurer or those claiming an interest under the insured without notice of such lien. *Ellis et al. v. Kreutzinger et al.*, 27 Mo. 311, loc. cit. 314, 72 Am. Dec. 270."

Thus, also, an order by a contractor on the owner to pay a materialman, which was not presented until within the four months of the contractor's bankruptcy, being withheld by agreement not to be presented unless the contractor failed to keep up payments, is a preference as of the date of the presentation.³⁸⁷ And, on the same principle, levies under irrevocable powers of attorney to confess judgment, where the power was made more than four months before bankruptcy but not acted upon until within the four months, are void, if otherwise preferential.³⁸⁸

But the possessing one's self of material, within the four months, and the selling of the same under a subsisting contract made before the four months, has been held not to be a preference:

Savin v. Camp, 3 A. B. R. 579, 98 Fed. 974 (D. C. Ore.), rejected in *Torrance v. Winfield Bk.*, 11 A. B. R. 185 (Sup. Ct. Kas.): "The transfer by the Colby Company to Camp was not a preference under the Bankruptcy Act. It is true, the transaction was consummated within the four months, but it originated in October, 1897. What was done was in pursuance of the pre-existing contract, to which no objection is made. Camp furnished the money out of which the property which is the subject of the sale to him was created. He had good right, in equity and in law, to make provisions for the security of the money so advanced, and the property purchased by his money is a legitimate security and one frequently employed. There is always a strong equity in favor of a lien by one who advances money upon the property which is the product of the money so advanced. This was what the parties intended at the time, and to this, as already stated, there is, and can be, no objection in law or in morals. And so when, at a later date, but still prior to the filing of the petition in bankruptcy, Camp exer-

^{387.} *Johnston v. Huff*, 13 A. B. R. 287, 133 Fed. 704 (C. C. A. Va.), discussed and distinguished in *Wilder v. Watts*, 14 A. B. R. 60 (D. C. S. C.).

^{388.} *Wilson v. Nelson*, 7 A. B. R. 142, 183 U. S. 198.

cised his rights under this valid and equitable arrangement to possess himself of the property and make sale of it in pursuance of his contract, he was not guilty of securing a preference under the Bankruptcy Law."

And also apparently contra, a bankrupt contractor's unrecorded indemnity agreement to the surety on his bond, whereby he agrees, in the event of inability to complete the contract, to assign "and does hereby assign" to the surety the plant dedicated to the job, has been held valid, although the material, etc., included in the "plant," was not acquired by the contractor until afterwards, the court placing the decision on the doctrine of *Thompson v. Fairbanks*, 196 U. S. 517, that the lien being good, between the parties, was good against the trustee.

Wood v. U. S. Fidelity & Guaranty Co., 16 A. B. R. 25, 143 Fed. 424 (D. C. Mass.): "The auditor finds that at the time the indemnity agreement was executed, King had not begun the contract work and that no part of the plant or material taken was then at Ft. McKinley. It does not appear when the plant or material taken was acquired by King nor when it was taken to Ft. McKinley. Assuming that it was all acquired by King after the execution of the indemnity agreement, the defendant's claim to it when it was taken was, in my opinion, none the less valid. The defendant's right to the property is still, as in *Thompson v. Fairbanks*, 196 U. S. 517, 13 Am. B. R. 437, and *Humphrey v. Tatman*, 198 U. S. 91, 14 Am. B. R. 74, to be judged not by the state of facts existing when possession was taken, but by the state of facts existing when the right was given. Since possession was taken before the bankruptcy, the defendant, upon taking possession, held the property by a title relating back to the time when its right was acquired, at which time, so far as appears, there was nothing to prevent King from giving it such a right, and by a title which is good against the trustee in bankruptcy." This decision might equally as well have been based on the doctrine that the lien given was a present transfer ["does hereby assign"] operative immediately on acquisition of the after-acquired material, etc.

§ 1371. **"After-Acquired Property" Taken Possession of by Mortgagee within Four Months.**—And it would seem on principle that where "after-acquired property" is acquired within the four months period and possession is thereafter taken under a chattel mortgage, attempting in terms to cover after-acquired property, such taking of possession would operate to fix the lien as of the date of the taking of possession, at least of the after-acquired property, and would amount to a preference as of such date; but such is not the holding.³⁸⁹

§ 1372. **Equitable Liens Not Requiring to Be Recorded, Good.**—On the other hand, equitable liens not required to be recorded, made by oral

³⁸⁹ *Thompson v. Fairbanks*, 13 A. B. R. 437, 196 U. S. 516, rejecting *In re Ball*, 10 A. B. R. 564, 123 Fed. 164 (D. C. Vt.); *In re Rogers & Woodward*, 13 A. B. R. 82, 132 Fed. 560 (D. C. Vt.); *In re Nat'l Valve Co.*, 15 A. B. R. 524 (D. C. Ohio); *Wood v. U. S. Fidelity & Guaranty Co.*, 16 A. B. R. 25, 143 Fed. 424 (D. C. Mass.); *Fisher v. Zollinger*, 17 A. B. R. 618, 149 Fed. 54 (C. C. Ohio). See also, subdiv. "C" of the preceding division of this chapter, § 1236.

or written contract on present consideration, or before the four months period, upon choses in action or other property, may be good although actual delivery to the creditor be not made until within the four months period; if there be the equivalent of a delivery;³⁹⁰ or if there be not the equivalent of a delivery.

Wilder v. Watts, 15 A. B. R. 57, 138 Fed. 426 (D. C. S. C.): "The testimony supports the answer of the defendant Watts that the money was advanced to him in good faith at a time when he was solvent, to be used in his business; that there was an agreement at that time that his stock of goods was to be insured, and that the policies were to be assigned as security for the loan. There was a present consideration, and an agreement to assign the policies, which, on principle and on authority, created an equitable lien upon the money due on the policies of insurance. * * * The general doctrine is that where a party by express agreement sufficiently indicates an intention to make some particular property, real or personal, or fund, a security for a debt or other obligation, and promises to assign or transfer the property as security, equity, regarding that as done which ought to be done, creates an equitable lien upon the property indicated. * * * The fact that the policies of insurance were not actually delivered to the creditors is of no consequence here. A case might arise in which delay or nondelivery might be important as evidence upon the question of a complete execution of the agreement for a lien, but the testimony shows beyond dispute the agreement for a lien; and equity, which regards the true intention of the transaction, will consider what was actually done as sufficient if the parties themselves treated it as a sufficient performance of that part of the agreement. 'Actual delivery of the policies and continuous possession by the transferee are not indispensable to create and preserve such lien as is now being considered.' *Spring v. Ins. Co.*, 8 Wheat. 268, 5 L. Ed. 614. As most of the standard forms of policies inhibit their assignment before a loss, the actual manual delivery of the policy after the loss suffices."

In re Grandy & Son, 17 A. B. R. 206, 146 Fed. 318 (D. C. S. C.): "Mrs. Grandy's right and title to these policies accrued at the moment when she assigned her renunciation of dower, which was the consideration paid. Equity from that date would have compelled the execution of such formal papers as were necessary to enable her to obtain her own, and in such circumstances the date of the formal assignment does not seem to me material. All transactions between a wife and a husband, who afterwards proves to be in failing circum-

^{390.} *McDonald v. Daskam*, 8 A. B. R. 543, 116 Fed. 276 (C. C. A. Wis., affirming *In re Veneer & Panel Co.*, 6 A. B. R. 271, 108 Fed. 593, D. C. Wis.), where a parol agreement made before the four months period that certain fire insurance policies should stand as collateral for an antecedent debt, was held to create an equitable lien upon the proceeds of the policies, although actual delivery of the policies to the creditor was not made until within the four months period, the custody of the insurance agent being evidently considered by the parties as a sufficient delivery.

See ante, § 1298. But compare *Long v. Farmers' Bk.*, 17 A. B. R. 103 (C. C. A. Ia.). And compare *In re Klingman*, 4 A. B. R. 254, 101 Fed. 691 (D. C. Ia.). Perhaps *Wood v. U. S. Fidelity & Guaranty Co.*, 16 A. B. R. 25, 143 Fed. 434 (D. C. Mass.), quoted in preceding section. Compare, *In re Duncan*, 17 A. B. R. 289 (D. C. S. Car.), where the court proceeds upon the erroneous theory that the property was in custodia legis by the filing of the bankruptcy petition, although before adjudication and when no receiver had been appointed. See "What Constitutes Custodia Legis," § 1524. Compare, as to "equitable" liens, *Warehousing Co. v. Hand*, 16 A. B. R. 63, 143 Fed. 32 (C. C. A. Wis.).

stances ought to be subject to the closest scrutiny by the courts, and no claim by her upon his estate, unless sustained by abundant testimony, ought to be allowed; but in this case there is no question of the absolute good faith of this transaction. That she has parted with a valuable property right upon an express agreement that a specific security should be assigned to her, and the neglect of the husband to make the formal assignment—a neglect for which she is not to be blamed, and which did not work to the prejudice of the creditors—ought not to operate to defeat her title.”

§ 1373. State Law Governs as to Time Agreements for Liens, and Taking of Possession or Recording Take Effect as Liens or Other Transfers.—But the state law will govern as to the time that agreements for liens take effect as liens; also, as to whether the taking of possession under an unrecorded instrument, or the recording of such instrument, reverts to the date of the original transaction, or effects a transfer as of the date of the taking of possession or recording.³⁹¹

Thompson v. Fairbanks, 13 A. B. R. 437, 196 U. S. 516: “Whether, and to what extent a mortgage of this kind is valid is a local question, and the decisions of the State Courts will be followed by this court in such case.”

In re Hunt, 14 A. B. R. 427, 139 Fed. 283 (D. C. N. Y.): “It must be borne in mind in considering these questions that the effect of mortgages and acts under them in transferring title, etc., is a local question, and the courts of the United States must follow the decisions of the highest court of the State.”

Compare, analogously, *In re Engle*, 5 A. B. R. 373, 105 Fed. 893 (D. C. Pa.): “The bonds accompany and are secured by a mortgage, and it is argued in support of the validity of the executions that the lien of the judgments is carried back by the law of Pennsylvania to the date when the mortgage was recorded, and should, therefore, be considered as if the lien had originated at that time. This may be true for certain purposes, but, under the present circumstances, I must decline to assign a fictitious date to the existence of the lien.”

§ 1374. Mere Exchanges of Property of Equal Value within Four Months, Not Preferences.—The mere exchange of property of equal value within the four months will not constitute a preference; nor will the renewal of securities of equal value; but if the property last given exceeds the value of the property for which it is exchanged, a preference will exist as to the excess; but the exchange will only be voidable as a preference to the extent of such excess.³⁹²

^{391.} See discussions in the following paragraphs, ante, § 1139, et seq., and § 1237. *Fisher v. Zollinger*, 17 A. B. R. 625, 149 Fed. 54 (C. C. A. Ohio).

Instance, after-acquired property coming under chattel mortgage. In Vermont possession taken within the four months period reverts to original date of mortgage. *Thompson v. Fairbanks*, 13 A. B. R. 437, 196 U. S. 516. Compare, *In re Ball*, 10 A. B. R. 564, 123 Fed. 164 (D. C. Vt.), rejected by *Thompson v. Fairbanks*, 13 A. B. R. 437, 196 U. S. 516.

Instance, after-acquired property coming under agreement for indemnity lien, *Wood v. U. S. Fidelity & Guaranty Co.*, 16 A. B. R. 25, 143 Fed. 424 (D. C. Mass.).

^{392.} *In re Cutting*, 16 A. B. R. 753, 145 Fed. 388 (D. C. N. Y.). As to all these several propositions, see ante, “First and Third Elements of a Preference,” §§ 1295, 1320, et seq.

§ 1375. **Four Months—How Computed.**—The four months are to be computed by excluding the day the preference was given or recorded, and including the day the petition is filed; but the reverse method is harmless error.³⁹³

Fractions of a day are to be considered,³⁹⁴ and it is the time of the filing of the petition, not of the issuance nor service of the subpoena that controls.³⁹⁵

§ 1376. **Preferences Made before Bankruptcy Act Passed, Voidable.**—Preferences made before the passage of the Bankruptcy Act are voidable, if made within four months of the filing of the petition. Of course this situation under the Present Act could only arise in the case of voluntary bankruptcies, since by the Act itself involuntary petitions could not be filed until four months after the Act otherwise took effect.³⁹⁶

§ 1377. **Preferences Made after Filing Petition if before Adjudication.**—A preference may be made by the bankrupt, after the filing of the petition as well as before, if made before adjudication³⁹⁷ (if made with property that was transferable or leviable on at the time of the filing of the petition).

The title vests only "as of the date he was adjudged a bankrupt."³⁹⁸

§ 1378. **After Adjudication, No Preference.**—After adjudication it is not within the power of a bankrupt to make a preference: title has passed from him.³⁹⁹

§ 1379. **Preferences as Affected by Recording.**—Where the preference consists in a transfer, the four months period will not expire until

393. Bankr. Act, § 31 (a); *Whitley Grocery Co. v. Roach*, 8 A. B. R. 505, 115 Ga. 918; *Dutcher v. Wright*, 94 U. S. 553; *In re Dupree*, 97 Fed. 28; *In re Stevenson*, 2 A. B. R. 66, 94 Fed. 110 (D. C. Del.); *In re Planing Mill Co.*, 6 A. B. R. 38 (Ref. N. Y.).

394. *In re Planing Mill Co.*, 6 A. B. R. 38 (Ref. N. Y.); apparently contra (analogously), *In re Hill*, 15 A. B. R. 499, 140 Fed. 984 (D. C. Calif.).

395. *In re Lewis*, 1 A. B. R. 458 (D. C. N. Y.).

396. *In re Brown*, 1 A. B. R. 107, 91 Fed. 358 (D. C. Ore.); contra, *In re Terrill*, 4 A. B. R. 145 (D. C. Vt.).

397. Bankr. Act, § 60 (a); Instance, *In re Austin*, 13 A. B. R. 139 (D. C. Hawaii). Compare, *In re Duncan*, 17 A. B. R. 289 (D. C. S. C.): In this case, however, the avoidance was placed, not upon the ground of preference, but of the passing of the title by the filing of the petition.

398. Obiter, *In re Milk Co.*, 16 A. B. R. 729, 145 Fed. 1013 (D. C. Penn.).

399. *Ryttenberg v. Schefer*, 11 A. B. R. 652, 131 Fed. 313 (D. C. N. Y.).

Instances where facts show no preference within the time limit:

1. *Pratt v. Christie*, 12 A. B. R. 1, 95 App. Div. 282 (N. Y. Sup. Ct. App. Div.).
2. *In re Folb*, 1 A. B. R. 22, 91 Fed. 107 (D. C. N. Car.): Creditors receiving preferences under an assignment made more than a year before bankruptcy.

3. *Batchelder & Lincoln Co. v. Whitmore*, 10 A. B. R. 641 (C. C. A. Mass.): Creditor receiving secret advantage under a composition made in 1896.

four months after the date of the recording or registering of the transfer, if by law recording or registering is required.⁴⁰⁰

This exception was engrafted upon the statute by the Amendment of 1903, and was engrafted in order to prevent secret preferences by way of mortgages and other liens not recorded until after the four months period had elapsed within which bankruptcy proceedings could have been brought.⁴⁰¹

However, it had been held, even before the law was amended, that the date of the recording or filing of a preferential chattel mortgage or other instrument would govern, notwithstanding it was executed and delivered before the four months.⁴⁰² But the true rule, before the Amendment of 1903, was *contra*, namely, that if the actual transfer took place before the four months period, it was good, notwithstanding the recording or registering of the transfer occurred within the four months period.⁴⁰³

It would seem on principle that since the Amendment of 1903, making the four months an essential element of the very definition of a preference itself, the date of the recording or filing is to be taken as being the date of the consummation of the transfer so far as creditors in bankruptcy are concerned.⁴⁰⁴

English v. Ross, 15 A. B. R. 370, 140 Fed. 630 (D. C. Pa.): "The case turns therefore on whether the transfer of property effected by the deeds is to be judged as of the dates when they were respectively executed, or as of June 2, 1903, when they were left for record; the latter only being within the four months period prior to bankruptcy, necessary to make out a preference. * * *

"Having sole regard to the State law, it must be confessed that the deeds in

400. Bankr. Act, § 60 (a). Compare *post*, § 1507.

401. Compare, *First National Bank v. Johnson*, 10 A. B. R. 208, 68 Neb. 641.

402. *Babbett v. Kelly*, 9 A. B. R. 335, 70 S. W. 384 (St. Louis Ct. App.), also, *In re Klingman*, 4 A. B. R. 254, 101 Fed. 691 (D. C. Iowa).

Obiter, *Matthews v. Hardt*, 9 A. B. R. 373, 76 N. Y. Sup. 134: "The trend of the decisions in the United States Supreme Court under the recent Bankruptcy Act upon the subject of the date of the transfer, is in support of the view that with respect to an instrument of transfer, it is the time when such instrument is recorded, or when possession is taken or notice is otherwise brought home to the creditors of the bankrupt that is controlling."

403. *In re Mersman*, 7 A. B. R. 46 (Ref. N. Y.).

404. See *ante*, "Nature of Limitation," § 1369; *In re Montague*, 16 A. B. R. 20, 143 Fed. 428 (D. C. Va.).

Compare, analogously, *Johnson v. Huff*, 13 A. B. R. 287, 133 Fed. 704 (C. C. Va.): This was a case where an order of a contractor on funds in the owner's hands was not to be presented unless the contractor did not keep up payments; the court holding it not to be a "transfer" until presentation. Compare, *In re Klingman*, 4 A. B. R. 254, 101 Fed. 691 (D. C. Iowa). See note *In re Wright*, 2 A. B. R. 368, 96 Fed. 187 (D. C. Ga.); inferentially, *contra*, *In re U. S. Food Co.*, 15 A. B. R. 329 (Ref. Mich.).

This would not be the effect of a failure to file or record a conditional sale contract, however, for such contract does not effect a transfer but simply keeps a title that never has left the original owner, preference implying transfer. *Bradley Clark & Co. v. Benson*, 13 A. B. R. 170, 100 N. W. 670 (Minn.); *In re Cavagnaro*, 16 A. B. R. 323, 143 Fed. 668 (D. C. N. H.). But see, *In re Klingman*, 4 A. B. R. 254 (D. C. Iowa). But compare, *Deland v. Miller*, 11 A. B. R. 744, 119 Iowa 368.

controversy were effective to convey title, whatever their purpose, without being recorded; and, that if this is controlling, it is, to say the least, doubtful whether they can be disturbed. It is only qualifiedly, here, that recording can be said to be required. Originally under the Act of May 28, 1715, 1 Smith's Laws, 95, except as to mortgages, it was permissive merely. *Powers v. McFerran*, 2 Serg. & Rawle, 34; *Kellar v. Nutz*, 5 Serg. & Rawle, 246. But by the Act of May 18, 1775, 1 Sm. Laws, 422, it was made compulsory, within six months, if the grantee would preserve his title as against subsequent purchasers or mortgagees, without notice, for value. * * *

"But, however, the deeds would be regarded under ordinary circumstances, and without passing upon the standing of the trustee with reference to the State law, the case turns, in my judgment, on the construction to be given to that provision of the Bankruptcy Act, and others, by which it is subtended, which, treating of voidable preferences occurring within four months of bankruptcy, prescribes (§ 60a): 'Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer if by law such recording or registering is required.' This was introduced by the amendatory Act of 1903, and was manifestly intended (*Collier*, 5th ed., 453) to overcome the decisions under the law as it previously stood (*In re Wright*, 2 Am. B. R. 364; *In re Mersman*, 7 Am. B. R. 46; *Dean v. Plane*, 195 Ill. 495), by which it was held the same as under the Act of 1867 (*Clark v. Iselin*, 21 Wall. 360, 375; *Sleek v. Turner*, 76 Pa. 142), that the date of the delivery of a preferential instrument, rather than the date when it was put on record, marked the beginning of the four months period, although even then, cases were not wanting which held that the date of record was to be taken. *In re Klingaman*, 4 Am. B. R. 254; *Chesapeake Shoe Co. v. Seldner*, 10 Am. B. R. 466, 122 Fed. 593; *Babbitt v. Kelley*, 9 Am. B. R. 335; *Mathews v. Hardt*, 9 Am. B. R. 373; *Johnson v. Huff*, 13 Am. B. R. 287. It also must be regarded as intended to bring the section where it is found into substantial accord with § 3a, b, where, after defining what shall constitute an act of bankruptcy, and providing that proceedings must be begun within four months after the commission by the bankrupt of the act relied upon, it is declared:

"Such time shall not expire until four months after the date of the recording or registering of the transfer or assignment, where the act consists in having made a transfer of any of his property with intent to hinder, delay or defraud his creditors, or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of creditors; if by law such recording or registering is required or permitted; or, if it is not, from the date when the beneficiary takes notorious, exclusive or continuous possession of the property, unless the petitioning creditors have received actual notice of such transfer or assignment."

"According to what is so provided, there would seem to be no question that, in this State, where a preferential or a fraudulent transfer, which is relied upon as an act of bankruptcy, consists in a conveyance of real estate, under which possession is not taken, and of which the petitioning creditors have no actual knowledge, it is not committed in legal intentment until the deed or other instrument by which it is accomplished is put on record. Notice is made essential, and where there is none in reality, according to the other alternative, it must be supplied constructively by recording. This is the effect of record by the State law and is thus 'required' within the meaning of this provision. Any other view makes it insensible and useless.

"But whatever construction is thus given to the one section (§ 3a, b), is neces-

sarily carried forward and impressed upon the other (§ 60a). The two are intimately related, the one in that particular being the basis of and dominating the other, and it is the failure to recognize this and to draw them together as they should be, that is responsible for any misapprehension. What is thus 'required' in the way of recording in the one is also 'required' as a consequence in the other, and for the same purpose. It is true that some things are omitted in the transition, but enough is retained to make this manifest. It is none other, for instance, than the preference which is made an act of bankruptcy in the earlier section that is intended to be made voidable at the instance of the trustee, in the interest of creditors, in the later, and upon substantially the same terms, the superadded condition only being present, that the person who received it had reasonable cause to believe that a preference was intended. In the present case, the petitioning creditors could unquestionably have assigned as an act of bankruptcy, the transfer of his property by the bankrupt to the defendant by the deeds in controversy, they having no knowledge of them, and the deeds having been put on record within the four months period. But if so, how can the defendant successfully deny the effect of them as a preference in his hands? The character of the transaction as a preference does not change in the shifting of the issue from the bankrupt to the preferred creditor. It may, its voidable quality dependent upon whether the creditor had reasonable cause to believe that a preference was intended. But that is another matter, and does not concern us, being unquestionably present here.

"It seems to me, therefore, clear that in any case, where the facts are the same as they are here, a deed by which a transfer of a bankrupt's property is effected, and under which no possession is taken, is to be judged, on the question of preference, by the date when it is put on record, regardless of the date of delivery; and that, tested by this, the conveyances to the defendant cannot stand. I do not lose sight of the fact that the first of these was several years prior to the passage of the Bankruptcy Act, which is not to be given a retroactive effect if it can be avoided. But the security thereby provided was a continuing one. It was not given merely for the debt then due, but also for whatever might subsequently become so; and it is safe to conclude that the original debt of \$573 is long since paid, together with whatever after that antedated the passage of the Act. Thereafter the defendant held his deeds subject to the condition there imposed, and at the risk, if not duly put on record, of having them declared void, as here upon the intervention of bankruptcy within four months after they were. If the result seems in any respect harsh, it is to be remembered that by withholding them as he did, and allowing the bankrupt to remain in full possession and enjoyment of his property, the defendant enabled him to secure a false credit, which has worked fully as much injury to others entirely innocent.

"The only doubt I have is raised by those cases which apparently hold that the right of the trustee to question such a conveyance is to be determined by the State law and what there obtains. *Thompson v. Fairbanks*, 196 U. S. 516, 13 Am. B. R. 437; *Humphrey v. Tatman*, 198 U. S. 91, 14 Am. B. R. 74, 25 Sup. Ct. Rep. 567; *In re N. Y. Economical Printing Co.*, 6 A. B. R. 615; *In re Shirley*, 7 Am. B. R. 299. But all these will be found on examination to have arisen prior to the amendments of 1903, by which the clause with regard to recording was carried forward from the third section to the sixtieth; and do not assume to pass upon the Act as it now stands. Neither do they consider the relation existing between the two sections named. Regarding them as in these respects distinguishable, I have ventured to follow what seems to me to be the natural and necessary construction to be given to this part of the Act, upon which its

efficiency in the matter of preferences, in my judgment, in large measure depends."

Contra, *Rogers v. Page*, 15 A. B. R. 506, 140 Fed. 596 (C. C. A. Tenn.): "The preference in such case was given when the mortgage was executed and delivered."

And thus a chattel mortgage, although originally given on a presently passing consideration, might, under this doctrine, amount to a preference, if it is not filed until within the four months period, for it would not be effective as a transfer until filed, and yet, at the date of filing, the consideration on which it was based would be past.

Nevertheless, such does not appear to be the trend of the more recent decisions.⁴⁰⁵

Christ v. Zehner, 16 A. B. R. 790, 212 Pa. St. 188, 61 Atl. 822: "The only question remaining, then, is as to when the title to the property of the bankrupt actually passed. Was it when the bill of sale was executed and delivered, or when possession of the goods was actually given? The authorities cited by the trial judge seem to fully sustain his conclusion that the property was transferred when the bill of sale was executed and delivered."

Nor was it, the view held by the courts under the law of 1867.

Sawyer v. Turpin, 91 U. S. 118: "The conveyance was by a bill of sale absolute in its terms, having no condition or defeasance expressed, but it was understood by the parties to be a security for the debt due. It was, in substantial legal effect, though not in form, a mortgage. Having been executed more than four months before the petition in bankruptcy was filed, there is nothing in the case to show that it was invalid. True, it was not recorded, and it may be doubted whether it was admissible to record. True, no possession was taken under it by the vendee; but for neither of these reasons was it the less operative between the parties. It might not have been a protection against the attaching creditors, if there had been any; but there was none. It was in the power of Turpin to put it on record any day, if the recording acts apply to such an instrument, and equally within his power to take possession of the property at any time before other rights against it had accrued. These powers were conferred by the instrument itself, immediately on its execution."

That a prior lien, in exchange for which the lien or other transfer in question was given within the four months period, was not recorded as required by statute, has been held immaterial, if it was nevertheless given upon a presently passing consideration.⁴⁰⁶

Rogers v. Page, 15 A. B. R. 506, 140 Fed. 596 (C. C. A. Tenn.): "Being a valid security under the law of the State, it was entirely competent for the mortgagee to demand and receive payment, or to enforce his lien in default, and, if foreclosure occur or payment is received by the voluntary action of the mortgagor before the property is seized by creditors or impounded as a conse-

⁴⁰⁵. *York Mfg. Co. v. Cassell*, 15 A. B. R. 633, 201 U. S. 342. Also, see discussion, ante, § 1214. In *re Cutting*, 16 A. B. R. 751, 145 Fed. 388 (D. C. N. Y.).

⁴⁰⁶. *Deland v. Miller*, 11 A. B. R. 744, 119 Iowa 368.

quence of an adjudication in bankruptcy, the transaction will not be a preference, provided the unrecorded lien was created more than four months before adjudication. The preference over other creditors in such case was given when the mortgage was executed and delivered. *Sabin v. Camp* (C. C.), 3 Am. B. R. 578, 98 Fed. 974; *Humphrey v. Tatman*, 198 U. S. 91, 14 Am. B. R. 74. It follows that if the defendant has shown an appropriation of a part of the purchase price of the bankrupt's coal land in satisfaction of a valid indebtedness secured by an unrecorded lien made, accepted, and held in good faith, more than four months before the filing of the mortgagor's voluntary petition in bankruptcy, he may escape a decree against him to that extent."

This doctrine, though undoubtedly the prevailing doctrine, seems dangerous, for it affords an easy method of circumventing the provision against secret preferences. The more correct view would seem to be that laid down above, namely, that the date of the recording or filing is the date of the consummation of the transfer as to creditors, since it is then and not beforehand that the creditor has effectively depleted the trust fund. In accordance with the latter view proof of insolvency, reasonable cause of belief and of all the other elements of a voidable preference, should be made as of the date of the recording—the date of the "transfer."

§ 1380. Where Recording, etc., Not "Required," Preference Dates from Actual Transfer.—Where the statute does not require registry or recording, the consummation of the preference will date from the actual transfer, as the State law may determine such date to be.⁴⁰⁷

§ 1381. Whether, Where Not "Required," Preference Dates from Taking of Notorious and Exclusive, etc., Possession.—It is held, in some cases, that where recording or registering is not required by the State law the date of the preference will not be considered to be the date of the taking of notorious, exclusive or continuous possession by the beneficiary or from the giving of actual notice thereof to creditors; and that these provisions of § 3 (b), defining the time limits of a preference as an act of bankruptcy, are not to be imported into § 60 (a) for the recovery of preferences from creditors.⁴⁰⁸

But other cases hold that the Amendment of 1903 to § 60 was intended to bring §§ 60 (a) and 3 (a) into harmony in this particular.⁴⁰⁹

Loeser v. Bank & Trust Co., 17 A. B. R. 631, 148 Fed. 975 (C. C. A. Ohio): "What has been the effect of that Amendment? This fact was referred to by Mr. Ray of the House Judiciary Committee, who explained the amendment in question, when proposed in Congress, as intended to prevent preferences under

^{407.} But compare, *Matthews v. Hardt*, 9 A. B. R. 373, 76 N. Y. Sup. 134.

^{408.} *Little v. Hardware Co.*, 13 A. B. R. 422, 133 Fed. 874 (C. C. A. Tex.); *In re Wright*, 2 A. B. R. 364, 96 Fed. 187 (D. C. Ga.); *In re Hunt*, 14 A. B. R. 416, 139 Fed. 283 (D. C. N. Y.).

^{409.} *Long v. Farmers' State Bk.*, 17 A. B. R. 109, 147 Fed. 360 (C. C. A. Iowa); *English v. Ross*, 15 A. B. R. 370, 140 Fed. 630 (D. C. Penn.).

unrecorded instruments given more than four months before the filing of the petition. Touching this he said:

"By adding to 'A' a clause which shall be equivalent to that found in § 3, B, (1). It seems that as § 60a now stands, a preferential mortgage may be given and the creditor preferred, by withholding it from record four months be able to dismiss the trustee suit to recover the same though the paper was actually recorded within the four months period. See *In re Wright* (Ga.), 2 Am. B. R. 364, 96 Fed. 187; *In re Mersman* (N. Y.), 7 Am. B. R. 46.' Vol. 35, part 7, Cong. Record, 6943.

"Before this amendment, § 60a read as follows:

"A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.' * * *

"(1) A preference which is an act of bankruptcy by § 3 should in an harmonious law be voidable by the trustee. By that section a transfer made by one, 'while insolvent,' of any portion of his property to one or more of his creditors 'with intent to prefer such creditors over his other creditors,' is made an act of bankruptcy, and a petition may be filed against such person 'within four months after the commission of such act.' With respect to the date of the commission of such act of bankruptcy, subdivision (1) of the same section provides, that the date from which the four months begins to run shall be 'the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property' * * * 'for the purpose of giving a preference as hereinbefore provided,' * * * 'if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment.' By § 60a, a definition of a 'preference' is given which under § 3 would constitute an act of bankruptcy and by § 60b, a 'preference' so defined is made voidable by the trustee. But as we have seen heretofore, § 60a and (b) did not make a preference voidable by the trustee unless the preference, whether under a recorded or unrecorded instrument, was given within four months prior to the filing of a petition in bankruptcy. Thus, a 'preference' under § 3, as denied by § 60a, might constitute an act of bankruptcy and justify an adjudication if given by an unrecorded instrument more than four months prior to bankruptcy and the preference itself be enforced as a perfectly valid act. The plain purpose of the amendment of § 60a was to bring it into harmony with § 3, by making the same period of time the test as to whether a preference may be avoided by the trustee under the former, or may constitute an act of bankruptcy under the latter. The construction given to § 3 should be carried forward and given to § 60a as amended, thus bringing them into consistent relations. 'The two,' said Judge Archbald, in *English v. Ross*, cited above, 'are intimately related, the one in this particular being the basis of and dominating the other, and it is the failure to realize this and to draw them together as they should be that is responsible for any misapprehension. What is thus "required" in the way of recording in the one is also "required" as a conveyance in the other and for the same purpose.'

"(2) The evil to be corrected was that of secret preferences, given by withholding from record instruments which by the whole policy of recording statutes should be recorded.

"This evil was pointed out by the author of the Amending Act of 1903 and

the object of the amendment of 60a was stated to be the remedying of this evil. The law as it stood encouraged such secret liens and preferences, for if they could be concealed for four months, though acts of bankruptcy, they were not voidable by the trustee. If we say, that unless the law of the State where the transfer is made makes void all such transfers as to all the world, that it is not a law which 'requires' recording, the evil will continue and judges will continue to bewail the iniquity of a law which makes such a secret transfer an act of bankruptcy and yet holds the preference valid against the bankrupt's estate because made more than four months before starting bankrupt proceedings against the maker. See the lament of Judge Ray, *In re Hunt*, 14 Am. B. R. 416, 139 Fed. 286-287."

And it was held, even before the Amendment of 1903 that § 3 (b) and § 60 (a) should be construed together.⁴¹⁰

§ 1382. Where "Required" Only as to Bona Fide Purchasers and Encumbrancers.—Where the failure to record or register the transfer does not make the transfer void as to creditors, but only as to bona fide purchasers or encumbrancers, the date of the recording would not be the date from which to compute the four months. Obviously, the case would stand precisely as if recording or registering were *not* required.⁴¹¹

§ 1383. Where State Law Does Not "Require" Recording, but Merely "Permits" It.—Where the State law does not "require" the recording, in order to give validity as against levying creditors, recording is not necessary, although recording may be "permitted."⁴¹²

Compare, *In re Hunt*, 14 A. B. R. 416, 139 Fed. 283 (D. C. N. Y.): "This last sentence was added by the amendment of February 5, 1903. As introduced in the House of Representatives by the author of the amendment, as it was reported from the Judiciary Committee of the House of Representatives and as it passed the House the words 'or permitted, or if not, from the date when the beneficiary takes notorious, exclusive or continuous possession of the property transferred' followed the word 'required' and ended the sentence. Had the section become a law in this form the ending of the amendment would have been, 'if by law such recording or registering is required or permitted,' etc. In such case there would be no contention here on this subject. In this regard it followed subdivision b, § 3, of the Act. The Senate struck out the words 'or permitted,' etc., above quoted. Did it regard these words as surplusage? Were they surplusage? This court thinks not. The words 'if by law such recording or registering is required' must mean the same as they would if the words 'to make the transfer valid against the person executing it' or 'to make the transfer valid as against the general creditors of the person executing it' were added after the word 'required.' In New York the registering or recording of a mortgage on real estate is not required in order to give it validity as against the mortgagor, or general or even judgment creditors; consequently recording is

410. *In re Klingman*, 4 A. B. R. 254, 101 Fed. 691 (D. C. Iowa).

411. *In re Hunt*, 14 A. B. R. 416, 139 Fed. 283 (D. C. N. Y.); *In re McIntosh*, 18 A. B. R. 173, 150 Fed. 546 (C. C. A. Calif.).

412. Compare, also, *Drug Co. v. Drug Co.*, 14 A. B. R. 477, 136 Fed. 396 (C. C. A. Tex.).

not required to give it validity as against the trustee in bankruptcy. The word 'required' does not mean the same as 'permitted,' or the same as the words 'required in any case, or for any purpose.' In some States a real estate mortgage must be recorded or registered to be good as against even general creditors. The laws of New York require the recording of such a mortgage as against purchasers and mortgagees in good faith and for value only."

In the case *In re Hunt*, the court—Judge Ray, having himself been the chairman of the Judiciary Committee of the United States House of Representatives, whose amendment was amended by the striking out of the words "or permitted"—held that the word "required" means, not "required in order to make the transfer valid as against creditors" but "required in order to make the transfer valid as against the person executing it" or "as against the general creditors of the person executing it." Notwithstanding the peculiar weight of that court's opinion, arising from the court's intimate acquaintance with the legislation itself, it would seem that the words "or permitted" would not have added to the strength of the Statute nor have made its meaning at all clearer. On the contrary, it would have introduced confusion and uncertainty, for many kinds of transfers are "permitted" to be recorded, if the recorder's fee is paid. Such being the case, the effect of the adoption of the words "or permitted" would have been to make it necessary to record numberless transfers not ordinarily recorded but whose record might be "permitted." Such indeed, is the subsequent criticism of Judge Ray's reasoning in *Loeser v. Bank & Trust Co.*, 17 A. B. R. 631 (C. C. A. Ohio), quoted later.

The better rule is that enunciated in the main proposition, that "required" refers to validity as against levying creditors.

First Nat'l Bk. *v. Connett*, 15 A. B. R. 662, 142 Fed. 33 (C. C. A. Mo.): "Within the meaning of amended § 60a of the Bankruptcy Act, the Missouri Law (Rev. St. 1899, § 3404) required the recording of chattel mortgages. To be sure an unrecorded mortgage is not pronounced void absolutely and under all circumstances, but it 'is required to be recorded' in the sense in which that phrase is customarily used, and the language of requirement is similar to that employed in the registry laws of most of the states. The word 'required' found in the phrase 'the recording or registering of the transfer, if by law such recording or registering is required' of the amendment of § 60a, has reference to the character of the instrument of transfer required to be recorded by the State law rather than to the particular individuals who by reason of adventitious circumstances may or may not be affected by an unrecorded instrument. Thus an affirmative answer would unhesitatingly be given to the inquiry: 'Does the law of Missouri require the recording of chattel mortgages?'"

"The Circuit Court of Appeals of the Fifth Circuit, in a case involving the registry statute of Texas, held that, as an unrecorded chattel mortgage was good between the parties thereto and against ordinary creditors, and as there were no intervening lienholders or purchasers, it could not be said that a registry or recording was required, and upon the facts of that case it accordingly concluded that a chattel mortgage given before but placed on record within the four months before the institution of bankruptcy proceedings could not be considered as a voidable preference. *Meyer Bros. Drug Co. v. Pipkin Drug Co.* (C. C. A.), 14 A. B. R. 477, 136 Fed. 396. In effect this is the adoption, without

exception or qualification, of the old rule that whether and to what extent a chattel mortgage given before but recorded within the four months period is valid against a trustee in bankruptcy should be determined exclusively by the State law. In our opinion, the amendment of 1903 has qualified this rule in respect of the question whether such a mortgage may constitute a voidable preference under subdivisions 'a' and 'b' of § 60. If this has not resulted, we fail to see that Congress has accomplished anything by the amendment."

Loeser v. Bank & Trust Co., 17 A. B. R. 633, 148 Fed. 475 (C. C. A. Ohio): "Some effect should be given to the amendment of § 60a if the language of the provision will permit. If 'required' be construed as applying only to a law which makes every such transfer absolutely void as to all persons, the amendment will be of no effect, for no recording statute, of which we have any knowledge, makes void transfers or conveyances as between the parties and all of them give effect to such instruments as against some classes of persons having actual notice. The amendment would be idle and the evil sought to be remedied would flourish as before and the legislative purpose be frustrated.

"(4) In view of all of the foregoing considerations we reach the conclusion that the word 'required,' as used in the amendment, refers to the character of the instrument giving the preference or making the transfer, without reference to the fact that as to certain persons or classes of persons it may be good or bad according to circumstances. If to be valid against certain classes of persons, the law of the State 'requires' the constructive notice of registration, it is a transfer which under the amendment is 'required' to be recorded. This takes account of the purpose and policy of recording acts; remedies the evil which flourished under the law before the amendment; gives effect to the plain purpose of Congress; and gives some effect and force to a provision which would otherwise be meaningless, and brings §§ 3 and 60a and 60b into harmony of purpose and meaning.

"(5) We do not ignore the argument, that in § 3 the word 'required' is followed by the words 'or permitted,' and that the latter words are omitted from the amendment, and that the words 'or permitted' were in the Act as introduced by the author of the bill and retained in the amendment as it passed the House but was dropped in the Senate.

"It is a fact of which we may take notice, that it is common to recording statutes to set out a list of contracts, conveyances, and transfers which may be registered, or are 'entitled' or 'permitted' registration. But if an instrument is not 'entitled' or 'permitted' by law to be recorded, its record is of no effect as constructive notice. * * *

"We conclude from the general purpose and policy of recording statutes, that the words 'or permitted' are of no vital signification in § 3. If the instrument giving the preference is one which is 'permitted' to be recorded in order to give it validity as against certain classes of persons, though perfectly valid without record as to other classes, it is an instrument 'required' to be recorded within the meaning of the word as there used. The words 'required' and 'permitted' in the connection used are of synonymous legal meaning. The dropping of the words 'or permitted' by the Senate is, therefore, of vital signification if we are right in regarding § 3 and § 60a as closely connected provisions."

§ 1384. Preferences as Affected by Taking Possession within Four Months under Unfiled Mortgages or Mortgages Covering After-Acquired Property.—It has previously been observed (ante, § 1236), that unrecorded instruments may be made effective as against the trustee in bankruptcy, by the taking of possession thereunder by the mortga-

gee before the mortgagor's bankruptcy. This will be true even though such possession be taken within the four months prior thereto, if, by the State law, such taking of possession causes the lien to revert to the date of the original transaction, although it is doubtfully true in case the lien is considered by the State law not to so revert but to arise at the date of the taking of possession.

Although "transfers," whether by way of pledge, mortgage, sale, gift or any other or different mode of parting with property, will be preferences under the Bankruptcy Act, if made within the four months preceding the mortgagor's bankruptcy (provided the other elements of a preference co-exist), yet the Bankruptcy Act looks to the State law to determine the time when such "transfer" is held to be consummated, and the facts that constitute a transaction a "sale," or "mortgage" or "pledge," etc. So it is that in States where the taking of possession under an unrecorded instrument causes the "sale" or "mortgage" or "pledge" to revert to the original date of execution, then in such State the "transfer" will be held to have occurred at the date of the original transaction and not at the date of taking possession.⁴¹³

Fisher v. Zollinger, 17 A. B. R. 610, 149 Fed. 54 (C. C. A. Ohio, affirming *In re Nat'l Valve Co.*, 15 A. B. R. 524): "This act of taking possession perfected the lien and made the instrument operative and effective against the world unless the bankrupt trustee has by virtue of some positive provision of the bankrupt law, a right to avoid a mortgage which was good as between the parties and all others who had acquired no intervening rights before the mortgagor took possession. If he has a right to avoid this mortgage under § 60a of the bankrupt law, as a preference made within four months of the filing of the petition in bankruptcy against the mortgagor, it will be because the preference of the mortgage was obtained only when the mortgagee took possession and was not a lien as of the date of the mortgage. But it cannot for a moment be pretended that Zollinger's lien under the mortgage only arose when he took possession. He took possession by virtue of his mortgage and his lien relates to its date. It was not a lien created when he took possession. The lien upon the chattels conveyed was always good as between the parties. That the property was subject to seizure by the process of creditors, or might pass to a subsequent purchaser, may be conceded. The only effect of taking possession was to cut off the possibility of rights accruing to third persons. The status of Zollinger was identical with that of a mortgagee under an unrecorded chattel mortgage. Until recorded the mortgaged property is subject to seizure by third persons. The lien of such an unrecorded mortgage relates to the date of the instrument and is not a preference within the meaning of 60a of the Bankrupt Act, if that date is more than four months antecedent to the filing of a petition in bankruptcy against the mortgagor. *Rogers v. Page*, 15 Am. B. R. 502, 140 Fed. 596; *Humphrey v. Tatman*, 198 U. S. 91, 14 Am. B. R. 74. The effect of the amendment of February 5, 1903, upon such unrecorded instruments we need not here consider. * * *

"But the contention of counsel for appellant is, that it was this act of 'taking

413. See ante, § 1237, et seq.

In re National Valve Co., 15 A. B. R. 524, 140 Fed. 679 (D. C. Ohio, affirmed sub nom. *Fisher v. Zollinger*, 7 A. B. R. 618, 149 Fed. 154, C. C. A. Ohio).

possession which created the lien and as this took place on the eve of bankruptcy and at a time when Zollinger knew the National Valve Company was insolvent and could not continue its business,' it was therefore a preference obtained, granted within four months preceding the bankruptcy of that company. The whole case must turn here, for, if the preference claimed by Zollinger is not to be attributed to the mortgage as of its date rather than as of the date of this act of taking possession, the decree of the court below must be reversed in so far as Zollinger was permitted to enforce a lien against such after-acquired property. But we cannot assent to the premise of the argument. The lien of Zollinger against the after-acquired property did not arise when he took possession. As to third persons, at law, it was inchoate. The possession then taken only perfected this incipient lien as against third persons who had not therefore acquired rights. The question as to whether the lien thus perfected relates to the date of the instrument of mortgages, or to the date when possession was taken, is, in principle, identical with the lien of a mortgage of chattels providing that the mortgagor shall remain in possession with a power of sale, or the lien secured by an unrecorded transfer of property. In both the latter instances the mortgage is a perfectly valid security as between the parties, and voidable only by certain third persons who may acquire rights, in one case before the mortgagee took possession and in the other before the mortgage goes to record. Neither is there anything in the Ohio decisions that will justify any distinction in principle and prevent the lien from relating to the date of the mortgage which included the contract for the lien. It is true that in Ohio, as in some other jurisdictions, the lien upon after-acquired property is not regarded as valid at law until perfected or completed by possession. *Chapman v. Weiman*, 4 Ohio St. 481; *Francisco v. Ryan*, 54 Ohio St. 307. In *Francisco v. Ryan*, the Ohio court, referring to *Chapman v. Weiman*, said:

"The principle upon which that case rests is, that the mortgage constitutes a valid and binding contract between the parties, and being so it must be given effect according to the intention of the parties.' * * * Continuing, the court said of such mortgage: It 'is a complete contract already obligatory upon the parties, and which continues to be so until it is fully executed, so that in taking possession of the acquired property in pursuance of its provisions, the mortgagee exercises a right belonging to him under the mortgage.'

"The court quotes with approval from *Chase v. Denny*, 130 Mass., where it said:

"If the after-acquired property is taken by the mortgagee into his possession before the intervention of any rights of third persons, he holds it under a valid lien by the operation of the provisions of the mortgage in regard to it.'

"Whether the lien of an unrecorded mortgage, or a mortgage of chattels where the mortgagor is left in possession with a power of sale, shall relate to the date of the instrument or to the date when the lien is completed or perfected as against third persons who have acquired no intervening rights before the recording of the instrument or taking possession of the mortgaged chattels, is ordinarily of no importance. All persons are cut off by the recording of the instrument or the taking of possession who have not theretofore acquired some right. This is also true as to the relation of the lien of an after-acquired property clause upon such after-acquired property. It is only when some insolvency statute, or some bankruptcy law, avoiding preferences obtained within a given time before a general assignment or the filing of a petition in bankruptcy is involved, that the date of a preference under such an instrument becomes important. In neither *Chapman v. Weinman* nor *Francisco v. Ryan*, both cited above, was the date of the lien upon the after-acquired property of any importance. Neither was

any such question involved in *In re Shirley*, 7 Am. B. R. 299, 112 Fed. 301, or in *In re First National Bank of Canton*, 14 Am. B. R. 180, 135 Fed. 66, and any reference in those cases to the effect of registration as that of a new mortgage was figurative and not intended to intimate that the lien was only of the date of registration. That the lien of an unrecorded mortgage is not of the date of recording but is as of the date of the contract for the lien, is well settled. *Humphrey v. Tatman*, 198 U. S. 91, 14 Am. B. R. 74; *Rogers v. Page et al.*, 15 Am. B. R. 502, 140 Fed. Rep. 342. In case of a mortgage upon property to be acquired, as well as in the other instances above referred to, the lien is the lien contracted for by the instrument of mortgage, and there is just as much room for holding that the lien relates to the date of the contract for the lien in the one instance as in the other. There is nothing in *Francisco v. Ryan* which is antagonistic to this relation of the lien. Upon the contrary, the reasoning of the Ohio court is plainly in line with that of the Vermont court in *Peabody v. Linden*, 61 Vermont 318, and *Thompson v. Fairbanks*, 75 Vermont 361, 369, where it became necessary to decide the date of the lien, because in one case an insolvency statute which avoided preferences obtained within a short time before a general assignment was involved, and the other the effect of § 60a of the Bankrupt Act of 1898 avoiding preferences obtained within four months of bankruptcy."

Some decisions, however, have laid it down as a rule of general law, that the taking of possession of unrecorded instruments within the four months will not constitute a preference, if the original transaction occurred before the four months.⁴¹⁴

§ 1385. Eighth Element of a Preference—Transfer Must Give Creditor Greater Percentage than Other of Same Class.—The effect of the transfer or other appropriation of property must have been to give the creditor receiving it a greater percentage of his claim than some other creditor of the same class in the order of priority. Preference implies advantage of one creditor over others of the same class.⁴¹⁵

It is obvious that if each creditor receives an equal percentage out of the insolvent fund, there can be no preference—that is precisely the equality that the bankruptcy act itself seeks to bring about. It is only because some one is getting more than his share that the bankruptcy act steps in and prohibits the preference.

Swarts v. Fourth Nat'l Bk., 8 A. B. R. 677, 117 Fed. 1 (C. C. A. Mo.): "The dominant purpose of the prohibition of a preference was not to benefit or injure, or to prevent the benefit or injury, of any creditor or class of creditors, but to prevent the debtor from making any disposition of his property which would prevent its equal distribution—to prevent him from doing anything which would result in the payment out of his property of a larger percentage upon any claim than others of the same class would receive. * * * The test of a

⁴¹⁴. *Christ v. Zehner*, 16 A. B. R. 790, 212 Penn. St. 188, 61 Atl. 822, quoting *Sawyer v. Turpin*, 91 U. S. 118.

⁴¹⁵. *West v. Bk. of Lahoma*, 16 A. B. R. 733, 16 Okla. 508; obiter, *In re Bloch*, 15 A. B. R. 750 (C. C. A. N. Y.); impliedly, *Parker v. Black*, 16 A. B. R. 205, 143 Fed. 560 (D. C. N. Y., affirmed in 18 A. B. R. 15); *Spike & Iron Co. v. Allen*, 17 A. B. R. 288 (C. C. A. Va.).

preference, under the act, is the payment, out of the bankrupt's property, of a larger percentage of the creditor's claim than other creditors of the same class receive, and not the benefit or injury to the creditor preferred. *Marshall v. Lamb*, 5 Q. B. 115, 126, 127."

Livingston v. Heineman, 10 A. B. R. 41, 120 Fed. 786 (C. C. A. Ohio, reversing, on other grounds, *In re New*, 8 A. B. R. 566): "The equal distribution of the bankrupt's estate among his creditors, contemplated by the Bankruptcy Law, will not admit of one creditor receiving a greater percentage of his debt than any other creditor of the same class."

Obiter, Peterson v. Nash, 7 A. B. R. 181, 112 Fed. 311 (C. C. A. Minn.): "This provision (§ 60 [a]), it seems, does not make the transfer of property (which includes the payment of money), by an insolvent debtor, in and of itself a preference. It must be so done that the effect of the transfer will be to enable one creditor to obtain a greater percentage of his debt than any other creditor of the same class."

In re Denning, 8 A. B. R. 135, 114 Fed. 219 (D. C. Mass.): "Only that is a preference which enables a creditor to obtain a greater percentage of his debt than other creditors of the same class."

Brittain Dry Goods Co. v. Bertenshaw, 11 A. B. R. 629, 68 Kan. 734: "The theory of the national bankrupt law is to secure a distribution of the debtor's property among the creditors ratably and in proportion to their respective claims. If the insolvent debtor himself should make such distribution of his assets, the creditors receiving their equitable shares ought not to be required to restore to the trustee in bankruptcy what they have received, in order that it may be repaid to them again, less the cost of administering the trust. The end and aim of the bankrupt law is to secure payment to creditors of an equal percentage of their claims. If the insolvent person does this, we can see no reason why his creditors should contribute to pay the expenses of bankruptcy proceedings to accomplish the same result."

In re Read, 7 A. B. R. 111 (Ref. N. Y.): "Under § 60, subdiv. a, the effect of a preferential transfer must be to enable any one of the bankrupts' creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. A payment on account which fails to have this effect is not a preference, though all the other elements are present."

§ 1386. If No Net Decrease of Indebtedness during Four Months, No Preference.—If there be mutual dealings within the four months, but their result does not decrease the net indebtedness to the creditor, the creditor has not received a greater percentage of his claim than some other creditor of the same class and there is no preference.⁴¹⁶

§ 1387. Who Are in "Same Class."—The words "the same class" refer to the classes created by the bankruptcy act itself in prescribing the order of priority in the distribution of the general estate among creditors, as, for instance, taxes are in the first class, wages of workmen, clerks and servants are in the second class, other priorities given out of insolvent estates by state or federal laws are in the third class, and all other creditors constitute the fourth and last class.

It seems clear that the classes meant are precisely the classes created by

⁴¹⁶. See ante, "First Element of Preference," § 1296. See post, § 1419.

the Bankruptcy Act itself. The Act, in § 64, prescribes what debts have priority and the order of their priority.

Thus, no preference can be predicated upon the fact that an insolvent debtor has paid his taxes, state, national and municipal, for such taxes constitute a class by themselves entitled to the first place in the order of priority in bankruptcy administration, and no one can blame an insolvent debtor for doing that which the law otherwise would do for him.

Next, no preference can arise from an insolvent debtor paying all of his workmen, clerks and servants in full for their work within three months, even though thereby but a small per cent. is left for other creditors, for workmen, clerks and servants constitute a class by themselves entitled to priority of payment out of the bankrupt estate anyway; so general creditors cannot complain because the debtor paid them in full—it was not at the expense of the general creditors.

Nor do secured creditors constitute such a class, because they are not priority creditors in the true sense of the word—they are not entitled to priority of payment out of the trust funds at all; they own (of course by way of security) a definite and described part of the property in the hands of the trustee that by reason of the ownership does not belong to the trust fund at all: moreover their rights are not created by any “laws of the States or of the United States” granting priority of payment, so they cannot come within the fifth and last class of priority claimants of § 64; but their rights are created by the voluntary acts of the parties themselves; that is to say, a secured creditor is one who owns, who has the title to, certain definite property which once belonged to the estate and which by this ownership has become separated from the fund out of which, and out of which only, can priority payments be made. Therefore, payment to a secured creditor (unless perchance thereby a corresponding release of property of the debtor is obtained and the property restored to the general fund, as to which, see ante, § 1325) will constitute a preference if it operates to give him a greater percentage of his claim than some unsecured general creditor, for he is not in a separate class by himself but—so far as preferences are concerned—is in the same class with unsecured general creditors; that is to say, neither he nor they are entitled to priority of payment out of the trust fund. Otherwise, as we have seen (ante, § 1325), where there are several secured creditors, holding liens upon the same property, and that property is insufficient to pay them all, the bankrupt could pay out his estate with impunity by paying an equal percentage to each of these secured creditors and, unless the liens were thereby so reduced by the payments as to leave a surplus, there would be nothing for general creditors. It could not be claimed, except as against the last of the secured creditors in the order of priority of liens, that the deficit in the value of the security rendered the claim pro tanto unsecured, for that reasoning would invalidate only the payment upon the last claim. If, then, a payment to a secured creditor results in releasing a corresponding amount of property to the general creditors, then the pay-

ment would not amount to a preference, for it would come under the rule "fair exchange is no robbery." But a payment that would not so operate would be a preference, for general creditors would pro tanto lose part of their so-called trust fund.

The true rule is that the classes meant are the different classes of priority creditors in their order, and, lastly, all other creditors.⁴¹⁷

Swarts v. Fourth Nat'l Bk. St. L., 8 A. B. R. 673, 680, 117 Fed. 1 (C. C. A. Mo., reversing *In re Siegel Hillman Dry Goods Co.*, 7 A. B. R. 351): "While it is true that the Bankrupt Act does not define the word 'class,' nor in terms state what creditors are in the same class, it creates some classes, and specifies others, and it seems to us that the meaning of the word 'class' in the act should if possible, be derived from the statute itself. Section 64, after directing the payment of certain expenses of administration, creates three classes of creditors—parties to whom taxes are owing, employees holding claims for certain wages, and those who, by the laws of the States or of the United States, are entitled to priority. Sections 56b, 57e, and 57h provide for the treatment and disposition of claims secured by property, and of claims which have priority. The creditors who hold these various claims, and the general creditors of the estate, constitute the classes of creditors of which the Bankrupt Act treats. Now, if any one of these various classes is taken by itself and examined, it will be seen that each of the creditors in the same class always receives the same percentage upon his claim, out of the estate of the bankrupt, that every other creditor of his class receives. Where the estate is insufficient to pay the claims of differ-

417. *Contra*, *In re Proctor*, 6 A. B. R. 660 (Ref. Iowa). Also, *contra*, *In re Kohn*, 2 N. B. N. & R. 367 (note to 7 A. B. R. 111, Ref. Wis.).

But payments made within the four months period to a workman cannot be applied upon wages earned before the statutory period, so as to leave a priority claim for the full amount for wages earned within the statutory period; the claimant must surrender his preference on his common claim. *In re King Co.*, 7 A. B. R. 619, 113 Fed. 110 (D. C. Mass.). But, of course, these payments must be shown, since the Amendment of 1903, also to have been received with reasonable cause for belief, etc.

See also, the classifications made in the following cases:

Indorsers held to be in different "class" from holders of undorsed notes: *In re Happke and Doyle v. Milw. Nat. Bk.*, 8 A. B. R. 535, 116 Fed. 295 (C. C. A. Wis.), where the Circuit Court of Appeals held that the holder of an indorsed note receiving payment in full of it from the indorser but with knowledge or at least reasonable grounds for believing the money came from the bankrupts—the makers—themselves is held to be in a different class from the holder of an undorsed note.

Landlords held to belong to separate class:

In re Barrett, 6 A. B. R. 199 (Ref. N. Y.), wherein a landlord was held to belong to a class by himself. This decision was right in its results but not for the reasons stated in the opinion. The proper reason was that the payment of current rent is not the payment of a pre-existing debt but is based upon a contemporaneously arising consideration.

In re Belknap, 12 A. B. R. 326 (D. C. Penn.). Also, see obiter in *Livingston v. Heineman*, 10 A. B. R. 39, 120 Fed. 786 (C. C. A. Ohio), where the Circuit Court of Appeals divides the creditors into two classes, to be sure, making priority creditors one class but confining the second class to **unsecured or general creditors**.

Joint and separate creditors of partnership and individual partners held not to belong to same class: Obiter, *In re Denning*, 8 A. B. R. 136, 114 Fed. 801 (D. C. Mass.).

Wife held to belong to separate class as regards repayment to her of dowry by bankrupt husband in Louisiana, within the four months preceding bankruptcy of the husband. *Gomila v. Wilcombe*, 18 A. B. R. 143, 151 Fed. 470 (C. C. A. La.).

ent classes in full, the classes receive, out of the bankrupt estate, different percentages of their claims, but creditors of the same class receive the same percentage. The test of classification is the percentage paid upon the claims out of the estate of the bankrupt."

Livingston v. Heineman, 10 A. B. R. 42, 120 Fed. 786 (C. C. A. Ohio, reversing, on other grounds, *In re New*, 8 A. B. R. 566): " * * * and there are two general classes—first, those who have priority and are to be paid in full; and, second, general or unsecured creditors, among whom the balance remaining after paying the creditors of the first class, is to be distributed equally, in proportion to the amount of their respective claims."

Inferentially, *In re Read*, 7 A. B. R. 111 (Ref. N. Y.): "Workmen, clerks, and servants constitute a distinct class of creditors, and certain conditions and privileges are attached to their claims. If, therefore, there are sufficient assets to pay all workmen, clerks or servants of the same class in full, payments on account prior to the bankruptcy are immaterial, as each creditor of that class is fully paid, and therefore there can be no preference of one over another. It would be a circuitous remedy, if creditors so situated should be compelled to refund a preference and then immediately have it returned to them."

In re Belknap, 12 A. B. R. 326 (D. C. Penna.): In this case the court held that a landlord entitled to priority out of insolvent funds by State law is not in the "same class" with unsecured creditors, the court saying: "There is no other creditor of the same class, for there is but a single landlord; and, as the claim for rent had priority over the claims of the general creditors, the distress did not enable the landlord to obtain a greater percentage of his debt. The rent was entitled to be paid first out of the proceeds of the very property upon which the distress was levied, whenever it should be sold by the trustee, and therefore the distress gave no new light, but merely hastened the time of payment. When he distrains, a landlord is simply enforcing the priority which is given to him by law, and in no way gains any improper advantage over other creditors by thus converting the property into money more speedily."

In re Feuerlicht, 8 A. B. R. 550 (Ref. N. Y.): "It seems to me that the motion of the trustee in this matter cannot be allowed for the reason that this is a preferred (priority) claim, and even if a payment to a servant of a part of his wages could be called a preference, in this matter the result would simply be that the claimant would be obliged to pay back to the trustee in bankruptcy, the amount that he has received on account and then demand from the trustee as a preference for wages, the whole of the amount of his wages."

In re Flick, 5 A. B. R. 465, 105 Fed. 503 (Ref. Ohio): "A preference to a person entitled to a priority would only be considered a preference as to other creditors entitled to the same priority and not as to general creditors."

§ 1388. Preferences among Priority Creditors.—Of course even in the case of payments to those entitled to priority, as for instance, a workman, a preference would exist if the insolvent had paid one workman a greater percentage of his claim than the others would receive out of the estate.⁴¹⁸

§ 1389. Actual Receipt of Like Percentage by Other Creditors Not Essential to Exoneration from Charge of Preference, if Enough Left.—It is not necessary that other creditors of the same class actually

⁴¹⁸ Inferentially, *In re Read*, 7 A. B. R. 111 (Ref. N. Y.); inferentially, *obiter*, *In re Flick*, 5 A. B. R. 465, 105 Fed. 503 (Ref. Ohio).

shall have received the same proportion in order to exonerate from the charge of preference, if enough is left to give them the same proportion.⁴¹⁹

Brittain Dry Goods Co. v. Bertenshaw, 11 A. B. R. 631, 68 Kas. 734: "There was a finding that the payment to defendant below prevented the remaining creditors from securing payment of their claims from Ridgeway & Co., but, in the light of other answers of the jury, this means that the payment had the effect to prevent a payment in full to other creditors. In the case of *Pepperdine v. Bank* * * * the principle was recognized that if the debtor making the payment had paid, or made provision to pay, other creditors a proportionate amount, the transaction was not a preference. It is essential to a recovery in cases of this kind that the effect of the payment was to enable one creditor to obtain a greater percentage of his debt than other creditors of the same class."

§ 1390. Modes of Proving This Element.—Of course the manner of proving this element will vary with each case. It has been held that proof of its being a preference over others may be established by showing that other creditors of the same class had received nothing on account during the same period;⁴²⁰ or by showing that the creditor receiving the transfer received full pay or full security, while not sufficient was left to pay or secure all remaining creditors in full.⁴²¹

Obiter, *Brittain Dry Goods Co. v. Bertenshaw*, 11 A. B. R. 631, 68 Kas. 734: "If plaintiffs in error had received all of their claim, the payment manifestly would have been a preference, for it was clearly shown that the debtor's assets were insufficient to satisfy all they owed."

§ 1391. Transfer Not Necessarily to Creditor nor Agent if Benefit Accrues to Creditor.—The transfer need not be to the creditor nor to his agent, so long as the effect of it is to enable the creditor to receive out of the debtor's estate a larger percentage of his claim than others of the same class.

§ 1392. But Either Actual Receipt or Actual Benefit Requisite.—The property must have been actually received by the creditor or the creditor have actually gotten the benefit of it in some way.⁴²²

⁴¹⁹ Inferentially, *Brittain Dry Goods Co. v. Bertenshaw*, 11 A. B. R. 631, 68 Kas. 734; *Pepperdine v. Bank*, 10 A. B. R. 570, 84 Mo. App. 234, 242.

⁴²⁰ In *re Colton Export and Import Co.*, 10 A. B. R. 14, 121 Fed. 663 (C. C. A. N. Y.).

⁴²¹ *Crooks v. People's Nat'l Bk.*, 3 A. B. R. 238, 46 App. Div. (N. Y.) 333 (N. Y. Sup. Ct. App.).

Still another instance, *Swarts v. Fourth Nat'l Bk.*, 8 A. B. R. 673, 117 Fed. 1 (C. C. A. Mo.): Two debts upon promissory notes; one series of notes had two accommodation endorsers; the other had four accommodation endorsers; preferences were received on one series of notes; held the preferences must be surrendered before either claim can be allowed, for the two series of notes were in the same "class."

⁴²² Instance where not received nor benefit had: Agent himself a creditor receiving a preference, the surplus to be turned over to principal, who was also a creditor—no surplus shown to exist, In *re Hickey*, 7 A. B. R. 282 (D. C. Iowa): A transfer of book accounts

Creditors actually receiving the fruits of a preference also are bound, although not authorizing the proceeding.⁴²³

§ 1393. **Resume.**—In explicating the subject of preferences, the eight elements have now been considered which constitute a preference under the present Bankruptcy Act. To recount: Preference implies:

1st, *An appropriation of property and depletion of the trust fund*: some portion of the debtor's property must have been appropriated by the transaction to the payment of a claim;

Implies, 2nd, *Application of the property to the benefit of a creditor*: The claim upon which the preferential transfer is made must have been the claim of a creditor;

Implies, 3rd, *A preceding creditor*: The creditor's claim must have been a debt—a pre-existing debt;

Implies, 4th, *Voluntary action of the debtor*: The debtor must have made a "transfer" or have "procured" or "suffered" the creditor to obtain a judgment, whose enforcement would have operated to appropriate property of the debtor;

Implies, 5th, *Application of the property upon a debt*.

Implies, 6th, *Insolvency of the debtor*: The debtor must have been insolvent at the time of the transfer or other appropriation of property;

Implies, 7th, *A transaction or recording within the four months preceding bankruptcy*: The transfer or other appropriation of property, or at any rate the recording of it where recording is required by law, must have been made within four months before the filing of the bankruptcy petition;⁴²⁴

Implies, 8th, *An advantage to be acquired by one creditor over others of the same class*: The effect of the transfer or other appropriation of property must have been to give the creditor receiving it a greater percentage of his claim than some other creditor of the same class.

With any of these elements lacking there is no preference; with them all existing a preference exists.

Thus, mere knowledge of a debtor's insolvency cannot transform into a preference an act which otherwise is no preference.

In re King Co., 7 A. B. R. 619, 113 Fed. 110 (D. C. Mass.): "Bankrupt Act, § 60b, does not provide that the trustee may recover all payments received with knowledge of insolvency, but only preferences so received. This seems to be the inevitable result of *Dickson v. Wyman*, combined with *Pirie v. Trust Co.* I must hold, therefore, that knowledge of insolvency did not make a preference of acts which otherwise did not amount to a preference."

§ 1394. **Voidable Preferences.**—Now, while proof of these eight elements will establish a preference, yet, without proof of other elements,

⁴²³. Stern, *Falk & Co. v. Trust Co.*, 7 A. B. R. 305, 112 Fed. 501 (C. C. A. Ky.).

⁴²⁴. **Eventual Adjudication of Bankruptcy, Also Necessary Element.**—Of course eventual adjudication of the debtor as a bankrupt is also implied, for the special rights conferred by the bankruptcy law in regard to preferences are dependent on the debtor being adjudged bankrupt.

they fall short of having any practical effect, either as establishing an act of bankruptcy or a recoverable preference.⁴²⁵

Unless proof also be made that the debtor made the transfer, or procured the judgment to be taken with intent to prefer the creditor receiving it, the proof will fall short of a preference amounting to an act of bankruptcy. Again, unless it is proved that the creditor receiving it, or his agent, acting therein, had reasonable cause to believe the debtor made the transfer with such intent then it also falls short of being proof of a voidable preference and the creditor will not be obliged to surrender the property so received by him.

Thus a preference itself has eight elements, as above noted; a preference that amounts to an act of bankruptcy as also noted has these same eight elements and one more element, namely, the debtor's intent to prefer, making nine elements in all; whilst a preference that is voidable so that the property affected by it can be recovered again for the benefit of the bankrupt estate, has the same eight elements, and also one additional element although this additional element is not the identical additional element requisite to make the preference an act of bankruptcy.

§ 1395. Ninth Additional Element Requisite to Make Preference Voidable—Creditor Must Have Had Reasonable Cause to Believe Preference Intended.—The additional element requisite to make a preference voidable is that the creditor (or his agent) receiving the preference must have received it under such circumstances as naturally would have caused the ordinary person, had he been the creditor receiving the preference, to have believed that the debtor intended thereby to give him a preference.⁴²⁶ A voidable preference

^{425.} See note to *Crooks v. People's Nat'l Bk.*, 3 A. B. R. 238. See note to *In re McLam*, 3 A. B. R. 246, 248 (D. C. Vt.).

^{426.} Bankr. Act, § 60 (b): "If a bankrupt shall have given a preference and the person receiving it or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee and he may recover the property or its value from such person."

Crooks v. Peoples' Bk., 3 A. B. R. 243, 46 App. Div. (N. Y.) 335; *Baden v. Bertenshaw*, 11 A. B. R. 308, 68 Kans. 32; *Hicks v. Langhorst*, 6 A. B. R. 178 (Ohio Com. Pleas); *Sav. Bk. v. Jewelry Co.*, 12 A. B. R. 781, 123 Iowa 432; *Keith v. Gettysburg Nat'l Bk.*, 10 A. B. R. 762, 23 Penn. Superior Court 14; *Babbitt v. Kelly*, 9 A. B. R. 338, 70 S. W. 384 (Mo. Ct. App.); *Deland v. Miller*, 11 A. B. R. 744, 119 Iowa 368; *Upson v. Mt. Morris Bk.*, 14 A. B. R. 6 (N. Y. Sup. Ct. App. Div.); *Laundy v. Nat'l Bk.*, 11 A. B. R. 223 (Kans. Sup. Ct.); *In re Clifford*, 14 A. B. R. 281, 136 Fed. 475 (D. C. Iowa); *Benedict v. Deshell*, 11 A. B. R. 20, 177 N. Y. 1, 68 N. E. 999; *Hussey v. Dry Goods Co.*, 17 A. B. R. 513, 148 Fed. 598 (C. C. A. Kans.); *In re Bartheleme*, 11 A. B. R. 70 (Ref. N. Y.); *Sebring v. Wellington*, 6 A. B. R. 673 (N. Y. Sup. Ct. App. Div.); *In re Eggert*, 4 A. B. R. 456, 102 Fed. 735 (C. C. A. Wis., affirming 3 A. B. R. 541); *In re Armstrong*, 16 A. B. R. 583, 145 Fed. 202 (D. C. Iowa); *Crittenden v. Barton*, 5 A. B. R. 775 (N. Y. Sup. Ct. App. Div.); *In re Hines*, 16 A. B. R. 495, 144 Fed. 543 (D. C. Penn.); impliedly, *Kaufman v. Treadway*, 12 A. B. R. 684, 195 U. S. 271; impliedly, *Hackney v. Hargreaves Bros.*, 13 A. B. R. 164, 68 Neb. 634; impliedly, *Turner v. Fisher*, 13 A. B. R. 243, 133 Fed. 594 (D. C. Calif.); impliedly, *Brown v. Guichard*, 7 A. B. R. 518 (Sup. Ct. N. Y.); impliedly, *Sund-*

implies intent on the creditor's part to deplete the trust fund in order to obtain satisfaction in whole or in part of his own claim.

Cullinane v. State Bk. of Waverly, 12 A. B. R. 779, 123 Iowa 340: "A finding that such was the fact—conceding insolvency—would not be sufficient of itself to defeat the lien of the mortgage. The bank must have had reasonable cause to believe not only that insolvency existed as a fact, but that a preference was intended; and this must be made to appear before the mortgage can be avoided at the suit of the trustee. This is the express provision of the Bankruptcy Act."

Levor v. Seiter, 8 A. B. R. 459 (N. Y. Sup. Ct. App. Div.): "The allegations of the complaint may be sufficient as setting forth a cause of action under § 60¹ of the Bankruptcy Law, but the proof failed to disclose the existence of an element necessary to the maintenance of an action under that section, namely, that the defendants had reasonable cause to believe that their debtors, by suffering a judgment to be taken against them, intended to give a preference to the defendants."

Johnson v. Anderson, 11 A. B. R. 294 (Sup. Ct. Neb.): "The trustee in bankruptcy may recover money paid by the bankrupt as a preference only when the person receiving it had reasonable ground to believe a preference was intended."

Compare, *In re Eggert*, 4 A. B. R. 452, 107 Fed. 735 (C. C. A. Wis.): "While, therefore, rulings under the former act are inapplicable, in a certain sense, because of this difference in the meaning of the term 'insolvency' they do apply so far as they determine the principles of law by which it is to be ascertained whether a creditor receiving a preference had reasonable cause to believe that the debtor had not at the time, property sufficient, at a fair valuation, to pay all of his debts."

In explicating this ninth element requisite to make the preference voidable, the following propositions will be useful.

§ 1396. **Existence of Reasonable Cause, Question of Fact.**—The question of the existence of the reasonable cause for so believing is a question of fact.⁴²⁷

Kaufman v. Treadway, 12 A. B. R. 684, 195 U. S. 271: "Whether the bankrupt was insolvent on August 4, 1898, when he paid the money to his brother, the defendant, and whether the latter had reasonable cause to believe that it

heim *v. Ridge Ave. Bk.*, 15 A. B. R. 134, 138 Fed. 951 (D. C. Pa.); impliedly, *Wetstein v. Franciscus*, 13 A. B. R. 326, 133 Fed. 900 (C. C. A. N. Y.). See note to *In re Jacobs*, 1 A. B. R. 518 (D. C. La.). Impliedly, *English v. Ross*, 15 A. B. R. 373, 140 Fed. 630 (D. C. Iowa); impliedly, *Crandall v. Coats*, 13 A. B. R. 712, 133 Fed. 965 (D. C. Iowa); impliedly, *In re Andrews*, 14 A. B. R. 247, 135 Fed. 599 (D. C. Mass.); impliedly, *Thomas v. Adelman*, 14 A. B. R. 511, 136 Fed. 973 (D. C. N. Y.); *In re Goodhile*, 12 A. B. R. 374, 130 Fed. 782 (D. C. Iowa); impliedly, *Stedman v. Bk.*, 9 A. B. R. 7, 117 Fed. 237 (C. C. A. Iowa); impliedly, *In re Virginia Hardwood Mfg. Co.*, 15 A. B. R. 136, 139 Fed. 209 (D. C. Ark.); impliedly, *In re Beerman*, 7 A. B. R. 431, 112 Fed. 663 (D. C. Ga.); impliedly, *Bank v. Sundheim*, 16 A. B. R. 863 (C. C. A. Penn.); impliedly, *Plate Glass Co. v. Edwards*, 17 A. B. R. 447 (C. C. A. Iowa). Decisions under the law of 1867, are applicable: *Stevenson v. Milliken*, 13 A. B. R. 206, 99 Me. 320. Contra, *In re Andrews*, 16 A. B. R. 387 (C. C. A. Mass.).

⁴²⁷ *Ridge Ave. Bk. v. Sundheim* (*Bank v. Sundheim*), 16 A. B. R. 863 (C. C. A. Penn., affirming *Sundheim v. Bk.*, 15 A. B. R. 132). See *Hackney v. Ray-*

was intended thereby to give a preference, are questions of fact determined by the verdict of the jury and not open to review in this court."

Sundheim v. Ridge Ave. Bk., 15 A. B. R. 132, 138 Fed. 951 (D. C. Pa.; affirmed sub nom. *Ridge Ave. Bk. v. Sundheim*, 16 A. B. R. 863): "And whether or

mond Bros. *Clarke Co.*, 10 A. B. R. 213 (Supt. Ct. Neb.) (this case was reversed, on other grounds, in 13 A. B. R. 164), 68 Neb. 624; *Turner v. Fisher*, 13 A. B. R. 243 (D. C. Calif.); *Upson v. Mt. Morris Bk.*, 14 A. B. R. 6 (N. Y. Sup. Ct. App.); *Deland v. Miller*, 11 A. B. R. 744, 119 Iowa 368; *Wetstein v. Franciscus*, 13 A. B. R. 326, 133 Fed. 900 (C. C. A. N. Y.); *Crittenden v. Barton*, 5 A. B. R. 775 (N. Y. Sup. Ct. App. Div.). *Obiter*, *Johnson v. Anderson*, 11 A. B. R. 303, — Neb. —. Note to *In re Jacobs*, 1 A. B. R. 518 (D. C. La.).

Instances where the facts have been held sufficient to indicate a "reasonable cause for believing:" Mortgagee, although loaning on present consideration, yet knowing of insolvency of debtor and of debtor's intent to prefer relatives with proceeds, and actually assisting in preferring with the proceeds: *In re Bartheleme*, 11 A. B. R. 67 (Ref. N. Y.).

Assignment of insurance policy: *In re Graham*, 6 A. B. R. 750 (D. C. Ills.).

Creditor reading in newspaper of suits being started, thereupon inquiring at debtor's office, dunning the debtor frequently and finally getting chattel mortgage: *Crittenden v. Barton*, 5 A. B. R. 775 (N. Y. Sup. Ct. App. Div.).

Debtor, already owing the creditor, borrows more from him in order to cover a defalcation, loses his position and his principal endorser dies, such facts being known to the creditor: held to constitute reasonable grounds for belief: *Sebring v. Wellington*, 6 A. B. R. 671 (N. Y. Sup. Ct. App. Div.).

Brother of bankrupt agreeing not to record mortgage: and afterwards, insisting on full payment: *Rogers v. Page*, 15 A. B. R. 502, 140 Fed. 596 (C. C. A. Tenn.).

Creditor being obliged to dun the debtor repeatedly and finally taking as security the assignment of certain judgments owned by the bankrupt: *English v. Ross*, 15 A. B. R. 373, 140 Fed. 630 (D. C. Penn.).

Information that the debtor was hard up and knowledge of circumstances indicative of same state. Failure to investigate will not excuse where the information was sufficient to have put the ordinary man on inquiry: *Crandall v. Coats*, 13 A. B. R. 712, 113 Fed. 965 (D. C. Iowa).

Knowledge of debtor's failure to pay debts: payment by return of goods, not cash in the ordinary course of business: consulting a lawyer and inquiring about solvency and finding close margin: *In re Andrews*, 14 A. B. R. 247, 135 Fed. 599 (D. C. Mass.).

Knowledge that debtor's business was bad and that he was being pressed, he eventually selling out business four days before bankruptcy and making payment from the proceeds: *Thomas v. Adelman*, 14 A. B. R. 510, 136 Fed. 973 (D. C. N. Y.).

Creditor knowing debtor had nothing, was behind in her payments and owed claim and that some business houses had discontinued selling to her, took assignment of insurance policy after fire: *In re Graham*, 6 A. B. R. 750 (D. C. Ills.).

Creditors inducing insolvent debtors to transfer entire stock in trade to creditor's clerk: then commingling same with their own and misleading other creditors to believe same was purchased from third party and was only small in amount: held sufficient to warrant setting aside the bill of sale as a preference: *In re Frank v. Musliner*, 9 A. B. R. 229, 76 App. Div. (N. Y.) 617 (App. Div. Sup. Ct. N. Y.): Why would these facts not warrant a finding also that the conveyance was made to hinder and delay creditors?

Western Tie & Timber Co. v. Brown, 12 A. B. R. 111, 129 Fed. 728 (C. C. A. Ark., reversed in 13 A. B. R. 447, 196 U. S. 502).

Hackney v. Raymond Bros. Clarke Co., 10 A. B. R. 213 (reversed in 13 A. B. R. 164, 68 Neb. 624); *In re Teague*, 2 A. B. R. 168 (D. C. Ind.).

Instances where facts held insufficient to establish "reasonable cause for belief."

Chattel mortgage six-sevenths for a present loan and one-seventh to pay a past debt: mortgagee not chargeable with having had reasonable ground for believing a preference was intended by the mere fact that it knew the six-sevenths were to be used in paying up debts (they being eventually in fact so

not the facts and circumstances in the possession of the defendant in this case, at the time the payments were made to it, were sufficient to cause an ordinarily prudent business man to conclude a preference was intended, was a question for the jury and not for the court."

The question is one for the jury;⁴²⁸ yet, where the facts are established, then as matter of law the court may direct a verdict as in other cases;⁴²⁹ but not so where the facts are not established sufficiently to have authorized a directing of a verdict in other cases.⁴³⁰

The adjudication of bankruptcy does not establish the existence of reasonable cause for belief on the creditor's part.⁴³¹

§ 1397. Preferential Transfer Not Necessarily Fraudulent.—The action is not one for fraud. A preference is not necessarily fraudulent.⁴³²

used) where the debts it had knowledge of were small in comparison with what it understood to be the value of the assets: *Stedman v. Bk. of Monroe*, 9 A. B. R. 4, 117 Fed. 237 (C. C. A. Iowa).

Creditor acted in good faith after personal examination of debtor's books, from which books the debtor had concealed a large indebtedness but for which indebtedness he would have been solvent at the time of the transfer: *Brown v. Guichard*, 7 A. B. R. 515 (Sup. Ct. N. Y.).

Fair business transaction without suspicion of fraudulent preference: *In re Eggert*, 3 A. B. R. 541, 98 Fed. 843 (D. C. Wis., affirmed in 4 A. B. R. 449, 102 Fed. 735).

Creditors of employee working on salary and also on percentage of profits knowing firm insolvent but relying on law of his State that such employee was not a partner cannot be said to have had reasonable grounds of belief that a preference was intended although such employee eventually was held to be a partner: *Jacobs v. Van Sickle*, 10 A. B. R. 519, 123 Fed. 340 (D. C. N. J., affirmed in 11 A. B. R. 470, 127 Fed. 62).

Information of creditor in taking chattel mortgage that chattels about to be sold for \$2000.00 more than debts: *Hussey v. Dry Goods Co.*, 17 A. B. R. 512, 148 Fed. 598 (C. C. A. Kans.).

Bankrupts, commission merchants doing all their business through another firm of commission merchants, proceeds of sale within the four months period not recoverable preferences in absence of proof of reasonable grounds for believing preference was intended: *Ryttenberg v. Schefer*, 11 A. B. R. 652, 131 Fed. 313 (D. C. N. Y.).

Wife held not have had reasonable cause of belief: *In re Block*, 15 A. B. R. 750, 142 Fed. 674 (C. C. A. N. Y.). *Hastings v. Fithian*, 13 A. B. R. 676 (N. J. Ct. Errors & App.); *Off v. Hakes*, 15 A. B. R. 699, 142 Fed. 364 (C. C. A. Ills.); *Western Tie & Timber Co. v. Brown*, 13 A. B. R. 447, 196 U. S. 502 (reversing 12 A. B. R. 111); *Tomlinson v. Bk. of Lexington*, 16 A. B. R. 632 (C. C. A. N. Car.).

^{428.} *Kaufman v. Treadway*, 12 A. B. R. 684, 195 U. S. 271; *Christopherson v. Oleson*, 102 N. W. 685 (Sup. Ct. S. Dak.).

^{429.} *Christopherson v. Oleson*, 102 N. W. 685 (Sup. Ct. S. Dak.).

^{430.} *Upson v. Mt. Morris Bk.*, 14 A. B. R. 6 (N. Y. Sup. Ct. App. Div.).

^{431.} *Laundy v. Nat'l Bk.*, 11 A. B. R. 223 (Sup. Ct. Kans.); *Hussey v. Dry Goods Co.*, 17 A. B. R. 513, 148 Fed. 598 (C. C. A. Kans.).

^{432.} *Little v. Hardware Co.*, 13 A. B. R. 429, 133 Fed. 874 (C. C. A. Tex.); *Baden v. Bertenshaw*, 11 A. B. R. 308 (Sup. Ct. Kans.); *Upson v. Mt. Morris Bk.*, 14 A. B. R. 6 (N. Y. Sup. Ct. App.); *In re Duffy*, 9 A. B. R. 360, 118 Fed. 926 (D. C. Penn.); *Githens v. Shiffler*, 7 A. B. R. 453, 112 Fed. 505 (D. C. Penn.); *In re Belknap*, 12 A. B. R. 329, 129 Fed. 646 (D. C. Penn.); *Fry v. Pennsylvania Trust Co.*, 5 A. B. R. 53 (opinion of Com. Pleas); *Chism v. Bk.*, 5 A. B. R. 56, 77 Miss. 599; *In re Block*, 15 A. B. R. 752, 142 Fed. 674 (C. C. A. N. Y.). See ante, §§ 113 and 1305.

Crooks v. People's Nat. Bk., 3 A. B. R. 238, 46 App. Div. N. Y. 335: "Under this statute the question of fraud does not enter; it is the result or effect of the act done that is declared against, not the manner nor method by which it is done, no matter how circuitous the method may be. If the effect of a transfer of property made within four months * * * is to enable any of the bankrupt's creditors to obtain a greater percentage of his debt than others of the same class, then such transfer is voidable if the person receiving it or to be benefited thereby had reasonable cause to believe that it was intended thereby to give a preference."

But it is not a joinder of inconsistent causes of action to allege the transaction alternatively, as whether a preference or a fraudulent conveyance.⁴³³

§ 1398. Creditor Need Not Actually Know, nor Actually Believe.—It is not necessary to prove the creditor himself actually knew of the debtor's intent or condition;⁴³⁴ nor is it necessary to prove the creditor himself actually believed.⁴³⁵

In *re Andrews*, 14 A. B. R. 247, 135 Fed. 599 (D. C. Mass.): "Hardy, whatever his actual belief, had reasonable cause to believe that Andrews was insolvent."

And it is no defense for the creditor to prove that actually he did not so believe.⁴³⁶

§ 1399. Sufficient if Circumstances Such as to Raise Inference of Belief on Creditor's Part.—It is sufficient to prove that the circumstances, all taken together, were such as would naturally have led an ordinary person to believe.⁴³⁷

433. *Wright v. Skinner*, 14 A. B. R. 500, 136 Fed. 694 (D. C. N. Y.); inferentially, *Laundy v. Bk.*, 11 A. B. R. 223 (Sup. Ct. Kans.).

434. In *re Jacobs*, 1 A. B. R. 518 (D. C. La.), and note. *Hackney v. Raymond Bros. Clarke Co.*, 10 A. B. R. 213 (reversed on the facts in 13 A. B. R. 164, 68 Neb. 624; *Crittenden v. Barton*, 5 A. B. R. 777 (Sup. Ct. App. N. Y.); In *re Eggert*, 4 A. B. R. 452, 107 Fed. 735 (C. C. A. Wis.); note to *Crooks v. People's Nat'l Bk.*, 3 A. B. R. 238 (N. Y. Sup. Ct. App. Div.); *Sundheim v. Ridge Ave. Bk.*, 15 A. B. R. 132, 138 Fed. 951 (D. C. Penn., affirmed sub nom. *Ridge Ave. Bk. v. Sundheim*, 16 A. B. R. 863); *English v. Ross*, 15 A. B. R. 374, 140 Fed. 630 (D. C. Penn.); compare, *Western Tie & Timber Co. v. Brown*, 13 A. B. R. 451, 196 U. S. 502; In *re Hines*, 16 A. B. R. 497, 144 Fed. 543 (D. C. Penn.).

435. In *re Jacobs*, 1 A. B. R. 518 (D. C. La.); *Hackney v. Raymond Bros. Clarke Co.*, 10 A. B. R. 213, reversed on the facts in 13 A. B. R. 164, 68 Neb. 624; *Crittenden v. Barton*, 5 A. B. R. 777 (N. Y. Sup. Ct.); In *re Eggert*, 4 A. B. R. 452, 107 Fed. 735 (C. C. A. Wis.); note to *Crooks v. People's Nat'l Bk.*, 3 A. B. R. 238 (N. Y. Sup. Ct. App. Div.); *Sundheim v. Ridge Ave. Bk.*, 15 A. B. R. 132, 138 Fed. 951 (D. C. Penn.); In *re Virginia Hardwood Mfg. Co.*, 15 A. B. R. 135, 139 Fed. 209 (D. C. Ark.); In *re Hines*, 16 A. B. R. 497, 144 Fed. 543 (D. C. Penn.); *English v. Ross*, 15 A. B. R. 374, 140 Fed. 630 (D. C. Pa.).

436. In *re Hines*, 16 A. B. R. 497, 144 Fed. 543 (D. C. Penn.).

437. *Buchanan v. Smith*, 16 Wall 277; *Dutcher v. Wright*, 94 U. S. 553; *Bank v. Cook*, 95 U. S. 343; In *re Virginia Hardwood Mfg. Co.*, 15 A. B. R. 135, 139 Fed. 209 (D. C. Ark.); *Benedict v. Deshell*, 11 A. B. R. 20, 68 N. E. 999; In *re Jacobs*, 1 A. B. R. 518 (D. C. La.); *Crooks v. People's Nat'l Bk.*, 3 A. B. R. 238, 46 App. Div. N. Y. 335; *Hackney v. Raymond Bros. Clarke Co.*, 10 A. B. R. 213, reversed in 13 A. B. R. 164, 68 Neb. 624.

In *re Andrews*, 14 A. B. R. 247, 135 Fed. 599 (D. C. Mass.): Payment by return of goods and not by cash in the usual course of trade, coupled with

Bardes v. First National Bank of Hawarden, 12 A. B. R. 771, 122 Iowa 443: "We concede the legal proposition contended for in behalf of defendants that a mere suspicion of financial embarrassment is not enough to charge the creditor with knowledge of insolvency. * * * But it is enough to constitute a reasonable cause to believe him insolvent that the facts and circumstances with reference to the debtor's financial condition which are brought home to the creditor are such as would put an ordinarily prudent man upon inquiry, which, if pursued, would lead to knowledge of insolvency."

In *re Eggert*, 4 A. B. R. 449, 102 Fed. 735 (C. C. A. Wis., affirming 3 A. B. R. 341): "It is not essential that the creditor should have actual knowledge of, or belief in, his debtor's insolvency, but that he should have reasonable cause to believe his debtor to be insolvent; that if facts and circumstances with respect to the debtor's financial condition are brought home to him, such as would put an ordinarily prudent man upon inquiry, the creditor is chargeable with knowledge of the facts which such inquiry should reasonably be expected to disclose."

Toof v. Martin, 13 Wall. 40: "It is a general principle that every one must be presumed to intend the necessary consequences of his acts. The transfer, in any case, by a debtor, of a large portion of his property, while he is insolvent, to one creditor, without making provision for an equal distribution of its proceeds to all of his creditors, necessarily operates as a preference to him, and must be taken as conclusive evidence that a preference was intended, unless the debtor can show that he was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts. * * * The burden of proof is upon him in such case, and not upon the assignee or contestant in bankruptcy. * * * The Statute, to defeat the conveyances, does not require that the creditors should have had absolute knowledge on the point, nor even that they should, in fact, have had any belief on the subject. It only requires that they should have had reasonable cause to believe that such was the fact. And reasonable cause they must be considered to have had when such a state of facts was brought to their notice in respect to the affairs and pecuniary condition of the bankrupts as would have led prudent business men to the conclusion that they could not meet their obligations as they matured in the ordinary course of business ["insolvency" under Act of 1867]."

Sundheim v. Ridge Ave. Bk., 15 A. B. R. 132, 134, 138 Fed. 951 (D. C. Pa., affirmed sub nom. *Bank v. Sundheim*, 16 A. B. R. 863): "Reasonable cause to believe that it was intended to give a preference does not require proof that the defendant had either actual knowledge or actual belief, but only such surrounding circumstances as would lead an ordinarily prudent business man to conclude that a preference was intended."

Thus, the resort to unusual methods of payment or securing of payment will raise an inference of belief that a preference was intended.⁴³⁸

knowledge that debtor does not pay debts. *Crittenden v. Barton*, 5 A. B. R. 775 (N. Y. Sup. Ct. App. Div.); *Upson v. Mt. Morris Bk.*, 14 A. B. R. 6 (N. Y. Sup. Ct. App. Div.); *In re Beerman*, 7 A. B. R. 431, 112 Fed. 663 (D. C. Ga.); *Parker v. Black*, 16 A. B. R. 205, 143 Fed. 560 (D. C. N. Y., affirmed in 18 A. B. R. 15); *In re Hines*, 16 A. B. R. 497, 144 Fed. 543 (D. C. Penn.).

⁴³⁸ *In re Andrews*, 14 A. B. R. 247, 135 Fed. 599 (D. C. Mass.): Return of goods not cash.

But see *Laundy v. First Nat'l Bk.*, 11 A. B. R. 223 (Sup. Ct. Kans.), where it was held, that the depositing of book accounts as security with the creditor was not sufficient. Yet this was a most extraordinary proceeding it would seem. Business men do not usually resort to the pledging of their book accounts until they are in extremis.

Similarly, the taking of a mortgage or other transfer of substantially all of a debtor's property, knowing it to be such, and that other creditors existed, will constitute a preference with reasonable cause.

In re Virginia Hardwood Mfg. Co., 15 A. B. R. 142, 139 Fed. 209 (D. C. Ark.): "He knew that his mortgage covered so much of the assets that what was left was totally insufficient to pay the other creditors listed on the statement. If he really believed that the bankrupt had (as the statement shows) assets amounting to \$104,288.80, and that he was taking practically all of it, and excluding creditors (as the statement shows) who held claims aggregating \$13,518.78, he knew that he was getting security far in excess of his claim, and that the effect of it was to hinder and delay the other creditors. * * *

"The same rule is true where a single creditor, with a knowledge of the insolvency of its debtor, takes a mortgage upon substantially all of its assets with the knowledge at the time (as will appear later) that there were outstanding creditors of nearly \$49,000, which was the situation in the case at bar when this mortgage was taken."

Pollock v. Jones, 10 A. B. R. 616, 124 Fed. 163 (C. C. A. S. Car.): "It is true that it is said that no good reason existed for supposing that Mr. Pollock knew of this insolvency. It is to be remarked, however, that in getting security Pollock obtained and accepted a mortgage of the entire assets of the firm. * * *

"Yet, by taking this mortgage, covering and controlling their entire stock of goods of every description in their possession, present and future, he practically made the firm at that instant insolvent to the extent, at least, of appropriating all the assets of the firm to the payment of one favored creditor, and if these be required to pay him in full, leaving nothing for other creditors."

And the request and agreement to withhold a mortgage from the records indicates such reasonable cause.⁴³⁹

§ 1400. Cause for Belief Not Simply That Preference Given, but Intended.—The belief, of which the existence of reasonable ground is to be proved, is not simply belief that a preference in fact was given but also belief that the debtor intended to give a preference.⁴⁴⁰

§ 1401. Belief of Existence of Intent May Be Presumed.—But belief of the existence of such intent may be presumed, and where a creditor has reasonable ground to believe the debtor is insolvent, and where the obvious effect of the receipt of the money or other property in satisfaction of the

⁴³⁹. Rogers v. Page, 15 A. B. R. 505, 140 Fed. 596 (C. C. A. Tenn.).

⁴⁴⁰. Cullinane v. State Bank, 12 A. B. R. 776, 123 Iowa 340; Turner v. Fisher, 13 A. B. R. 243, 133 Fed. 594 (D. C. Calif.); inferentially, Western Tie & Timber Co. v. Brown, 12 A. B. R. 111, 129 Fed. 728 (C. C. A. Ark.); note to In re Jacobs, 1 A. B. R. 518 (D. C. La.); note to Crooks v. People's Nat'l Bk., 3 A. B. R. 242 (N. Y. Sup. Ct. App.); inferentially, Sundheim v. Ridge Ave. Bk., 15 A. B. R. 132, 133 Fed. 951 (D. C. Penn.); inferentially, Kaufman v. Treadway, 12 A. B. R. 684, 195 U. S. 371.

obligation under those circumstances is to give him an advantage over other creditors, he is chargeable with notice of intention to prefer.⁴⁴¹

English v. Ross, 15 A. B. R. 374, 140 Fed. 630 (D. C. Pa.): “ * * * and, now that it has turned against him, he cannot be heard to say that he did not know he was getting a preference or that one was contemplated. Where that is the necessary result of a transaction it is conclusively presumed to have been intended.”

Obiter, [Western] *Tie & Timber Co. v. Brown*, 13 A. B. R. 451, 196 U. S. 502: “This conclusion, moreover, is the result of the finding that Harrison had no intention to give the tie company a preference, for if Harrison, being insolvent, to the knowledge of the company, within the prohibited period, gave to the tie company authority to collect the sums due to him by the laborers for goods sold them, with the right, or even the option to apply the money to a prior debt due by Harrison to the company, the necessary result of the transaction would have been to create a voidable preference. And if the inevitable result of the transaction would have been to create such a preference, then the law would conclusively impute to Harrison the intention to bring about the result necessarily arising from the nature of the act which he did. *Wilson v. City Bank*, 17 Wall. 486, 21 L. Ed. 727. To give effect, therefore, to the finding that there was no intention on the part of Harrison to prefer, we must consider that the authority given by him to the tie company to collect from the laborers did not give that company the right, or endow it with the option, when it had collected, to retain the money for its exclusive benefit, and to the detriment of the other creditors of Harrison.

“The result of the facts found, then, is this: Harrison sold his goods to the laborers, and agreed with the tie company that that company, when it paid the laborers, should deduct the amount due by the laborers from the wages which the tie company owed them, and, after making the deduction, should remit to Harrison the amount thus deducted, irrespective of any indebtedness otherwise due by Harrison to the tie company. Did this give rise to a voidable preference within the intentment of § 57g and § 60b of the Bankrupt Act?

“In view of the necessary result of the findings which we have previously pointed out, it is, we think, beyond doubt that the agreement was not voidable preference within the meaning of the statute, since, considering the agreement alone, it brought about no preference whatever.”

In re Hines, 16 A. B. R. 499, 144 Fed. 142 (D. C. Pa.): “In thus monopolizing the last available asset that the debtor had to deal with, he could but know that he was getting more than his share if Hines proved insolvent, to which everything pointed. Of this he took the risk, and now that it has gone against him he cannot be heard to say that he did not know he was getting a preference, or that one was contemplated. When that is the necessary result of a transaction, it is conclusively presumed to have been intended.”

And the creditor's denial of any knowledge that he was getting a preference will be unavailing.⁴⁴²

441. *Hackney v. Hargreaves Bros.*, 13 A. B. R. 169, 68 Neb. 624; impliedly, *In re Andrews*, 14 A. B. R. 247, 135 Fed. 599 (D. C. Mass.).

Compare, similar holdings as to presumptions of debtor's intent to prefer as an act of bankruptcy, ante, § 132. Compare, under State preference law, *Wright v. Gansevoort*, 17 A. B. R. 326 (N. Y. Sup. Ct.).

442. *In re Hines*, 16 A. B. R. 497, 144 Fed. 142 (D. C. Penn.); *Sundheim v. Ridge Ave. Bank*, 15 A. B. R. 134 (affirmed sub nom. *Bank v. Sundheim*, 16 A. B. R. 863, D. C. Penn.).

English v. Ross, 15 A. B. R. 374, 140 Fed. 630 (D. C. Pa.): "Monopolizing, as he thus did, all the available assets of the bankrupt, the defendant could not but know that he was getting more than his share, if Mangan proved insolvent, to which everything pointed, and of which he was therefore affected with notice."

§ 1402. Reasonable Cause for Belief of Insolvency Requisite.—Reasonable cause for belief that a preference was intended to be given necessarily involves reasonable cause for belief that the debtor was in fact insolvent.⁴⁴³

And this means reasonable cause for belief that his assets at fair valuation do not equal his liabilities.⁴⁴⁴

In *re Andrews*, 16 A. B. R. 390 (C. C. A. Mass.): "This [the new definition of insolvency in the Act of 1898] has established so artificial a rule that the usual indicia by virtue of which a man is regarded as insolvent, and, consequently, by virtue of which a creditor may be said to have reason to believe that he is insolvent, or the reverse, become, to a very large extent, of no importance."

§ 1403. Also of All Other Elements of Preference.—Merely to establish grounds which reasonably would have caused the creditor to believe the debtor insolvent is not enough.⁴⁴⁵

Cullinane v. State Bank, 12 A. B. R. 776, 123 Iowa 340: "The bank must have reasonable cause to believe not only that insolvency existed as a fact, but that a preference was intended."

Babbitt v. Kelly, 9 A. B. R. 338 (Mo. Ct. App.): "To invalidate a preference, the party benefited, or his agent, must have reasonable cause to believe, not

443. *Savings Bk. v. Jewelry Co.*, 12 A. B. R. 781, 123 Iowa 432; In *re Eggert*, 4 A. B. R. 457, 102 Fed. 735 (C. C. A. Wis.); In *re Hines*, 16 A. B. R. 497, 144 Fed. 142 (D. C. Penn.); *Hussey v. Dry Goods Co.*, 17 A. B. R. 514, 148 Fed. 593 (C. C. A. Kans.); In *re Goodhile*, 12 A. B. R. 374, 130 Fed. 471 (D. C. Iowa); *Johnson v. Anderson*, 11 A. B. R. 294, — Neb. —; *Baden v. Bertenshaw*, 11 A. B. R. 308, 68 Kans. 32.

444. In *re Pettingill & Co.*, 14 A. B. R. 758, 135 Fed. 218 (C. C. A. Mass.); *Suffel v. Nat'l Bk.*, 16 A. B. R. 262, 106 N. W. 837 (Wis.).

445. *Obiter*, contra, *McMurtrey v. Smith*, 15 A. B. R. 435 (Master's Report adopted by D. J.). Compare, also, *Johnson v. Anderson*, 11 A. B. R. 294 (Neb.).

Merely Reasonable Ground of Belief of "Insolvency" Apparently Considered Sufficient.—Many of the reported decisions seem to imply, that the reasonable ground of belief to be proved is merely as to the debtor's insolvency. In *re Virginia Hardwood Mfg. Co.*, 15 A. B. R. 135, 139 Fed. 209 (D. C. Ark.); *Johnson v. Anderson*, 11 A. B. R. 294 (Neb.).

In *re Andrews*, 14 A. B. R. 247, 135 Fed. 599 (D. C. Mass., reversed, on this point, in 16 A. B. R. 391): "If the debtor is insolvent he intends preference by any payment of a pre-existing debt. If the creditor has reasonable cause to believe that the debtor is insolvent, then the creditor has reasonable cause to believe a preference is intended."

Suffel v. Nat'l Bk., 16 A. B. R. 259, 106 N. W. (Wis.) 837; In *re Beerman*, 7 A. B. R. 431, 112 Fed. 663 (D. C. Ga.); In *re King*, 7 A. B. R. 619, 113 Fed. 110 (D. C. Mass.).

And one case even holds that the petition must allege that the creditor had reasonable grounds for belief not only that a preference was intended but also that the debtor was insolvent. *Hicks v. Langhorst*, 6 A. B. R. 178 (Com. Pleas Ohio), and note.

This is incorrect: reasonable grounds for belief that a preference was in-

that the debtor is insolvent, but that a preference is intended, the act says; that this involves knowledge by the preferred creditor or his agent, or reasonable cause to believe, that the debtor is insolvent at the time of the alleged preferential act, for the essence of a preference denounced by the Bankrupt Law is that it is given by an insolvent debtor."

Contra, *In re Andrews*, 14 A. B. R. 247, 135 Fed. 599 (D. C. Mass.): "If the debtor is insolvent, he intends preference by any payment of a pre-existing debt. If the creditor has reasonable cause to believe that the debtor is insolvent then the creditor has reasonable cause to believe that a preference is intended."

The proof must also show reasonable grounds for believing that the debtor intended or supposed the other seven elements of a preference to exist, namely, that the debtor made a transfer of his property, or suffered a judgment, etc., that he intended thereby to give one creditor a greater percentage of his debt than some other of the same class, etc., etc.⁴⁴⁶

Thus the preferred creditor must have reasonable cause to believe it was intended to give him a greater per cent. than other creditors would receive.⁴⁴⁷

And the burden of proof is on the trustee to prove each element of the preference.⁴⁴⁸

§ 1404. Reasonable Cause for Belief Preference Intended Involves Reasonable Cause for Belief Debtor Knew His Insolvency.—Reasonable cause to believe a preference was intended involves reasonable cause to believe the debtor knew insolvency existed as a matter of fact.⁴⁴⁹

tended, includes reasonable ground for belief that the debtor was insolvent. *Savings Bank v. Jewelry Co.*, 12 A. B. R. 781, 123 Iowa 432.

In *re Eggert*, 3 A. B. R. 541, 98 Fed. 843 (affirmed in 4 A. B. R. 449, 102 Fed. 735, D. C. Wis.): "To constitute a voidable preference, as defined in section 60a, 60b, the creditor must have reasonable cause to believe the debtor to be insolvent in fact, as the foundation for reasonable cause to believe that an unlawful preference is intended;" hence the latter allegation is superfluous, although as evidence it is admissible.

Some few cover the entire field, however. See *Johnson v. Anderson*, 11 A. B. R. 294 (Sup. Ct. Neb.); compare, *Baden v. Bertenshaw*, 11 A. B. R. 308, 68 *Kaus*, 32.

Compare, also, *In re Goodhile*, 12 A. B. R. 374, 130 Fed. 471 (D. C. Iowa): "Under the present law, this decision of the Supreme Court (*Merchants' Bank v. Cook*, 95 U. S. 342) would require that the condition of the debtor's affairs must be known to be such that prudent business men would conclude that the aggregate of the debtor's property at a fair valuation, was not sufficient to pay his debts' before there is reasonable cause to believe the debtor is insolvent and that a preference would therefore be the result of a payment while in such condition."

^{446.} *Hackney v. Raymond Bros. Clarke Co.*, 10 A. B. R. 213, 68 Neb. 624 (reversed in 13 A. B. R. 164); inferentially, *Bank v. Sundheim*, 16 A. B. R. 865 (C. C. A. Penn.); *Cullinane v. State Bank*, 12 A. B. R. 779, 123 Iowa 340; *Turner v. Fisher*, 13 A. B. R. 243, 133 Fed. 594 (D. C. Calif.).

^{447.} *In re Armstrong*, 16 A. B. R. 593 (D. C. Iowa).

^{448.} *Keith v. Gettysburg Nat'l Bk.*, 10 A. B. R. 762 (23 Penn. Sup. Ct. 14); compare, *In re Chappell*, 7 A. B. R. 608, 113 Fed. 545 (D. C. Va.), although this was a case of "innocent" preferences.

^{449.} *In re Virginia Hardwood Mfg. Co.*, 15 A. B. R. 142, 139 Fed. 209 (D. C. Ark.).

Savings Bk. *v.* Jewelry Co., 12 A. B. R. 785, 123 Iowa 432: "That the execution, by a debtor of a mortgage covering all his property, in favor of one of several existing creditors, is evidence of an intention to prefer such creditor, may well be supposed. But such is not conclusive upon the question. A preference such as offends the Bankruptcy Act must be one likely in its results to defeat the collection by other creditors of their claims. Essential to such a preference, therefore, is insolvency; because if the debtor was solvent the execution of the mortgage would not, in all likelihood, operate to defeat the other creditors of the mortgagor. Knowledge or a reasonable cause to believe that a preference is intended involves, therefore, knowledge or a reasonable cause to believe that insolvency exists as a matter of fact."

§ 1405. Whether Intent of Bankrupt to Prefer Need Be Shown.—

It is a question whether the actual intent of the bankrupt to prefer need be shown. On the one hand, it is urged that the intent of the bankrupt to make a preference need not be shown for the reason that the statute nowhere says the debtor must actually be guilty of the intent to give the preference which he is thus believed to have intended to give. In accordance with this view, the bankrupt may have been absolutely innocent of any actual intent to prefer the creditor, yet, if the circumstances were such as would lead the ordinary man to *believe* the debtor did intend to prefer, it is enough, it being the creditor's intent that is of importance in recovering preferences, and the debtor's intent being immaterial except as it may or may not otherwise be evidence.⁴⁵⁰

Benedict v. Deshel, 11 A. B. R. 20 (N. Y. Court of App.): "In the case at bar the courts below have gone a step further and have held that such an action cannot be maintained without affirmative proof of the debtor's intent to give a preference. It is practically conceded that this interpretation of the statute rests upon judicial construction rather than direct language, and the argument by which it is sought to be supported is that a creditor's reasonable cause to believe that, in the payment to him it was intended to give a preference, can only be predicated upon the existence of such an intent in the mind of the debtor. It is contended that it would be paradoxical to hold that the creditor should have reasonable ground to believe in the debtor's intent to give a preference unless that intent, in fact, exists and is disclosed by proof. The difficulty with this argument is that it ignores the explicit language of the statute (subdivision a), by which the debtor's intent is removed from the sphere of speculation or evidence into the category of established fact. In unmistakable language Congress has said that when an insolvent debtor makes a transfer of property, the effect of which will be to enable any one of his creditors to obtain a greater percentage of his debt than any other creditor of the same class, 'the debtor shall be deemed to have given a preference.' Shall this language be held to be meaningless? Shall it be expunged from the

⁴⁵⁰. [*Western*] *Tie & Timber Co. v. Brown*, 12 A. B. R. 111, 129 Fed. 728 (C. A. Ark., reversed, on other grounds, by U. S. Supreme Court in 13 A. B. R. 447, 196 U. S. 502); *Upton v. Mt. Morris Bk.*, 14 A. B. R. 6 (N. Y. Sup. Ct. App. Div.); *Parker v. Black*, 16 A. B. R. 205 (D. C. N. Y., affirmed in 18 A. B. R. 15); contra, *Peck v. Connell*, 8 A. B. R. 500 (Penn. Superior Ct., affirming 6 A. B. R. 93 (Penn. Com. Pleas)); compare, inferentially and apparently contra, obiter, *Baden v. Bertenshaw*, 11 A. B. R. 308, 68 Kans. 32; apparently contra, *In re Ebert*, 1 A. B. R. 340 (Ref. Wis.).

statute by judicial construction? If it does not disclose the legislative intent to fix by law that which would otherwise be the subject of controversy, what purpose does it serve? The only answer to these queries is found in the rather metaphysical contention, already alluded to, that if the debtor's intent depends upon his act, without reference to his state of mind, it is quite superfluous to ascertain the creditor's reasonable ground for belief as to the character and purpose of the debtor's act. This argument, it seems to us, is more refined than sound. The Statute deals with three distinct legal entities concerned in the administration of a bankrupt's estate: 1. The debtor. 2. The trustee. 3. The creditor. As to the debtor, the statute declares that a payment under certain conditions shall be held to be preferential. He is not to be heard upon the question of his intent. The effect of his act is fixed by law. That is the scope and purport of subdivision a. The next section, subdivision b, declares, in effect, that a preferential payment is not void per se, but voidable by the trustee upon a certain condition. And what is the condition? Simply that the trustee shall establish that the creditor had reasonable cause to believe that the payment to him was intended as a preference. In other words, the trustee's remedy is not absolute, but is made to depend upon proof of the knowledge or belief with which the creditor took the payment. * * * In each case the condition affixes the remedy, ignores the state of mind of one of the parties to the transaction and renders his act dependent upon the purpose of the other. We think, therefore, that when a trustee in bankruptcy has proven that a debtor who is insolvent has made a payment, the effect of which will be to give one creditor a preference over others of the same class, and has supplemented this by evidence from which a jury would have the right to find that the creditor receiving the payment had reasonable ground to believe that it was intended thereby to give a preference, he has established all that the statute requires in support of his cause of action. He need not go further, as the plaintiff herein was required to do, and seek to prove the intent of the debtor in making the payment."

Obiter, *In re Bloch*, 15 A. B. R. 750 (C. C. A. N. Y.): "It is not necessary in order to constitute a preference under § 60a that there should have been any intent to prefer on the part of the bankrupt. The word preference does not import the conscious participation of the creditor and debtor in the same intent."

On the other hand it is urged that naturally and justly no one could be charged with "reasonable cause to believe" something unless the something existed to which the belief was supposed to relate, and that actual intent to prefer on the debtor's part must be proved to exist.

Obiter, *In re Andrews*, 16 A. B. R. 391 (C. C. A. Mass.): "It appears to us that, by this, the learned judge eliminated the element of actual intention on the part of the debtor to give a preference. In other words, the rule laid down is apparently that, so long as the debtor is insolvent, and knows that he is insolvent, and makes a payment of a pre-existing debt, the intent to prefer is a presumption of law. Whatever may have been the meaning of the learned judge, we understand that on the whole, he held the view of the law which the trustee squarely took before us; that is to say, 'that all that it is necessary for them to prove is that Powers & Mayer and Hardy had reasonable cause to believe that Andrews was insolvent on the dates in question.' Following this out, the trustee proceeded to argue at length against the proposition that, to prove a preference, it is necessary to show that the debtor actually intended

to give one and that the creditor had reasonable cause to believe that there was this actual intention.

"Under subdivision 'b' of § 60 of the Act of 1898, adopted, as we have shown, by § 12 of the Act of 1903, it can hardly be said that a creditor had reasonable cause to believe that a preference was intended until it is shown that there was such an intention on the part of the debtor. Let us first take its natural reading. We have shown that an element expressly contained therein is that the creditor 'shall have had reasonable cause to believe that it was intended thereby to give a preference.' Naturally and justly it would be said that no one could be charged with a reasonable cause to believe something unless the something existed to which the belief was supposed to relate. It is true that the ordinary rule that a person who does an act is supposed to contemplate what results therefrom, applies to cases of this class, but only as an element; and it cannot apply even as an element unless the party who does the act has a knowledge of the essential facts which tend to produce the resulting consequences, or at least has a reasonable cause to believe them, or purposely shuts his eyes. Therefore the question is whether the authorities support the position taken by the trustee, as we have explained it, notwithstanding the natural reading of the statute as amended in 1903 is as we have said it to be."

§ 1406. At Any Rate Existence of Actual Intent to Prefer, Proved by Circumstantial Evidence, or by Presumptions.—And at any rate the existence of an actual intent on the debtor's part may be proved by circumstantial evidence and by presumptions.⁴⁵¹

§ 1407. Mere Cause to Suspect Debtor's Insolvency Not Enough.—Merely because some cause to suspect insolvency of the debtor exists is not enough: there must be such a knowledge of facts as would induce a reasonable belief in the ordinary man that the debtor was intending to give a preference.⁴⁵²

Grant v. National Bank, 97 U. S. 80: "It is not enough that some creditor has some cause to suspect the insolvency of his debtor, but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debt. To make mere suspicion a ground of nullity in such a case would render the business transactions of the community altogether too insecure. It was never the intention of the

⁴⁵¹. *Obiter*, In re Andrews, 16 A. B. R. 391 (C. C. A. Mass.); inferentially, *Plate Glass Co. v. Edwards*, 17 A. B. R. 448 (C. C. A. Iowa).

⁴⁵². *Bardes v. Bank*, 12 A. B. R. 771, 122 Iowa 443; *Stevenson v. Milliken Tomlinson*, 13 A. B. R. 201, 99 Me. 320 (Sup. Jud. Ct. Me.); *Turner v. Fisher*, 13 A. B. R. 243, 133 Fed. 594 (D. C. Calif.); *Off v. Hakes*, 15 A. B. R. 699, 142 Fed. 364 (C. C. A. Ills.); *Upton v. Mt. Morris Bk.*, 14 A. B. R. 6 (N. Y. Sup. Ct. App.); *Keith v. Gettysburg Nat'l Bk.*, 10 A. B. R. 762, 23 Penn. Sup. Ct. 141; *In re Eggert*, 4 A. B. R. 449, 102 Fed. 741 (C. C. A. Wis., affirming 3 A. B. R. 541); *Hackney v. Raymond Bros. Clarke Co.*, 10 A. B. R. 213, reversed in 13 A. B. R. 164, 68 Neb. 624; *Brown v. Guichard*, 7 A. B. R. 519 (Sup. Ct. N. Y.). Also, see *Laundy v. First Nat'l Bk.*, 11 A. B. R. 223 (Sup. Ct. Kans.). But compare, *In re Beerman*, 7 A. B. R. 431, 112 Fed. 663 (D. C. Ga.); *obiter*, *Crandall v. Coats*, 13 A. B. R. 716, 113 Fed. 965 (D. C. Iowa); note to *In re Jacobs*, 1 A. B. R. 518 (D. C. La.); *Suffel v. Nat'l Bk.*, 16 A. B. R. 259, 106 N. W. (Wis.) 837; *In re Alden*, 16 A. B. R. 379 (Ref. Ohio); inferentially, *obiter*, *Bank v. Sundheim*, 16 A. B. R. 865 (C. C. A. Penn.).

framers of the act to establish any such rule. A man may have many grounds of suspicion that his debtor is in failing circumstances and yet have no cause for a well grounded belief of the fact. He may be unwilling to trust him further; he may feel anxious about his claims, and have a strong desire to secure it; and yet such belief as the act requires may be wanting. Obtaining additional security or receiving payment of a debt under such circumstances is not prohibited by law. Receiving payment is put in the same category in the section referred to as receiving security. Hundreds of men constantly continue to make payments up to the very eve of their failure, which it would be very unjust and disastrous to set aside. And yet this could be done in a large proportion of cases if mere grounds of suspicion of their insolvency were sufficient for the purpose."

Stucky v. Masonic Savings Bank, 108 U. S. 74: "A creditor dealing with a debtor whom he may suspect to be in insolvent circumstances, but of which he may not have sufficient evidence, may receive payments without violating the bankruptcy law. He may be unwilling to trust him further: he may be anxious about his claim, and desire to secure it; but such relief as the Act requires may be wanting. Additional security and receiving payments under such circumstances are not prohibited by law."

In *re Goodhile*, 12 A. B. R. 374, 130 Fed. 471 (D. C. Iowa): "No doubt they were desirous of obtaining what was due them, and they may have had suspicions that she was embarrassed or might be insolvent but that is not enough."

§ 1408. **Mere Giving of Unusual Security Insufficient.**—Thus merely the giving of unusual security—as, for instance, the depositing with the creditor of certain book accounts as security—is not sufficient in and of itself.⁴⁵³

But agreeing to the stipulation that the mortgage is to be kept off the records is indicative of reasonable cause.

Rogers v. Page, 15 A. B. R. 505, 149 Fed. 194 (C. C. A. Tenn.): "That he should agree not to record the instrument then taken until he should deem it necessary for his own protection is significant of his knowledge of his brother's condition and of the effect upon his credit if recorded. The very fact that after carrying his brother for years he should demand the immediate payment of his entire debt out of the proceeds of the sale of this land, and his exoneration from liability as surety by the payment of every debt upon which he was bound, admits of but one explanation in the light of this evidence, and that is that he knew his brother was insolvent, and that, if he was not thus preferred, he would lose a large part of his debt."

§ 1409. **Mere Nonpayment of Claim Long Past Due, or Frequent Duns or Broken Promises, Not Sufficient.**—Neither the mere nonpayment of the particular creditor's claim nor the fact that most of the indebtedness to the creditor is past due at the time of the payment on account and that the creditor has been urging payment and the debtor repeatedly promising it, is in itself sufficient cause for drawing the inference.⁴⁵⁴

⁴⁵³. *Laundy v. First Nat'l Bk.*, 11 A. B. R. 223 (Sup. Ct. Kans.). And compare, *In re Andrews*, 16 A. B. R. 391 (C. C. A. Mass.).

⁴⁵⁴. *Brown v. Guichard*, 7 A. B. R. 519 (Sup. Ct. N. Y.). To same effect, *Turner v. Fisher*, 13 A. B. R. 243, 133 Fed. 594 (D. C. Calif.). To similar effect, *Paper Co. v. Goembel*, 16 A. B. R. 29, 143 Fed. 295 (C. C. A. Ills.). To similar effect, *In re Alden*, 16 A. B. R. 379 (Ref. Ohio).

In *re Goodhile*, 12 A. B. R. 374, 130 Fed. 471 (D. C. Iowa): "It is true that most of the bankrupt's account with Wyman, Partridge & Co. was past due at the time of these payments, and that the company was urging payment, but that is not sufficient to charge it with reasonable cause to believe that she was insolvent. Neither is the fact that the check was dated ahead, if that were true; and, under the testimony submitted, it was not. Such facts would only show that the debtor was unable to meet payments promptly, and that is not insolvency, under the present bankruptcy law."

At least such fact is not sufficient to authorize a court to find reasonable grounds for belief to be established as a matter of law.⁴⁵⁵

But may be evidence tending to show reasonable cause for belief.⁴⁵⁶

Inferentially, *Walburn v. Babbitt*, 16 Wall. 577: "The usual and ordinary course of Mendelson's business was to sell at retail. * * * But it is a wholly different thing when he sells his entire stock to one or more persons."

Toof v. Martin, 13 Wall. 40: "And reasonable cause they must be considered to have had when such a state of facts was brought to their notice in respect to the affairs and pecuniary condition of the bankrupts as would have led prudent business men to the conclusion that they could not meet their obligations in the ordinary course of business."

§ 1410. Failure to Investigate No Excuse Where Facts Sufficient to Put on Inquiry.—Nevertheless, failure actually to investigate will not excuse where the creditor's information was sufficient to have put the ordinary man upon inquiry.⁴⁵⁷

Rogers v. Page, 15 A. B. R. 505 (C. C. A. Tenn.): "Thos. Merriam was aware of his brother's condition at the time he bought the land here involved or of such suspicious facts as to charge him with inquiry and notice of such facts as he might have learned by inquiry conducted in good faith."

Plate Glass Co. v. Edwards, 17 A. B. R. 447, 148 Fed. 377 (C. C. A. Iowa): "He testified to efforts to ascertain the bankrupt's financial condition, whether he owed certain parties, and that he relied on the information obtained, but he ignored other sources of information which were at hand and were so obvious

⁴⁵⁵ *Upson v. Mt. Morris Bk.*, 14 A. B. R. 6 (N. Y. Sup. Ct. App. Div.); In *re Eggert*, 4 A. B. R. 449, 3 A. B. R. 541, 102 Fed. 735 (C. C. A. Wis.).

⁴⁵⁶ Inferentially, In *re Moody*, 14 A. B. R. 276, 134 Fed. 628 (D. C. Iowa). And refusal to give further credit after receipt of security is not necessarily conclusive.

Paper Co. v. Goembel, 16 A. B. R. 29, 143 Fed. 295 (C. C. A. Ills.): "In any view the circumstance is of slight weight, as the extension of credit to purchasers is governed by various considerations: the solvent owner of property may well be refused credit if known to be slow pay, deceitful, litigious or in litigation."

⁴⁵⁷ *Crandall v. Coats*, 13 A. B. R. 712, 133 Fed. 965 (D. C. Iowa); In *re Eggert*, 4 A. B. R. 456, 457, 102 Fed. 735 (C. C. A. Wis.). Compare, to same effect, note in In *re Jacobs*, 1 A. B. R. 518 (D. C. La.). Compare, to same effect, In *re Pease*, 12 A. B. R. 66 (D. C. Mich.). Compare, also, to same effect, In *re Andrews*, 14 A. B. R. 247, 135 Fed. 599 (D. C. Mass.). Compare, to same effect, in fraudulent conveyance case, In *re Moody*, 14 A. B. R. 276, 134 Fed. 628 (D. C. Iowa). Compare, to same effect, obiter, *McMurtrey v. Smith*, 15 A. B. R. 435, 142 Fed. 853 (Spec. Master Approved by D. J.). Apparently contra, *Juffel v. Nat'l Bk.*, 16 A. B. R. 262 (Wis.), 106 N. W. 837.

and so much more accurate and reliable than in view of the undisputed facts of the case intentional avoidance is suggested."

In *re Nassau*, 14 A. B. R. 828, 140 Fed. 912 (D. C. Pa.): "The circumstances accompanying the transaction were such as to put the mortgagee's agent upon inquiry, and it can scarcely be doubted that very slight investigation would have led to knowledge of the bankrupt's financial condition."

And if the debtor is known to be insolvent it would seem the creditor is bound to exercise ordinary prudence and diligence to ascertain whether or not such insolvent can make a transfer that will not be in violation of the Bankruptcy Act;⁴⁵⁸ and, under such circumstances, if the transfer is out of the usual and ordinary course of trade, it will tend to negative good faith.⁴⁵⁹

But it has been held though the ruling is doubtful, and the opposite rule more reasonable, that a higher degree of proof is requisite than in cases of fraudulent conveyances.

Suffel v. Nat'l Bk., 16 A. B. R. 262, 106 N. W. (Wis.) 837: "The obvious meaning of this language when construed in connection with the other findings mentioned, is that the court held, as a matter of law, that the present Bankrupt Act does not require the same diligence of creditors concerning preferential payments, that is required of grantees in cases of fraudulent conveyances; and hence, that the facts known to the cashier at the time of receiving the payment, though sufficient to produce in his mind a doubt or suspicion of Dickinson's solvency, yet that they were insufficient to prove that the cashier had at the time reasonable cause to believe that Dickinson was then insolvent or that in making such payment he intended to give a preference to the defendant. This is in harmony with the conclusion of the lengthy opinion of the trial judge, where he said, in effect, that the point to be decided was somewhat difficult, but a considerable reflection had led him to the conclusion that the knowledge of facts and circumstances possessed by the cashier, were well calculated to produce a doubt or raise a suspicion in the mind of an ordinarily intelligent man, as to Dickinson's solvency, but not such as was calculated to produce a belief of it; and as that was essential to the plaintiff's cause of action, he could not recover."

And higher, even, than under the old law of 1867, where insolvency had a different meaning, and consequently, also, reasonable cause for belief of an intended preference had a different meaning.⁴⁶⁰

§ 1411. Cause for Belief Not Necessarily That of Person Receiving—May Be That of Person Benefited.—The reasonable cause for

⁴⁵⁸. Analogously, as to fraudulent conveyance, *In re Moody*, 14 A. B. R. 272, 134 Fed. 628 (D. C. Iowa).

⁴⁵⁹. Analogously, *In re Moody*, 14 A. B. R. 272, 134 Fed. 628 (D. C. Iowa); *Walburn v. Babbitt*, 16 Wall. 577; *Toof v. Martin*, 13 Wall. 40.

Inferentially, *In re Butler*, 9 A. B. R. 539, 120 Fed. 100 (D. C. Mass.): In this case the court held that the mortgage was out of the ordinary course of the business of the bankrupt, because he was a retail dealer, doing business of about \$100 a day, and a mortgage of such a trader's full stock is an open confession of insolvency. Citing *Nary v. Merrill*, 8 Allen 451.

⁴⁶⁰. *In re Pettingill & Co.*, 14 A. B. R. 758 (in note), 135 Fed. 220 (C. C. A. Mass.); *Suffel v. Nat'l Bk.*, 16 A. B. R. 259, 106 N. W. (Wis.) 837; *In re Andrews*, 16 A. B. R. 392 (C. C. A. Mass.).

belief need not be on the part of the one actually receiving the preference, but may be either on the part of the one actually receiving it, or on the part of the one benefited by the preference.⁴⁶¹

This rule is particularly applicable to indorsers, etc., upon commercial paper.

§ 1412. **Agent's Knowledge Imputed to Principal.**—Knowledge of an agent engaged in the transaction, or the existence of a reasonable cause for his believing, is to be imputed to the principal.⁴⁶²

Babbit v. Kelly, 9 A. B. R. 335 (Court of App. at St. Louis, 70 S. W. 384): "Knowledge by an agent of a creditor, or the agent's reasonable cause to believe, that a debtor is insolvent when he does a preferential act in favor of the agent's principal, affects the latter."

§ 1413. **Except When Agent Acting for Own Interest.**—But, of course, the knowledge of the agent is not the knowledge of the principal when the agent is acting in his own interest.⁴⁶³

Or when he had acquired the knowledge while acting as attorney for the bankrupt.

§ 1414. **Whether Public Corporations Chargeable with "Reasonable Cause for Believing."**—But it is a question whether a public corporation can be charged with participation in the preferential intent, it not being bound by tortious acts of its agents.⁴⁶⁴

But the exemption only applies to its governmental functions. It is possible the same rules should apply to public corporations as to other creditors.

§ 1415. **Whether Purchaser at Trustee's Sale Entitled to Set Aside Preferential Encumbrances on Property Purchased.**—A purchaser of property from the trustee, or of the trustee's interest in property, at judicial sale has been held entitled to set aside preferential encumbrances

⁴⁶¹. Bankr. Act, § 60 (b); compare *Swarts v. Siegel*, 8 A. B. R. 220, 117 Fed. 113 (C. C. A. Mo.). Also, *Swarts v. Fourth Nat'l Bk.*, 8 A. B. R. 673, 117 Fed. 1; *Landry v. Andrews*, 6 A. B. R. 281, 48 Atl. 1036 (Sup. Ct. R. I.). Compare, inferentially, to same effect, *Western Tie & Timber Co. v. Brown*, 12 A. B. R. 111, 129 Fed. 728 (C. C. A. Ark., reversed 13 A. B. R. 447, 196 U. S. 502); compare, *In re Sanderson*, 17 A. B. R. 875 (D. C. Vt.).

⁴⁶². *In re Teague*, 2 A. B. R. 168 (D. C. Ind.); *In re Dubant*, 3 A. B. R. 42, 96 Fed. 542 (D. C. N. Car.); *In re Nassau*, 14 A. B. R. 828, 140 Fed. 912 (D. C. Penn., affirming 15 A. B. R. 793).

Inferentially, *In re Wright Lumber Co.*, 8 A. B. R. 345 (D. C. Ark.): This case, however, was a case of surrender of an "innocent" preference as a prerequisite to sharing in the dividends before the Amendment of 1903. Compare, inferentially, *In re Beerman*, 7 A. B. R. 431, 112 Fed. 663 (D. C. Ga.).

⁴⁶³. *Crooks v. Bk.*, 5 A. B. R. 754 (N. Y. Sup. Ct.): In this case the president of the bank alleged to be guilty of receiving the preference was also the leading member of the debtor firm. *In re Ebert*, 1 A. B. R. 340 (Ref. Wis.).

⁴⁶⁴. *In re Shultz & Marks*, 11 A. B. R. 690 (Ref. N. Y.).

upon the property or other preferential transfers of it precisely as would be the trustee himself.

Bryan v. Madden, 11 A. B. R. 763, 78 N. Y. Sup. 220: "If this action had been brought by the trustee his right to recover would have appeared to be clear. Instead of bringing an action, however, by order of the District Court he was directed to transfer the interest of the bankrupt to a purchaser upon a sale made by him which he did. * * * The intention and effect was to assign whatever right the trustee in bankruptcy had, and that right was the same as the one which the trustee himself could reach, for by the orders for the sale and the sale the trustee parted with every interest he had in the bankrupt's contracts. * * * So far as he undertakes to pass property rights he assigns all that he can assign, and it is a wholesome rule that he can dispose of property interests which may be the subject of litigation, allowing others interested to carry the burden."

§ 1416. Right of Preferred Creditors to Offset New Credit.—If a creditor has been preferred, and afterwards, in good faith, gives the debtor further credit, without security of any kind, for property which becomes a part of the debtor's estate, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him.⁴⁶⁵

Gans v. Ellison, 8 A. B. R. 153, 114 Fed. 734 (C. C. A. Pa.): "Upon the true interpretation of paragraph 'a' of § 60, the preference in such case as this is the net gain to the creditor upon the transactions between him and the debtor. The net balance in favor of the creditor is the real preference under the law. For only to the extent of such net gain does the creditor 'obtain a greater percentage of his debt than any other creditors of the same class.' And so, on the other hand, only to the amount of the net gain to the creditor is the estate of the debtor impaired. If, then, a creditor innocently preferred has given return credits afterwards he has surrendered his preference to the extent of such return credits. To effectuate justice, both sides of the account are to be considered in the case of a creditor who innocently has received preferences, and afterwards in good faith has given the debtor further credit without security, for property which has become a part of the debtor's estate. Otherwise it is plain that such innocently preferred creditor would be compelled to surrender his preference a second time before he could prove his claim against the bankrupt's estate." Although this case was decided as to "innocent" preferences before the Amendment of 1903, the principles involved are the same.

⁴⁶⁵ Bankr. Act, § 60 (c); *Kaufman v. Treadway*, 12 A. B. R. 683, 195 U. S. 271, quoted post, § 1423; *Peterson v. Nash*, 7 A. B. R. 181, 112 Fed. 311 (C. C. A. Minn.), quoted post, § 1418; *In re Christenson*, 4 A. B. R. 202, 101 Fed. 802 (D. C. Iowa); *In re Sodolsky*, 7 A. B. R. 123, 111 Fed. 511 (D. C. Minn.); *McKey v. Lea*, 5 A. B. R. 267, 195 Fed. 923 (C. C. A. Ills.); compare, *Kimball v. Rosenham Co.*, 7 A. B. R. 718, 114 Fed. 85 (C. C. A. Ark.); *In re Thompson's Sons*, 7 A. B. R. 214, 112 Fed. 651 (D. C. Penn.); *Kahn v. Export Co.*, 8 A. B. R. 157, 115 Fed. 290 (C. C. A. Ga.); impliedly, *In re Bullock*, 8 A. B. R. 646, 116 Fed. 667 (D. C. N. Car.); impliedly, *In re Sagor & Bro.*, 9 A. B. R. 361, 121 Fed. 658 (C. C. A. N. Y.); compare, *Carleton Dry Goods Co. v. Rogers*, 9 A. B. R. 787 (C. C. A. Tex.).

§ 1417. **Right Distinguished from Offset under § 68.**—This is a different right from that referred to in § 68, relative to the preservation of the right of offset of mutual debts and credits.⁴⁶⁶

§ 1418. **Basis of Right.**—The basis of the right of offset of new credits against previous preferences is the pro tanto enrichment of the trust fund by the new property thrown into it, after the previous depletion of it occasioned by the taking of the preference out of it.

The theory of thus allowing offset against preferences seems to be that the goods so furnished on credit after the preference, were contributions to the trust fund already belonging to creditors by virtue of the insolvency of the debtor; that correlatively to the right of all creditors to share as equal beneficiaries in the trust fund after the insolvency, is the right of a party to withdraw such subsequent contributions therefrom.⁴⁶⁷

Jacquith v. Alden, 9 A. B. R. 773, 189 U. S. 78: "In the present case all the rubber was sold and delivered after the bankrupt's property had actually become insufficient to pay their debts, and their estate was increased in value thereby to an amount in excess of the payments made. The account was a running account, and the effect of the payments was to keep it alive by the extension of new credits, with the net result of a gain to the estate of \$546.89, and a loss to the seller of that amount, less such dividends as the estate might pay. In these circumstances the payments were no more preferences than if the purchases had been for cash, and, as parts of one continuous bona fide transaction, the law does not demand the segregation of the purchases into independent items so as to create distinct pre-existing debts, thereby putting the seller in the same class as creditors already so situated, and impressing payments with the character of the acquisition of a greater percentage of a total indebtedness thus made up."

Peterson v. Nash, 7 A. B. R. 185, 112 Fed. 311 (C. C. A. Minn.): "Nash Brothers by delivering merchandise to the debtor, within four months next preceding the institution of proceedings in bankruptcy by her, and extending credit to her therefor and doing this in the ordinary course of business without knowledge of insolvency, in good faith enhanced the value of the debtor's estate, and while so doing, in like good faith, received payments on general account for an amount less in the aggregate than the value of the merchandise delivered to her. The giving and receiving under such circumstances, may properly enough be regarded as one transaction, resulting not in a preferential payment to the creditor, but, in reality, in the creation of an indebtedness in favor of the creditor for the difference between the two."

⁴⁶⁶. Compare discussion as to the right of offset, ante, § 1170, et seq. Compare [Western] *Tie & Timber Co. v. Brown*, 12 A. B. R. 111, 129 Fed. 728 (C. C. A. Ark., reversed 13 A. B. R. 447, 196 U. S. 502).

⁴⁶⁷. Compare discussion as to "Net Results" under "Eighth Element of Preference," ante, § 1386; *Gans v. Ellison*, 8 A. B. R. 153, 114 Fed. 734 (C. C. A. Penn.); impliedly, *In re Sagor & Bros.*, 9 A. B. R. 361, 121 Fed. 658 (C. C. A. N. Y.); *In re Topliff*, 8 A. B. R. 141, 114 Fed. 323 (D. C. Mass.); *In re Jourdan* (S. C. Dickson *v. Wyman*), 7 A. B. R. 186, 111 Fed. 726 (C. C. A. Mass.); *Carleton Dry Goods Co. v. Rogers*, 9 A. B. R. 787 (C. C. A. Tex.); *Morey Mercantile Co. v. Schiffer*, 7 A. B. R. 670, 114 Fed. 447 (C. C. A. Colo.). But see *In re Calton Export & Import Co.*, 8 A. B. R. 257 (affirmed in 10 Am. B. R. 14, 121 Fed. 663, D. C. N. Y.).

§ 1419. **Net Result, as to Enrichment of Estate after Insolvency, Test.**—After the insolvency, the aggregate result to the trust fund, as to whether it has been enriched by the transaction taken as a whole notwithstanding the alleged preference, is to govern.

And the different items of payments, new goods, credits, etc., are not to be taken separately, nor are merely those new credits coming after any particular payment by the debtor to be offset against the payments preceding the particular new credits; but the transaction, after the insolvency within the four months, is to be taken as a whole and the net result taken.⁴⁶⁸

In *re Geo. M. Hill Co.*, 12 A. B. R. 227, 130 Fed. 315 (C. C. A. Ills.): "We think that in stating the accounts between the parties, within the rule declared in *Jaquith v. Alden*, all the transactions between the parties must be included, and that we are not limited to an account as it is stated or was kept by the bank, because we are to inquire whether the net result of the transaction was to increase or decrease the estate of the bankrupt. If the account was stated including that amount, there remains no question that the net result of the dealings was to decrease the bankrupt's estate, and that the bank is therefore chargeable with the amount of that net decrease as a condition of proving its claim."

Yaple v. Dahl-Millakan Grocery Co., 11 A. B. R. 596, 193 U. S. 526: "Two questions are propounded by this certificate, namely:

"1. Where a creditor has a claim for a balance due against an insolvent debtor afterwards adjudged a bankrupt, upon an open account for goods sold and delivered four months before the adjudication in bankruptcy, and during said period makes a number of sales of merchandise on credit to the insolvent debtor, which becomes a part of the debtor's estate, and during the same period receives payments of sums on account, from time to time, which payments are received in good faith, without knowledge of the debtor's insolvency on the part of the creditor, the sales exceeding in amount during said period the payments made during the same time—has the creditor, under such circumstances, received a preference which he is obliged to surrender before his claim shall be allowed under the Bankrupt Act?

"2. If each of such payments is a preference under the act, is it to be set off, under § 60c of the Act, by deducting subsequent sales therefrom, carrying forward to the next payment any excess of preferences, but not of sales, treating any excess of preferences as thus ascertained as a sum to be surrendered before the allowance of the creditor's claim?"

"The first question is answered in the negative on the authority of *Jaquith v. Alden*, 189 U. S. 78, 9 Am. B. R. 773, and the second need not be answered."

Compare, *In re Watkinson*, 17 A. B. R. 58 (D. C. Pa.): "We, therefore, hold that an increase of the bankrupt's estate, as a net result of the transactions

⁴⁶⁸. *Jaquith v. Alden*, 9 A. B. R. 773, 189 U. S. 78, quoted at preceding paragraph. *Morey Mercantile Co. v. Schiffer*, 7 A. B. R. 670, 114 Fed. 447 (C. C. A. Colo.); *Kimball v. Rosenham*, 7 A. B. R. 718, 114 Fed. 85 (C. C. A. Ark.); *Peterson v. Nash Bros.*, 7 A. B. R. 181, 112 Fed. 311 (C. C. A. Minn.); *In re Jourdan* (S. C. *Dickson v. Wyman*), 7 A. B. R. 186, 111 Fed. 726 (C. C. A. Mass.); *In re Watkinson*, 16 A. B. R. 38 (D. C. Penn.); *In re Delling*, 10 A. B. R. 688, 124 Fed. 852 (D. C. N. Y.); *In re King*, 7 A. B. R. 619, 113 Fed. 110 (D. C. Mass.); *In re Topliff*, 8 A. B. R. 141, 114 Fed. 323 (D. C. Mass.); contra, *In re Bailey*, 7 A. B. R. 26 (D. C. Vt.); contra, *In re Calton Export & Import Co.*, 8 A. B. R. 257, affirmed in 10 A. B. R. 14, 121 Fed. 663 (D. C. N. Y.); compare, *In re Jones*, 10 A. B. R. 513 (D. C. S. C.). See ante, § 1296.

between the bankrupt and a creditor within four months prior to filing the petition in bankruptcy where the last transaction was a payment on account of the indebtedness, is not sufficient to relieve the creditor from surrendering this last payment as preferential before he is permitted to prove the balance of his claim against the bankrupt's estate, when the account runs far back beyond the four months before the petition is presented and the transactions between them end with a large payment on account of the whole indebtedness. Under such circumstances it is a preferential claim and must be surrendered before the balance of the account of the creditor can be proven. *Kimball v. Rosenham Co.*, 7 Am. B. R. 718, 114 Fed. 85; *Sagor Bros.*, 9 Am. B. R. 361. Where in a running account payment by the bankrupt within the four months have induced new credits, which resulted in a net increase to the estate, the creditor may be said to have once surrendered his preference by the giving of the subsequent credit, but where, as in this case, the bankrupt, beginning far beyond the four months limit, makes a number of purchases, and then finally, within the four months, makes a large payment on account, the creditor has been preferred. To hold otherwise would clearly give him a greater percentage of his debt than would be given to others of the same class."

§ 1420. Where Entire Transaction Occurs within Four Months and after Insolvency, No Preference.—Where the entire transaction—all the items of the running account—occur within the four months period and after insolvency, payments on account are not preferential and need not be surrendered.⁴⁶⁹

§ 1421. Distinct Transactions with Same Creditor within Four Months, Not Severed.—Preference on one debt must be surrendered before any debt may be allowed. Distinct transactions with the same creditor within the four months period, provided of course they result in debts of the same "class," cannot be severed. Thus, if the debtor owes the same creditor on a building contract; on a note for money borrowed and also on an open account for goods bought, all which obligations constitute debts of the same "class" within the purview of the bankruptcy act, and pays off in full two of these obligations under such circumstances as would render the payment preferences, the creditor cannot have his claim on the third obligation allowed without surrendering the preferences on the other two. It makes no difference that the two transactions are "closed." All the transactions during the four months period and after insolvency, in the relation of debtor and creditor, are to be considered.⁴⁷⁰

⁴⁶⁹ *Jaquith v. Alden*, 9 A. B. R. 773, 189 U. S. 78 (affirming *Jaquith v. Alden*, 9 A. B. R. 165, C. C. A. Mass.); *Yaple v. Dahl Millakan Grocery Co.*, 11 A. B. R. 596, 193 U. S. 526; *In re Geo. M. Hill Co.*, 12 A. B. R. 221, 130 Fed. 315 (C. C. A. Ills.). Although in the *Yaple* and also in the *Hill Co.* cases the original account did not originate within the four months period as in the *Jaquith v. Alden*.

⁴⁷⁰ *In re Rosenberg*, 7 A. B. R. 316 (Ref. N. Y.); *In re Jones*, 10 A. B. R. 513 (D. C. S. C.); contra, inferentially, *In re Lyon*, 10 A. B. R. 25, 121 Fed. 723 (C. C. A. N. Y., affirming 7 A. B. R. 412); contra, *The Abraham Steers Lumber Co.*, 7 A. B. R. 332, 112 Fed. 406 (C. C. A. N. Y.).

In cases involving "Innocent" preferences before the Amendment of 1903: *In re Conhaim*, 3 A. B. R. 249, 97 Fed. 924 (D. C. Wash.); *In re Beswick*,

Swarts v. Siegel, 8 A. B. R. 689, 117 Fed. 13 (C. C. A. Mo.): "A creditor who has received a preference on one claim against a bankrupt estate is thereby debarred from the allowance of any claim until the preference is first surrendered."

Livingston v. Heineman, 10 A. B. R. 39, 120 Fed. 786 (C. C. A. Ohio, reversing *In re New*, 8 A. B. R. 566): "Sometime within four months preceding the filing of the petition in bankruptcy the bank was the owner and legal holder of the two series of notes, which, in so far as the bank was concerned, and for the purposes of the administration of the bankrupt's estate, constituted but a single claim for \$9,000, no part of which could have been allowed, in favor of the bank, without the restoration to the bankrupt's estate of the two preferential payments. The disability of the bank in this respect inheres in the claim, and operates against the holder into whose hands it may come, whether by assignment or subrogation."

In re Teslow, 4 A. B. R. 757, 104 Fed. 229 (D. C. Minn.): "The prohibition (against proof of claim without surrender of preference) extends to all claims of such creditors against the estate of the bankrupt, and is not, as in the Act of 1867, confined to the claims 'on account of which the preference is made or given.'"

In re Meyer, 8 A. B. R. 598, 115 Fed. 997 (D. C. Tex.): "While the note for \$350 was given to settle a prior, separate, and distinct indebtedness on the part of the bankrupt to Walshe & Co., yet at the time of bankruptcy a portion of this note was still owing, and constituted a portion of the whole debt owing by

7 A. B. R. 395 (Ref. Ohio); *In re Rogers Milling Co.*, 4 A. B. R. 540, 102 Fed. 687 (D. C. Ark.); *Dunn v. Gans*, 12 A. B. R. 316, 129 Fed. 750 (C. C. A. Penn.); *In re Bashline*, 6 A. B. R. 194, 109 Fed. 965 (D. C. Penn.); *Strobel v. Knost*, 99 Fed. 409; *Electric Corp'n v. Worden*, 3 A. B. R. 634, 99 Fed. 400 (C. C. A. Ind.); contra, *In re Abraham Steers Lumber Co.*, 7 A. B. R. 332, 112 Fed. 406 (C. C. A. N. Y.).

Contra, *In re Barrett*, 6 A. B. R. 199 (Ref. N. Y.): A case wrongly reasoned but right in its results since the payment of current rent is not the discharge of a pre-existing debt, but is the discharge of a contemporaneous obligation.

Contra, *Doyle v. Milw. Nat'l Bk.*, 8 A. B. R. 535, 116 Fed. 295 (C. C. A. Wis.); *In re Dickinson*, 7 A. B. R. 679 (Ref. N. Y.); *Wolf v. Levy*, 10 A. B. R. 153, 122 Fed. 127 (D. C. Tenn.); *In re Champion*, 7 A. B. R. 560 (Ref. Ala.); *In re Seay*, 7 A. B. R. 700, 113 Fed. 969 (D. C. Ga.).

Dividing of Indebtedness Ineffectual.—Much less can a creditor with an entire indebtedness avoid this result by dividing it by the taking of several distinct promissory notes therefor.

Dunn v. Gans, 12 A. B. R. 316, 129 Fed. 750 (C. C. A. Penn.): "We do not think that any fair construction of § 57 (g) would permit a creditor of an insolvent debtor to escape the penalty imposed by that section for receiving a preference, by simply dividing the indebtedness into several amounts or parts, evidenced by several promissory notes. * * * We agree with the opinion of the court below that § 57 (g) of the Act of 1898 concerns creditors and not claims."

But where money was lent to be used for a specific purpose but was not used at all, its return to the lender within the four months is not a preference. *Dressel v. North State Lumber Co.*, 9 A. B. R. 541, 119 Fed. 531 (D. C. N. Car.).

Creditor holding a claim for wages in excess of statutory amount, and extending back during all of the three months and for several months prior thereto, cannot apply payments received during the four months upon the items due before the three months and thus leave a priority claim for the full amount allowed by statute and a small common claim, but must surrender all the payments received by him within the four months as preferences—the payments cannot be considered as having been made on priority claims, for the claims were not priority claims when the bankruptcy actually occurred although they would have been priority claims had the bankruptcy occurred sufficiently earlier. *In re King Co.*, 7 A. B. R. 619, 113 Fed. 110 (D. C. Mass.).

the bankrupt to Walshe & Co. To rule that a creditor could withhold from proof a note upon which he had received substantial partial payments, and present for allowance other obligations of indebtedness without a surrender of partial payments received, would be, in the judgment of the court, to ignore the plain import of the language above quoted from the Bankruptcy Act."

In *re Jourdan*, 7 A. B. R. 186 (C. C. A. Mass.): "Section 57 (g) classifies according to creditors and not according to claims."

Swarts v. Fourth Nat'l Bk., 8 A. B. R. 673, 117 Fed. 1 (C. C. A. Mo.): "The unequivocal language and the unquestionable legal effect of this section are to prohibit the allowance of any claim of a creditor who has received a preference, either upon that or upon any other claim he holds against the estate of the bankrupt, unless he has first surrendered his preference."

In *re Thompson's Sons*, 10 A. B. R. 288, 289 (D. C. Penna., affirmed sub nom. *Gans v. Ellison*, 8 A. B. R. 153, 114 Fed. 734, C. C. A. Pa.): "It seems clear that the purpose of the act was that among creditors proving their claims, one should not receive a greater proportionate share of the bankrupt estate than another. To make a distinction between a creditor who lends \$5,000 upon one promissory note and receives \$2,500 in part payment thereof, and another creditor who lends the same sum on two promissory notes and receives the same payment, is inequitable and unjust."

§ 1422. Subsequent Credit, to Extent of Security Given, Not to Be Offset.—The new credit must have been given without security of any kind, else it cannot be offset, except as to the deficit in the value of the security.⁴⁷¹

§ 1423. Goods Purchased by Subsequent Credit Must Go to Enrich Estate.—The goods so purchased by the subsequent credit must go to form part of the estate.⁴⁷²

Impliedly, In *re Morrow*, 13 A. B. R. 394, 134 Fed. 686 (D. C. Ohio): "Three years were given in which to pay the then existing indebtedness, and to keep the business going the bankrupts were to be supplied with goods from time to time, upon short credit, and, as the evidence shows, the goods so supplied were, in fact, used in carrying on the business."

But it need not be proved that the goods for which the unpaid new credit was given, remained part of the bankrupt estate up to the time of adjudication.

Kaufman v. Tredway, 12 A. B. R. 683, 196 U. S. 502: "The trial court, and its views were approved by the Superior Court, held that the statute required not merely that the creditor in good faith gave the debtor credit without security and that the money or property in fact passed to the debtor and became a part of his estate, but also that it remained such until the time of the bank-

⁴⁷¹ Bankr. Act, § 60 (c).

Inferentially, In *re Tanner*, 6 A. B. R. 196 (Ref. N. Y.): This was the case of a chattel mortgage being given to secure a floating balance of credit not to exceed a certain limited sum: the credits given in excess of this sum held to be "without security of any kind."

⁴⁷² Bankr. Act, § 60 (c). Impliedly, *Kaufman v. Tredway*, 12 A. B. R. 683, 196 U. S. 502.

ruptcy and was transferred to the trustee, or at least that it was used in payment of preferred debts. * * *

"It will be noticed that the words used in paragraph 'c' are not 'the bankrupt's estate,' but 'the debtor's estate.' 'Debtor' is also found in the preceding clause as descriptive of the one to whom the credit is given. While the same person is both debtor and bankrupt, first debtor and then bankrupt, the use of the former term is suggestive of the time of the transaction as well as the status of the recipient of the credit. The paragraph further provides that 'the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off.' It is the nonpayment and not the fact that the property remains still a part of the debtor's estate which entitles to a set-off. It would seem that if Congress intended that which the trial court held to be of the meaning of the statute it would have said 'which becomes a part of the bankrupt's estate' or 'which becomes and remains a part of the debtor's estate until the adjudication in bankruptcy.'"

§ 1424. **Creditor Must Have Acted in Good Faith in Acquiring Offset.**—The creditor must have acted in good faith in the matter of acquiring the offset.⁴⁷³

Kaufman v. Tredway, 12 A. B. R. 685, 196 U. S. 502: "Further, Congress provided that the creditor act in good faith. Thus it excluded any arrangement by which the creditor, seeking to escape the liability occasioned by the preference he has received, passes money or property over to the debtor with a view to its secretion until after the bankruptcy proceedings have terminated, or with some other wrongful purpose. It means that the creditor should not act in such a way as to intentionally defeat the Bankrupt Act, but should let the debtor have the money or property for some honest purpose. Requiring that it should become a part of the debtor's estate excluded cases in which the creditor delivered the property to a third person on the credit of the debtor, or delivered it to him with instructions to pass it on to some third party. The purpose was that the property which passed from the creditor should in fact become a part of the debtor's estate, and that the credit should be only for such property."

§ 1425. **Payments upon Purchases on Subsequent Credit Not Themselves Preferences.**—Any payments made upon the purchases thus made on the subsequent credit are not to be held preferences.⁴⁷⁴

Impliedly, *In re Morrow*, 13 A. B. R. 394, 134 Fed. 686 (D. C. Ohio): "The payments were not intended to be applied upon the pre-existing indebtedness, the time for the payment of which had been extended one, two and three years, but were for goods which became a part of the bankrupt's estate."

§ 1426. **"Innocently" Received Preferences before Amendment of 1903.**—Before the Amendment of 1903 to the Bankruptcy Act it was held that preferences must be surrendered before the claim of the creditor could be "allowed," whether he had received the preference with reasonable

⁴⁷³. Impliedly, *In re Morrow*, 13 A. B. R. 394, 134 Fed. 686 (D. C. Ohio).

⁴⁷⁴. Compare same rule applied where payments were applied on the old account, *In re Watkinson*, 16 A. B. R. 38 (D. C. Penn.).

cause to believe a preference was intended to be given him or not. In other words, preferences per se prevented, until surrender, the allowance of the preferred creditor's claim.⁴⁷⁵

Flowing from these rulings quite a body of decisions grew up relative to so-called "innocently" received preferences, which, in many respects and upon many points, are still pertinent, although "innocently" received preferences need no longer be surrendered. Thus, as to the right of offset of new credits as well as other matters, the decisions as to "innocently" received preferences are in general still applicable and instructive.

§ 1427. "Surrender of Preferences" as Prerequisite to Allowance of Claim.—As to the requirement that preferences received by a creditor must be surrendered before his claim will be allowed, as also as to other matters of practice in the recovery of preferences, see ante, § 768, et seq.⁴⁷⁶

§ 1428. But Lien, Itself Not Preference, Not Denied Validity because Preference on Distinct Transaction Not Surrendered.—But a lien which itself is not a preference is not to be denied validity because the lienholder has received a preference on a distinct transaction and has not surrendered the same. The prerequisite of surrender of preferences is applicable only when a claim is presented for allowance to share in dividends.⁴⁷⁷

SUBDIVISION "B."

LIENS BY LEGAL PROCEEDINGS NULLIFIED BY BANKRUPTCY.

§ 1429. Second Branch of Trustee's Peculiar Title and Rights Conferred by Bankruptcy Act—Nullification of Liens by Legal Proceedings.—We have now completed our study of the law relating to

⁴⁷⁵. Carson, *Pirie v. Chic. Title & Trust Co.*, 5 A. B. R. 814, 182 U. S. 438.

⁴⁷⁶. Offsets to "Innocent Preferences" before Amendment of 1903.—It was held, before the Amendment of 1903, that the same right of offset existed in relation to "innocently" perceived preferences as to those received with "reasonable cause for believing a preference was intended to be given." *McKey v. Lee*, 5 A. B. R. 267, 105 Fed. 923 (C. C. A. Ills.); *In re Ryan*, 5 A. B. R. 396, 105 Fed. 760 (D. C. Ills.); *In re Sechler*, 5 A. B. R. 579, 106 Fed. 484 (D. C. Kans.); *In re Christenson*, 4 A. B. R. 202, 101 Fed. 812 (D. C. Iowa); *In re Arndt*, 4 A. B. R. 773, 104 Fed. 234 (D. C. Wis.); *Morey Mercantile Co. v. Schiffer*, 7 A. B. R. 670, 114 Fed. 447 (C. C. A. Colo.); *Gans v. Ellison*, 8 A. B. R. 153, 114 Fed. 734 (C. C. A. Penn., affirming *In re E. O. Thompson's Sons*, 7 A. B. R. 214); *Kahn v. Export & Commission Co.*, 8 A. B. R. 157, 115 Fed. 290 (affirming *In re Southern Overall Mfg. Co.*, 6 A. B. R. 633, cited in *Dunn v. Gans*, 12 A. B. R. 316, C. C. A. Penn.); *In re Soldosky*, 7 A. B. R. 123, 111 Fed. 511 (D. C. Minn.); *In re Bothwell*, 8 A. B. R. 213 (D. C. N. J.); *Peterson v. Nash*, 7 A. B. R. 181, 112 Fed. 311 (C. C. A. Minn.); *In re Thompson's Sons*, 7 A. B. R. 214, 112 Fed. 651 (D. C. Penn., affirming 6 A. B. R. 663); *In re Beswick*, 7 A. B. R. 403 (Ref. Ohio); *In re Tanner*, 6 A. B. R. 196 (Ref. N. Y.); *In re Rosenberg*, 7 A. B. R. 316 (Ref. N. Y.); contra, *In re Abraham Steers Lumber Co.*, 7 A. B. R. 332, 113 Fed. 406 (C. C. A. N. Y., affirming 6 A. B. R. 315); contra, *In re Keller*, 6 A. B. R. 334, 109 Fed. 118 (D. C. Iowa); contra, *In re Oliver*, 6 A. B. R. 626, 109 Fed. 784 (D. C. Iowa).

⁴⁷⁷. *In re Franklin*, 18 A. B. R. 218, 151 Fed. 742 (D. C. N. Car.).

voidable preferences and of the circumstances which must exist in order to entitle the trustee in bankruptcy to recover the property affected by the preference for the benefit of the bankrupt estate; and in doing so we have finished one branch of the third and last division of the subject of the title and rights of the trustee. As will be recalled, the third division was taken up with the title conferred on the trustee by the peculiar provisions of the bankruptcy law itself: that is to say, voidable preferences, liens obtained by legal proceedings invalidated by bankruptcy, and fraudulent conveyances, within the four months preceding bankruptcy. We have finished with voidable preferences. We come now naturally to the other branch of the third division of the subject, and enter upon the consideration of the **invalidity of liens obtained by legal proceedings.**

All liens obtained by legal proceedings upon property of the bankrupt within four months preceding the filing of the bankruptcy petition and when he is insolvent, are nullified by the adjudication in bankruptcy.

Section 67 "f" of the Statute contains broad and sweeping, unequivocal and unescapable provisions annulling all liens, of every kind whatsoever, obtained by legal proceedings when the bankrupt was insolvent upon the property of the bankrupt within the four months preceding the filing of the bankruptcy petition.⁴⁷⁸

Clarke v. Larremore, 9 A. B. R. 476, 188 U. S. 486 (affirming *In re Kenney*, 5 A. B. R. 355, and 3 A. B. R. 353, and 2 A. B. R. 494): "The judgment in favor of petitioner was not like that in *Metcalf v. Barker*, one giving effect to

478. Bankr. Act, § 67 "f": "That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate, and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: Provided, that nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

Metcalf v. Barker, 9 A. B. R. 43, 187 U. S. 165 (reversing *In re Lesser Bros.*, 5 A. B. R. 320); *In re Kemp*, 4 A. B. R. 242, 101 Fed. 689 (D. C. Colo.); *Bear v. Chase*, 3 A. B. R. 746, 99 Fed. 920 (C. C. A. S. C.); *In re Francis Valentine Co.*, 2 A. B. R. 522, 94 Fed. 793 (C. C. A. Calif., affirming 2 A. B. R. 188, 93 Fed. 935); *In re Richards*, 2 A. B. R. 518 (D. C. Wis., affirmed in 3 A. B. R. 145, 96 Fed. 937, C. C. A. Wis.); *In re Breslauer*, 10 A. B. R. 33, 121 Fed. 910 (D. C. N. Y.); *In re Kenney*, 3 A. B. R. 353, 97 Fed. 557 (C. C. A. N. Y., affirmed in 5 A. B. R. 355, and affirming 2 A. B. R. 494, distinguishing 4 A. B. R. 220); *In re Reichman*, 1 A. B. R. 17, 91 Fed. 624 (D. C. Mo.); *In re Fellerath*, 2 A. B. R. 40, 95 Fed. 121 (D. C. Ohio); *In re Benedict*, 8 A. B. R. 463 (N. Y. Sup. Ct.); *In re Vaughn*, 3 A. B. R. 362, 97 Fed. 560 (D. C. N. Y.); *In re Higgins*, 3 A. B. R. 364, 97 Fed. 775 (D. C. Ky.); *In re Burrus*, 3 A. B. R. 296, 97 Fed. 926 (D. C. Va.); *Watschke v. Thompson*, 7 A. B. R. 504 (Sup. Ct. Minn.); *Maurau v. Carpet Lining Co.*, 6 A. B. R. 734 (Sup. Ct. R. I.); *In re Brown*, 91 Fed. 359; *In re*

a lien theretofore existing, but one which with the levy of an execution issued thereon created the lien; and as judgment, execution and levy were all within four months prior to the filing of the petition in bankruptcy, the lien created thereby became null and void on the adjudication of bankruptcy."

§ 1430. Void, Irrespective of Constituting Acts of Bankruptcy.—And such liens are void irrespective of their constituting acts of bankruptcy.⁴⁷⁹

§ 1431. Void, Irrespective of Constituting Preferences.—And are void irrespective of their constituting preferences.⁴⁸⁰

§ 1432. Void, Irrespective of Consent or Permission of Debtor.—And are void irrespective of any consent or permission of the debtor.⁴⁸¹

§ 1433. Void, Though Judgment Not Dischargeable.—And are void even though the judgment, upon which the levy was made or lien obtained, is not dischargeable.⁴⁸²

§ 1434. Void, Irrespective of Creditor's Knowledge of Debtor's Insolvency.—And are void irrespective of any knowledge by the creditor of the debtor's insolvency.⁴⁸³

§ 1435. Invalidating of Liens Obtained by Legal Proceedings Distinguished from Barring of Debt by Bankrupt's Discharge.—The invalidating of liens on the bankrupt's property by the adjudication in bankruptcy is to be distinguished from the barring of debts by the interposition of the bankrupt's discharge; the former concerns only proceedings

Friedman, 1 N. B. N. 208; *Mfg. Co. v. Mitchell*, 1 N. B. N. 262, 1 A. B. R. 701 (Ct. Com. Pleas Penn.); *Schmielovitz v. Bernstein*, 5 A. B. R. 264, 47 Atl. 884 (Sup. Ct. R. I.); *Levor v. Seiter*, 5 A. B. R. 576 (N. Y. Sup. Ct., reversed, on other grounds, in 8 A. B. R. 459); *In re Kenney*, 2 A. B. R. 494, 95 Fed. 427 (D. C. N. Y., affirmed in 3 A. B. R. 353, 5 A. B. R. 355, 9 A. B. R. 476); *In re Richard*, 2 A. B. R. 506, 95 Fed. 258 (D. C. N. Car.); *Hardt v. Schuylkill Plush & Silk Co.*, 8 A. B. R. 479 (Sup. Ct. N. Y. App. Div.); *obiter*, *In re Weinger, Bergman & Co.*, 11 A. B. R. 427, 126 Fed. 875 (D. C. N. Y.); *In re Bailey*, 16 A. B. R. 289, 144 Fed. 214 (D. C. Ore.); *In re McCartney*, 6 A. B. R. 368, 109 Fed. 629 (D. C. Wis.); *In re Hammond*, 3 A. B. R. 490 (D. C. Mass.). Compare, *Rome Planing Mill*, 3 A. B. R. 123, 96 Fed. 812 (D. C. N. Y.).

^{479.} *In re Richards*, 3 A. B. R. 145, 96 Fed. 935 (C. C. A. Wis., affirming 2 A. B. R. 518).

^{480.} *In re Richards*, 3 A. B. R. 145, 96 Fed. 935 (C. C. A. Wis.); *In re Baird*, 11 A. B. R. 435, 126 Fed. 845 (D. C. Vt.); *contra*, *In re Collins*, 2 A. B. R. 1 (Ref. Iowa); *contra*, *inferentially*, *In re Huffman*, 1 A. B. R. 587 (Ref. Penn.).

^{481.} *In re Richards*, 3 A. B. R. 145, 96 Fed. 935 (C. C. A. Wis.).

^{482.} *In re Benedict*, 8 A. B. R. 463 (N. Y. Sup. Ct.); *Bear v. Chase*, 3 A. B. R. 746, 94 Fed. 793 (C. C. A. S. C.).

The rule that a stay will not be granted against a debt that is not dischargeable has reference to stays in behalf of the bankrupt to enable him to interpose his discharge and not to liens by legal proceedings within the four months, as to which stay will be granted though the debt be not dischargeable.

^{483.} *In re Richards*, 3 A. B. R. 145, 97 Fed. 935 (C. C. A. Wis.).

in rem affecting assets, the latter only obligations in personam enforceable out of any new estate the bankrupts might obtain after adjudication.⁴⁸⁴

Bk. of Commerce v. Elliott, 6 A. B. R. 415, 85 N. W. (Wis.) 417: "Whether the court erred in refusing to give appellant judgment in form against Elliott obviously depends upon whether, after the discharge in bankruptcy and the entry of the plea by Elliott in bar of further prosecution of the main suit as to him, appellant had a cause of action in any sense upon which a judgment could be rendered. It is conceded that if a defendant is discharged in bankruptcy from a debt, pending proceedings to enforce it, he is entitled to plead such circumstances in bar of further proceedings for a personal judgment, if the plaintiff does not voluntarily discontinue the action, and to recover on such plea. But it is said that if an action is wholly in rem, or partly in rem and partly in personam, its status as an action to reach the res is not disturbed by a discharge of the defendant in bankruptcy, if the plaintiff's interest therein be preserved by the Bankruptcy Act. The authorities seem to be uniform to that effect."

Powers Dry Goods Co. v. Nelson, 7 A. B. R. 506, 10 N. Dak. 580: "The lien of an attachment on personal property of a bankrupt is not destroyed by a mere discharge of the debt secured by the lien, through a discharge under the present National Bankruptcy Act; and, unless such lien is one which is itself declared void by said act, it may be enforced, through a modified form of judgment, as against the property on which the lien exists."

§ 1436. **Void, However, Only as to Trustee, Not as to Other Lienholders.**—The lien is not dissolved except for the benefit of the estate,⁴⁸⁵ and if preserved for the benefit of the estate is to be treated in determining priorities as still valid as to all other parties and lienholders interested in the property. But if not preserved, then it is annulled as to all lienholders as well as others.⁴⁸⁶

Nor is it void as to the bankrupt.

Powers Dry Goods Co. v. Nelson, 7 A. B. R. 506 (Sup. Ct. N. Dak.): "Section 67i of said act, which provides that certain liens upon the property of a bankrupt shall be null and void when he is adjudged a bankrupt, and that the property covered thereby shall pass to the trustee as a part of the estate of the bankrupt, does not apply to an attachment lien upon property which is exempt, and over which the bankruptcy court has disclaimed jurisdiction by setting it aside to the debtor as exempt."

In explicating this clause "f" of § 67, the following propositions are to be borne in mind.

There are five elements that must exist to make the lien void.

§ 1437. **First Element Requisite to Nullify Lien by Legal Proceedings—Must Be Lien by Legal Proceedings.**—The lien must have

⁴⁸⁴. See *Berry v. Jackson*, 8 A. B. R. 485 (Sup. Ct. Ga.). See post, § 2662, et seq., "Effect of Discharge on Rights of Parties."

⁴⁸⁵. In re *Morrow*, 12 A. B. R. 615 (D. C. Mass.).

⁴⁸⁶. *Thompson v. Fairbanks*, 13 A. B. R. 437, 196 U. S. 516.

been obtained by legal proceedings and the legal proceedings must have created the lien.⁴⁸⁷

Thus, liverymen's liens are not liens obtained by legal proceedings.⁴⁸⁸ Thus, mechanics' liens do not come within these rules, for they are not liens created by legal proceedings, although the recording and filing of an affidavit or the institution of legal proceedings may be necessary to preserve or evidence them.⁴⁸⁹ Likewise, it has been queried whether a landlord's distraint is a legal proceeding;⁴⁹⁰ some courts holding that it is legal proceedings and the lien invalidated by the bankruptcy,⁴⁹¹ but other courts holding that legal proceedings do not create the lien.⁴⁹²

§ 1438. **Liens from All Courts Equally Nullified.**—Clause "f" applies to liens from any court, state or federal.⁴⁹³

§ 1439. **All Kinds of Liens by Legal Proceedings Nullified.**—Clause "f" applies to any kind of a lien by legal proceedings; thus to a "Testatum fi. fa." issued within the four months;⁴⁹⁴ thus, to receiverships in equitable actions;⁴⁹⁵ and, to receiverships in proceedings supplementary to execution;⁴⁹⁶ and to receiverships over partnerships, dissolved by the death of a partner;⁴⁹⁷ and to receiverships to dissolve corporations;⁴⁹⁸ likewise, to receiverships in foreclosure suits where property not covered by the lien is also sought to be sequestered;⁴⁹⁹ also, to equity suits to reach the surplus of spendthrift trust income;⁵⁰⁰ also to attachments;⁵⁰¹ and to attach-

487. Compare, to same effect, *In re Rome Planing Mills*, 3 A. B. R. 123, 96 Fed. 812 (D. C. N. Y.).

In re Emslie, 4 A. B. R. 126, 102 Fed. 291 (C. C. A. N. Y.), where the District Court was reversed for holding a mechanic's lien void because the lien affidavit had been filed within the four months period, the Circuit Court of Appeals holding this was not a lien obtained by legal proceedings.

In re Collins, 2 A. B. R. 1 (Ref. Iowa): This case is not authority, however, on all its other points. *In re Drolesbaugh*, 2 N. B. N. & R. 1029.

488. *In re Pratesi*, 11 A. B. R. 319, 126 Fed. 588 (D. C. Del.): A liveryman's lien is not dependent upon legal proceedings but is a perfect lien directly created by statute and as such is cognizable and enforceable in bankruptcy. *In re Mero*, 12 A. B. R. 171, 128 Fed. 630 (D. C. Conn.).

489. See ante, subdiv. "F", div. 2, "Trustee's Title as Successor to Bankrupt's Title," § 1155, et seq.

490. *In re Belknap*, 12 A. B. R. 326, 129 Fed. 646 (D. C. Penn.).

491. *In re Dougherty Co.*, 6 A. B. R. 457, 109 Fed. 480 (D. C. Ga.).

492. *In re Seebold*, 5 A. B. R. 358, 105 Fed. 910 (C. C. A. La.).

493. *Wood v. Carr*, 10 A. B. R. 577 (Ky. Court of App.).

494. *Mecke v. Rosenberg*, 9 A. B. R. 323, 202 Penn. St. 131.

495. *In re Brown*, 1 A. B. R. 107 (D. C. Ore.): In action to set aside a fraudulent conveyance. *In re Kersten*, 6 A. B. R. 516, 110 Fed. 929 (D. C. Wis.); *Hanson v. Stephens*, 11 A. B. R. 172, 42 S. E. 1028 (Sup. Ct. Ga.).

496. *In re Tyler*, 5 A. B. R. 152, 104 Fed. 778 (D. C. N. Y.).

497. *Wilson v. Parr*, 8 A. B. R. 230, 115 Ga. 629.

498. *Mauran v. Carpet Lining Co.*, 6 A. B. R. 734 (Sup. Ct. R. I.); *In re Lengert Wagon Co.*, 6 A. B. R. 535, 110 Fed. 927 (D. C. N. Y.).

499. *In re Knight*, 11 A. B. R. 1, 125 Fed. 35 (D. C. Ky.).

500. *In re Tiffany*, 13 A. B. R. 310, 137 Fed. 314 (D. C. N. Y.).

501. *In re Brown*, 1 A. B. R. 107, 91 Fed. 358 (D. C. Ore.).

ments by mesne process where property has been sold but the proceeds are still in the officer's hands;⁵⁰² also to garnishment proceedings.⁵⁰³

Klipstein v. Allen Miles Co., 14 A. B. R. 15, 136 Fed. 385 (C. C. A. Ga.): "Besides this the garnishment proceedings being had within four months prior to the bankruptcy proceedings, the surety is not relieved because of the discharge of the debtor because his bankruptcy avoided the lien acquired by the garnishment and destroyed the remedy by which a judgment could be recovered against the defendant which is indispensable to make the lien of any avail to the plaintiff."

And to creditors' bills.⁵⁰⁴

§ 1440. Including Lien Acquired by Creditors by General Assignments.—All kinds of liens by legal proceedings are thus nullified, including the lien acquired by creditors by virtue of statutes regulating assignments for the general benefit of creditors.⁵⁰⁵

§ 1441. Including Statutory Suits in Behalf of All Creditors for Setting Aside Fraudulent or Preferential Transfers Prohibited by State Law.—The better reason would seem to be that § 67 also includes the lien acquired by creditors by virtue of statutory suits for the setting aside of transfers fraudulent and preferential under State law and the administration and distribution of the debtor's property for the general benefit of all creditors.

One case, however, seems to make a distinction between suits brought to set aside transfers as fraudulent and suits brought not exactly to set aside transfers but rather to declare them, under the statute, to inure (as being preferential), to the benefit of all creditors joining in the suit, this case holding, in effect, that such a statutory suit regarding a transfer made before the four months period, although instituted within the four months preceding bankruptcy, does not create a lien by legal proceedings within the purview of § 67 but simply "perfects," a "security," analogous to that of mechanics' liens; and that the bankruptcy court is to recognize the special rights of creditors so joining in the statutory suit and whether to grant them priority over other creditors under § 64 (b) (5), or permit them to go on with their statutory suit to its conclusion.

Moore v. Green, 16 A. B. R. 651, 145 Fed. 480 (C. C. A. W. Va., reversing *In re Porterfield*, 16 A. B. R. 11, 138 Fed. 192): "The proceeding in the State Court was one instituted under the statute of West Virginia, which enabled

^{502.} *Schmilovitz v. Bernstein*, 5 A. B. R. 265 (Sup. Ct. R. I.).

^{503.} *In re McCartney*, 6 A. B. R. 368, 109 Fed. 629 (D. C. Wis.).

^{504.} *Metcalf v. Barker*, 9 A. B. R. 36, 187 U. S. 165 (reversing *In re Lesser Bros.*, 5 A. B. R. 320, C. C. A. N. Y.); *In re Adams*, 1 A. B. R. 94 (Ref. N. Y.); instance, *Continental Nat'l Bk. v. Katz*, 1 A. B. R. 19 (Superior Ct. Ills.).

^{505.} Inferentially, *In re Andrae Co.*, 9 A. B. R. 135, 117 Fed. 561 (D. C. Wis.). But compare, *In re Gray*, 3 A. B. R. 647 (N. Y. Sup. Ct. App. Div.): This case states an unnecessary rule—the assignment is void under § 67 (f) as creating a lien by legal proceedings, or under § 67 (c) as being created in fraud upon the Act. See post, "Superseding of State Court's Custody in Cases of General Assignment," § 1602, et seq.

a creditor of an insolvent debtor to apply to a court of equity to vacate a preference in favor of a particular creditor, and have the conveyance declared to be for the benefit of all creditors properly joining in such suit. This suit was regularly instituted by the petitioner here, the holder of an unsecured debt of some \$3,700, and the same under said statute clearly inured to the benefit of himself and all other creditors authorized thereunder to intervene in the suit; and such rights could not, and should not, be destroyed by the subsequent act of the grantor in the trust deed in favor of his wife voluntarily waiting beyond the four months period, and then availing himself of the benefit of the Bankruptcy Act. Certainly such a result ought not to be brought about unless the interpretation of the bankruptcy law imperatively requires it. Until the husband chose to go into bankruptcy, his creditors had no right under the bankrupt law to require him so to do, he being a person 'engaged chiefly in farming or tillage of the soil,' and they had to look to the State law alone to ascertain their status respecting his property by assailing the deed made in favor of his wife, which they did. They could not anticipate that he would subsequently go into bankruptcy. Having thus availed themselves of the remedy prescribed by the State statute to enforce a right secured to them consequent upon the grantor's act while insolvent—to wit, the conveyances of his property to give a preference—upon instituting such proceedings in the State court they thereby became lienors and secured creditors, pursuant to said statute, under the deed of conveyance thus executed by the bankrupt, which conveyance the law declared upon the institution of the suit inured to the benefit alike of the secured creditor in the deed and his other creditors properly joining them. The true intent, spirit, and meaning of the Bankrupt Act, after enumerating the debts for which preference is thereby specially given, such as the payment of costs, taxes, etc., and certain labor claims, is to adopt the order of priority for the payment of debts prescribed by the State law; and by § 64b, subsec. 5, debts of the character here under consideration are plainly covered, namely, 'debts owing to any person who by the laws of the State is entitled to priority.' The debt secured by the trust deed of the 13th of June, 1902, to Mrs. Porterfield, the estate of whose husband is now being administered by the bankrupt court, would clearly be entitled to priority under the laws of West Virginia, under the deed securing the same, either in the State court or in the bankruptcy court sitting in said State. The debt itself has not been assailed, and the deed was apparently made in good faith, and within the time specified by the laws of the State under which the deed was given a proceeding was regularly taken, the effect of which was not to destroy the deed, but to cause the same, by reason of the insolvency of the grantor in the deed, to inure to the benefit of other creditors, as well as the beneficiary named in the deed. This was the condition existing at the time of the bankruptcy proceeding, and hence as to the property covered by that deed to the extent of the debt therein secured the bankruptcy court took and possessed itself of such property impressed with the lien, and liable not alone to that of the beneficiary named in the deed, but subject to the rights of all persons whose interest had attached thereto by reason of the law of the State at the time of the institution of the bankruptcy proceeding. * * *

"The lien here claimed is analogous to that of mechanics, materialmen, subcontractors, etc., which class of liens have been respected and enforced under the present Bankruptcy Act. They are given a lien by statute, but to be effective the same must be preserved and secured within a prescribed period by filing such claims, duly perfected, etc., for recordation in the designated court of the

State. Being thus entitled to this inchoate lien, taking the steps to secure the benefit thereof within four months of bankruptcy has in every instance, so far as we are advised, been held not to be the taking of legal proceedings in contravention of the Act, but merely doing the necessary thing—taking the essential step—to secure the existing right under the statute. In this class of claims, by reason of the work done or supplies furnished under the agreement between the parties, the statute declares that there shall exist for the amount due a lien, upon the same being properly perfected. In this case the lien arises pursuant to the statute, and under and by virtue of the deed or transfer of the debtor's property, he being an insolvent, provided the creditors assail the same within the statutory period. To say that they should lose the right thus secured by taking the step necessary to secure or make the same effective would be an anomaly. This view of the law has been steadily maintained by the bankruptcy courts under the present Bankruptcy Act."

The effect of the holding in *Moore v. Green* was not especially wrong on the facts of the case, except perhaps for the refusal of the bankruptcy court to permit any other creditors to share in the property recovered than those who had joined in the statutory suit, but the reasoning seems full of dangerous doctrine.

By the same reasoning creditors' suits of all kinds, started within the four months period, would be valid wherever any transfer therein sought to be set aside was made before the four months period. They could all be held to be simply the "perfecting" of a "security" within the four months period, given before that period to the particular creditor invoking the statutory remedy.

§ 1442. "Legal Proceedings" Must Have Operated to Create Lien.

—Thus, replevin actions where title is claimed by the plaintiff are not within the prohibition of the section. The cause of action is inconsistent with a lien. It is the assertion of a right in the property itself as owner, not a claim of lien on another's property.

§ 1443. **Unfounded Replevin Actions.**—But where the replevin action is a mere excuse and without foundation, and is an attempt to seize assets of the bankrupt or to get a preference, it has been held that it will be void.⁵⁰⁶

In *re Hymes Buggy & Implement Co.*, 12 A. B. R. 482, 130 Fed. 977 (D. C. Mo.): "The case at bar affords an apt illustration of the inequality and absurdity of allowing an exemption from the operation of § 67f in favor of a claimant who proceeds by writ of replevin. The evidence in this case shows that almost simultaneously with the institution of the replevin suit the petitioner instituted attachment proceedings against the bankrupt, indicating that it knew of the insolvency, and seized goods in the mass of property in said storehouse, but without segregating them. Becoming aware, doubtless, that the seizure under the writ of attachment would be nullified by the institution of proceedings in bankruptcy, the petitioner, under advice of counsel, let go, and resorted

⁵⁰⁶. In *re Haynes*, 10 A. B. R. 715, 123 Fed. 1001 (D. C. Vt.). Compare facts, In *re Heinsfurter*, 3 A. B. R. 109, 97 Fed. 198 (D. C. Iowa).

to the writ of replevin, the service of which was hardly complete when the proceedings in bankruptcy were instituted."

Obiter, *In re Weinger, Bergman & Co.*, 11 A. B. R. 427, 126 Fed. 875 (D. C. N. Y.): "The strict meaning of the word 'levy' is usually a seizure of the defendant's property, but it does not seem to me a strained construction to hold, in view of the general purpose of this section, that it includes any seizure of property in the bankrupt's possession which he claims to own. If the language of § 67f is not comprehensive enough to cover a suit in replevin to recover property sold and delivered on credit, under a contract which the plaintiff claims a right to rescind for fraud, and a court of bankruptcy has no right to interfere for the protection of general creditors in this class of cases, very grave injustice may result."

But even in cases where the replevin action is thus a mere subterfuge, the proper practice would be for the trustee to intervene therein and assert his rights; if it were a mere subterfuge, the replevin suit would fail and the trustee be thus vindicated. The plaintiff in the replevin suit is entitled to his day in court to prove it is not a mere subterfuge; and where else should he maintain his rights than in the suit itself?

§ 1444. Legal Proceedings Not Themselves Creating Liens but Merely Enforcing Pre-Existing Rights or Liens Not Affected.—Legal proceedings that do not themselves operate to create liens, but simply to enforce or give effect to pre-existing rights or liens, are not affected.⁵⁰⁷

Obiter, *Clarke v. Larremore*, 9 A. B. R. 478, 188 U. S. 486: "The judgment was not, like that in *Metcalf v. Barker*, one giving effect to a lien theretofore existing, but one which with the levy of execution thereon created the lien."

Thus, § 67 'f' does not refer to seizures by replevin;⁵⁰⁸ likewise, foreclosure suits, where no new lien is created but merely a former valid lien enforced, are not affected;⁵⁰⁹ nor are seizures by the sheriff on execution of property already mortgaged to the same creditor for the same debt affected;⁵¹⁰ nor does § 67 "f" refer to proceedings to give effect to landlord's liens, nor will it cause the bankruptcy court to supersede the custody of the State court under levy thereon.⁵¹¹

§ 1445. Lien Valid in Part, and Void as to Balance.—Where the suit is in part a mere foreclosure suit or other suit to realize upon a valid pre-existing lien, and in part creates a lien by legal proceedings upon other assets of the insolvent during the four months period, the legal proceedings

⁵⁰⁷. See post, "Conflict of Jurisdiction," § 1586. *Metcalf v. Barker*, 9 A. B. R. 36, 187 U. S. 165 (reversing *In re Lesser Bros.*, 5 A. B. R. 320, C. C. A. N. Y.); *In re Kavanaugh*, 3 A. B. R. 832, 99 Fed. 928 (D. C. Ky.); contra, *In re Knight*, 11 A. B. R. 1, 125 Fed. 35 (D. C. Ky.): But in this case the receivership operated to do more than enforce existing valid liens.

⁵⁰⁸. See ante, § 1443.

⁵⁰⁹. See post, "Conflict of Jurisdiction," § 1586.

⁵¹⁰. Analogously, *In re Chapman*, 3 A. B. R. 607, 99 Fed. 395 (D. C. Ga.); contra, *In re Booth*, 2 A. B. R. 770, 96 Fed. 943 (D. C. Ga.).

⁵¹¹. *In re Seebold*, 5 A. B. R. 353, 105 Fed. 910 (C. C. A. La.).

will be valid as to the first part and be nullified as to the latter, and the custody of the State Court will be preserved as to the first part and be superseded as to the latter part.⁵¹²

§ 1446. **Receiverships, etc., May Operate to Create "Liens by Legal Proceedings."**—And mere receiverships, even before the Amendment of 1903 made them acts of bankruptcy, were held to be legal liens and to be supplanted by subsequent bankruptcy proceedings.⁵¹³

Mauran v. Carpet Lining Co., 6 A. B. R. 739 (Sup. Ct. R. I.): "It seems to us that the word 'judgment,' as used above, is sufficiently broad to apply to the judgment of this court in appointing the receiver of the Crown Carpet Lining Co., and that the adjudication of bankruptcy against said corporation nullified and avoided the judgment of this court, and that the property held by the receiver must be turned over for administration under the bankruptcy proceedings. * * *

"For the reasons above stated, we are of the opinion that the application of the trustee in bankruptcy that the funds in the hands of the receiver appointed by this court be turned over to him, must be granted."

§ 1447. **Second Element Requisite to Nullify Lien by Legal Proceedings.**—The lien must have been obtained upon property which otherwise (save and except for such lien itself, and for any subsequent transfers void as to such lien, or inferior in priority thereto) would go into the bankrupt's estate to swell the trust fund for all creditors.⁵¹⁴

Thus, as has already appeared in the consideration of exempt property, it is a question of considerable doubt, on which, there are opposing lines of

⁵¹². *Carling v. Seymour Lumber Co.*, 8 A. B. R. 30, 113 Fed. 483 (C. C. A. Ga.).

⁵¹³. *Wilson v. Parr*, 8 A. B. R. 234, 115 Ga. 629.

See subject of "Assignment and Receiverships," post, § 1603. *Moore v. Green*, 16 A. B. R. 651, 145 Fed. 480 (C. C. A. W. Va.).

⁵¹⁴. Impliedly, perhaps, *In re Durham*, 4 A. B. R. 760, 104 Fed. 231 (D. C. Ark.), which was a case of a sheriff's seizure of exempt property after adjudication where there were no exemptions against purchase price levy. *Jewett Bros. v. Huffman*, 13 A. B. R. 738 (N. Dak.); *McKenney v. Cheney*, 11 A. B. R. 54, 118 Ga. 387; obiter, *Powers Dry Goods Co. v. Nelson*, 7 A. B. R. 506 (Sup. Ct. N. Dak.).

Impliedly (perhaps), *White v. Thompson*, 9 A. B. R. 653, 119 Fed. 868 (C. C. A. Ala.), which was a case of attachment of exempt property, although the decision was placed on other grounds. Impliedly, *In re Allen & Co.*, 13 A. B. R. 518, 134 Fed. 620 (D. C. Va.); obiter, *In re Hopkins*, 1 A. B. R. 209 (Ref. Ala.). But see contra, *In re Tune*, 8 A. B. R. 285, 115 Fed. 906 (D. C. Ala.). Inferentially, contra, *In re Bolinger*, 6 A. B. R. 171, 108 Fed. 374 (D. C. Penn.), in which, however, the levy was held void, as creating a "preference." Impliedly, contra, *In re Beals*, 8 A. B. R. 639, 116 Fed. 530 (D. C. Ind.). Contra, *In re McCartney*, 6 A. B. R. 366, 109 Fed. 621 (D. C. Wis.).

Compare, inferentially, *In re Lehigh Lumber Co.*, 4 A. B. R. 221 (D. C. Penn.), where the court impliedly holds that a lien obtained within four months of a partnership bankruptcy, upon the individual property of a nonbankrupt member, is not void, although of course it must be conceded the individual assets are sub modo a fund for the firm creditors. See ante, "Exemptions," § 1100.

authority as to whether a lien obtained by legal proceedings on exempt property is or is not nullified, since the title to exempt property does not, according to § 70, pass to the trustee in bankruptcy.

But after such lien by legal proceedings has been acquired, subsequent transfers may have been made or liens may have been acquired that would have prevented the property passing to the trustee even if the lien by legal proceedings were extinguished. In such event the lien is void only in a certain way, namely, it is void as to the trustee but is good as to subsequent transferees and lienholders, and if it is preserved for the benefit of the bankrupt estate, the trustee gets the advantage of the priority of the lien by legal proceedings, but uses such advantage for the benefit of all creditors.

First National Bk. v. Staake, 15 A. B. R. 644, 202 U. S. 141: "The argument is based upon the theory that the second clause was not intended to apply to liens acquired upon the estate of third parties, but to property which would have passed to Baird's trustee had the attachment not been levied. In other words, that the bankruptcy court has nothing to do with the property, since it really did not belong to the bankrupt, and would have passed to his vendee if the attachments had not been levied upon it. Indeed the opinion especially finds that 'had valid attachments not be levied, the property would have passed to the trustee of the Roanoke Furnace Company.'

"To what extent liens obtained by prior judicial proceedings shall be recognized is a matter wholly within the discretion of Congress. It might have validated all such liens, even though obtained the day before proceedings were instituted. It might probably have invalidated all such liens whenever obtained. It took a middle course, and invalidated all liens obtained through legal proceedings within four months prior to the filing of the petition, but at the same time preserved to the general body of creditors, as against third parties (such as purchasers under an unrecorded deed), such liens as attaching creditors had secured upon property which would have passed to the subsequent purchaser in case the attachment had not been levied. It is true that the attaching creditors are thereby deprived of the fruits of their diligence, but the same thing would have happened had the attachment been levied upon property to which the bankrupt had the whole and undisputed title, or of which he had made a fraudulent conveyance. As remarked by the District Judge, 'In cases where the bankrupt makes a valid conveyance, or where his fraudulent vendee makes a valid conveyance, the purpose of the law is worked out by preserving and enforcing the liens of the attaching creditors for the pro rata benefit of all the creditors.'

"Section 67f is merely carrying out the general purposes of the Act, of securing to the creditors the entire property of the bankrupt, reckoning as part of such property liens obtained by attaching creditors against real estate which had been transferred to another, though no deed had been actually executed and recorded.

"The argument that § 67f in question here, refers only to liens upon property which, if such liens were annulled, would pass to the trustee of the bankrupt, we think is unsound, since that contingency is amply provided for by the prior clause of the section annulling all such liens, and providing that property affected thereby shall pass to the trustee as a part of the estate. Under the argument of the attaching creditors in this case, the subsequent clause would be entirely unnecessary. This clause evidently contemplates that attaching creditors may acquire liens upon property which would not pass to the bankrupt,

if the liens were absolutely annulled, and therefore recognizes such liens, but extends their operation to the general creditors. Had no proceedings in bankruptcy been taken doubtless this property would have been sold for the benefit of the attaching creditors."

§ 1448. "Judgment" Means Judgment Lien, Not Judgment Itself.

—The "judgment" referred to in § 67f, where the statute invalidates all "judgments" and "other liens," does not refer to judgments where no lien is obtained. It means judgment liens.⁵¹⁵

In *re Beaver Coal Co.*, 7 A. B. R. 542, 113 Fed. 889 (C. C. A. Ore., affirming 6 A. B. R. 404, 110 Fed. 630): "Construing the language above quoted from § 67 'f,' we think it refers solely to liens, and that it does not mean that all judgments rendered within four months prior to bankruptcy shall be null and void. The use of the words 'judgments,' and 'or other liens' indicates that it was the purpose of the act to avoid liens only which were obtained by judicial proceedings within the prescribed time, and not to declare void judgments as such. This view is in harmony with other provisions of the Bankruptcy Law. Judgments rendered even after bankruptcy are sustained as determining the claim thereby adjudged."

In *re Blair*, 6 A. B. R. 206, 108 Fed. 529 (D. C. Mass.): "Section 67f avoids certain liens, if created within four months. This is its object. It does not avoid judgments or levies, except so far as these create a lien."

In *re Kavanaugh*, 3 A. B. R. 832, 99 Fed. 928 (D. C. Ky.): "This does, indeed, make certain liens and judgments void if obtained within four months of the adjudication; but it appears to us to be evident that the language, properly construed, was intended only to apply to such judgments as of themselves created liens. Liens thus created were intended to be overthrown and made ineffectual by the adjudication in bankruptcy, unless preserved for the benefit of the estate.

"Probably in most of the States of the Union—certainly in many of them—a judgment for debt, particularly if docketed and indexed, creates a lien upon the debtor's property; and we apprehend, from the connection in which the word 'judgment' is used in the paragraph quoted, that it was meant to confine its meaning to that class of judgments. The section in the main relates to liens, although subsection 'e' provides that certain mortgages or transfers made after the passage of the Bankrupt Act shall also be void upon certain conditions therein provided.

"It seems to us that a clear distinction should be drawn between judgment in this sense, upon a debt—a mere personal liability—and a decree of the chancellor declaring the property rights of parties in a case like the one before us, but which in no way created a lien."

Doyle v. Heath, 4 A. B. R. 705, 22 R. I. 213: "Literally construed, again § 67f avoids 'all judgments' against a bankrupt rendered within four months of the filing of the petition, irrespective of the time of the institution of the suit in which the judgment was ordered, and all such judgments are avoided, although

⁵¹⁵. *Metcalf v. Barker*, 9 A. B. R. 36, 187 N. S. 165 (reversing *In re Lesser Bros.*, 5 A. B. R. 320, C. C. A. N. Y.); *obiter*, *Kinmouth & Braeutigam*, 10 A. B. R. 85, 52 Atl. 226 (N. J. Ch.); *In re Bailey*, 16 A. B. R. 290, 144 Fed. 214 (D. C. Ore.); *In re Pease*, 4 A. B. R. 550 (Ref. N. Y.); compare, analogously, *Owen v. Brown*, 9 A. B. R. 717, 120 Fed. 812 (C. C. A. Colo.). See editor's note to *In re Beaver Coal Co.*, 5 A. B. R. 787 (D. C. Ore.). Compare, to same effect, analogously, *In re Chapman*, 3 A. B. R. 607 (D. C. Ga.).

no lien or preference was created thereby, for the language is 'without limitation or exception. But the difficulty and unreasonableness of adopting a literal construction of the words 'all judgments' appear upon considering the effect produced upon other sections of the act, and upon other provisions of the United States statutes concerning judgments. In the first place, the words are found in the act under the subtitle 'Liens,' and they are conjoined with 'levies, attachments or other liens.' Again, under § 63a of the act the debts which may be proved against a bankrupt are defined as including '(1) a fixed liability, as evidenced by a judgment or an instrument in writing absolutely owing at the time of the filing of the petition against him;' and this without restriction as to the date of entry of the judgment. And § 63 (5) also includes debts 'founded upon provable debts reduced to judgment after the filing of the petition.' Under § 17, among debts not affected by a discharge are '(2) judgments in actions for fraud or obtaining property by false pretenses or false representations, or for willful and malicious injury to the person or property of another'—a manifest inconsistency if the words 'all judgments' are to be taken literally. Again, § 905, Rev. St. U. S., provides that 'the records and judicial proceedings of the courts of any State or Territory when duly authenticated as therein specified, shall have such faith and credit given to them in every court in the United States as they have by law or usage in the courts of the State from which they are taken.' And it is hardly to be supposed that this general provision of federal legislation, first substantially enacted in 1790, was intended to be repealed by the single addition of the word 'judgments' in this clause of the Bankrupt Act of 1898. And, if the words 'all judgments' are to be literally construed, they must include judgments rendered in the courts of foreign countries, irrespective of treaty stipulations, and even the judgments of the very court in which the estate of the bankrupt is being administered. We decline to adopt such a construction of the language of the act, and we construe the words 'all judgments' to be qualified and defined by their context, and to be limited to the lien or preference created by such a judgment."

And it means liens by way of levy of execution or attachment or by way of creditor's bill under judgment.⁵¹⁶

§ 1449. Judgments Whose Liens Annulled Yet Valid for Other Purposes, as *Res Adjudicata*, etc.—A judgment whose lien is thus annulled may yet be valid so far as it fixes the extent and validity of the claims involved; and may even be *res judicata* as to the fraudulent character or otherwise of transfers therein sought to be set aside.⁵¹⁷

Metcalf v. Barker, 9 A. B. R. 36, 187 U. S. 44: "Moreover other provisions of the act render it unreasonable to impute the intention to annul all judgments recovered within four months. By § 63a, fixed liabilities evidenced by judgments absolutely owing at the time of the filing of the petition, or founded upon provable debts reduced to judgments after the filing of the petition and

⁵¹⁶ *Bear v. Chase*, 3 A. B. R. 746, 99 Fed. 920 (C. C. A. S. C.); *In re Darwin*, 8 A. B. R. 703 (C. C. A. Tenn.); *In re Lesser Bros.*, 5 A. B. R. 320 (C. C. A. N. Y.), reversed, on other grounds, sub nom. *Metcalf v. Barker*, 9 A. B. R. 36, 187 U. S. 165).

⁵¹⁷ *Obiter*, *In re Beaver Coal Co.*, 7 A. B. R. 542, 113 Fed. 889 (C. C. A. Ore.), quoted ante, at § 1448. *Obiter*, *Doyle v. Heath*, 4 A. B. R. 705, 22 R. I. 213. *Contra*, *St. Cyr v. Daignault*, 4 A. B. R. 638, 103 Fed. 854 (D. C. Vt.).

before the consideration of application for discharge, may be proved and allowed, while under § 17 judgments in actions of fraud are not released by a discharge, and other parts of the act would be wholly unnecessary if § 67f must be taken literally."

In *re Lesser Bros.*, 5 A. B. R. 320 (C. C. A. N. Y., affirming 3 A. B. R. 815, reversed, on other grounds, in *Metcalf v. Barker*, 9 A. B. R. 36, 187 U. S. 65): "In this case, it is not necessary to say that the entire judgment is null and void, because the judgment was to the effect that the transfers and assignments of personal property and the receiverships were fraudulent and void, and this part of the judgment is not affected by the Bankrupt Act. The lien, however, which was created by the judgment has become discharged by the provisions of § 67, and the Metcalfs cannot have the benefit of the decree which directs payment to them of their judgments in the actions at law because the preference created by the decree was made null by the Bankrupt Act."

In *re Pease*, 4 A. B. R. 547 (Ref. N. Y.): "The word 'judgment' is found in a section captioned by the word 'Liens,' and given over to that subject alone. It is apparently limited by the succeeding words, 'or other liens,' and the words, 'the property affected by the levy, judgment, attachment or other lien shall be deemed wholly discharged and released from the same.' Further, by § 63a (1) and (4), judgments are provable debts; while, if all judgments against an insolvent within four months are void, some of the words in § 60a, defining preferences, would be nonsense. An examination of § 3a (3) and § 17a (2) will further demonstrate the weakness of the contention.

"The word 'judgment' is necessary in this clause. Judgments become liens on realty without a levy or other proceeding. Accurately expressed, the judgment is one thing and the lien another; correctly, a judgment so a lien is a judgment lien. This is what is meant by the statute. Had the word 'judgment' been omitted, judgment liens, unlike other liens, might perhaps have been held good, even if against an insolvent and within the four months."

Expressive but obiter, *Kinmouth v. Braeutigam*, 10 A. B. R. 85 (N. J. Ch.): "The sentiment of the Federal courts seems to be that § 67, par. 'f,' applies only to the lien of judgments, and not to the judgments themselves. The judgment itself may remain until it is ascertainable whether the bankrupt will or will not be discharged. In case of a discharge of the bankrupt, the judgment is released. In case of the failure of the bankrupt to obtain his discharge, the judgment remains. But even in the latter event it can never be enforceable against any property owned by the bankrupt at the time he filed his petition in bankruptcy, but can only be used against after-acquired property. This view in respect to the entry of a judgment after the filing of the petition in bankruptcy, as well as in regard to the force of such judgment as a lien, is supported by the provisions of § 63, par. "a," subd. 5, of the Bankrupt Act. Debts of the bankrupt may be proved and allowed against his estate which are founded upon provable debts reduced to judgment after the filing of the petition, and before the consideration of the bankrupt's application for discharge, less costs incurred and interest accrued after the filing of the petition, and up to the time of the entry of such judgment. Here is a recognition of judgments entered between the filing of the petition and the application for discharge; while the provision respecting the provability of debts so reduced to judgment, less costs and interest accrued after the filing of the petition, is an implied negation of the existence of any lien to be obtained in any manner against the bankrupt's property by force of such judgment."

§ 1450. Lien by Legal Proceedings May Have Been Indirectly Effected.—The appropriation may be effected indirectly by the legal pro-

ceedings. Thus the property of the bankrupt may be discharged from the attachment levy by the giving of a redelivery bond, but if the bankrupt has pledged property of the estate to indemnify the surety on the redelivery bond, it is the same as if the attachment lien still subsisted on the bankrupt's property.⁵¹⁸

§ 1451. Third Element to Nullify Lien.—The lien must have been obtained within the four months preceding the filing of the bankruptcy petition.⁵¹⁹

518. Impliedly, *In re Eastern Commission & Importing Co.*, 12 A. B. R. 305, 129 Fed. 847 (D. C. Mass.).

Instance of indirect effecting of lien, *Klipstein v. Allen Miles*, 14 A. B. R. 15, 136 Fed. 385 (C. C. A. Ga.): Surety not indemnified but released because garnishment was within four months and therefore liability on the surety's bond fell with fall of lien.

Instance of indirect effecting of lien: *Hill v. Harding*, 107 U. S. 631.

519. *Clark v. Larremore*, 9 A. B. R. 476, 188 U. S. 486, affirming *In re Kenney*, 5 A. B. R. 355, 105 Fed. 897 (distinguished, on other points, in *In re Andre*, 13 A. B. R. 135, C. C. A. N. Y.). *In re Richards*, 3 A. B. R. 145, 96 Fed. 935 (C. C. A. Wis., affirming 2 A. B. R. 518). *In re Kenney*, 5 A. B. R. 355, 105 Fed. 897 (C. C. A. N. Y., affirming 3 A. B. R. 353 and 2 A. B. R. 494, and itself affirmed sub nom. *Clark v. Larremore*, 9 A. B. R. 476, 188 U. S. 486).

In re Collins, 2 A. B. R. 1 (Ref. Iowa): But this case is not to be considered as authority in so far as it lays down the rule that the lien must have created a preference.

Philmon v. Marshall, 11 A. B. R. 180, 116 Ga. 811, where the court introduces the further element of proof of the claim in the bankruptcy proceedings, holding that "a discharge does not affect the lien of a creditor who did not prove his debt in the bankruptcy court when the lien was created more than four months preceding the filing of the bankruptcy petition." The decision is correct, but there seems to be an unnecessary reference to the discharge and also to the filing of proofs of claim. The lien if void at all would not be void by virtue of the discharge nor of the filing of a proof of claim but simply by virtue of the provisions of the law annulling liens on adjudication of bankruptcy.

Also, see *In re Snell*, 11 A. B. R. 35, 125 Fed. 154 (D. C. Calif.); *Levor v. Seiter*, 5 A. B. R. 576 (N. Y. Sup. Ct., reversed, on other grounds, in 8 A. B. R. 459); *In re Engle*, 5 A. B. R. 372, 105 Fed. 893 (D. C. Penn.); *In re Francis-Valentine Co.*, 2 A. B. R. 188, 94 Fed. 793 (D. C. Calif., affirmed in 2 A. B. R. 522, 93 Fed. 953); *In re Blumberg*, 1 A. B. R. 633, 94 Fed. 476 (D. C. Tenn.).

In re English, 10 A. B. R. 133 (D. C. N. Y., reversed in 11 A. B. R. 674, 127 Fed. 940): "In the case at bar, an equitable lien upon partnership assets was created by the transfer of the interest in the partnership estate more than four months prior to the filing of the petition. Subsequently such lien, by decree of the State court, was reaffirmed, and became an established liability, which had accrued previously, and prior to the four months' period. This interest was paramount to the rights acquired by the trustee in bankruptcy to the funds in the hands of the receiver. It therefore follows that jurisdiction of the State court over the partnership property of the bankrupts was not divested by the proceedings in bankruptcy." This case was reversed in 11 A. B. R. 674 as far as it concerned the refusal of the bankruptcy court to order the State court receiver to turn over the balance in his hands to the trustee rather than to distribute it to creditors itself. The reviewing court also criticizes the designating of the rights of the transferee as being by way of "an equitable lien." The case was simply that a payment of a firm creditor by the partnership's transfer of part of its assets more than four months before bankruptcy: the institution of proceedings for dissolution and winding up, culminating in an order entered within four months of subsequent bankruptcy finding the transferee to be a tenant in common—and also to have an equitable lien thereby—and also endeavor-

Metcalfe v. Barker, 187 U. S. 165, 9 A. B. R. 36: "When it is obtained within four months the property is discharged therefrom but not otherwise."

Compare, to same effect, *In re Dunavant*, 3 A. B. R. 41 (D. C. N. Car.): "A proceedings in bankruptcy does not affect liens accruing four months prior to petition filed."

And it is not the date of the sale under the lien that is to be taken but the date the lien becomes attached.

Owen v. Brown, 9 A. B. R. 717 (C. C. A. Colo.): "The date of the sale is immaterial, whenever it took place it had redaction back to the date the lien of the judgment attached."

§ 1452. **If Obtained after Filing of Petition, Not Nullified by § 67 "f"—Though Perhaps Otherwise Void.**—Liens obtained by legal proceedings after the filing of the bankruptcy petition are not nullified by § 67 "f," though they may be void for other reasons; for § 67 "f," relating to liens by legal proceedings, unlike § 60 (a), relating to preferences, does not affect liens obtained after the filing of the petition.

Kinmouth v. Braeutigam, 4 A. B. R. 345, 46 Atl. (N. J.) 769: "It is argued on behalf of the motion that the words, 'at any time within four months prior to the filing of a petition in bankruptcy,' mean at any time after a date that is four months prior to the filing of the petition, even although the lien is obtained subsequent to such filing. I cannot assent to this construction. The words are perfectly plain, and have no inclusion of a judgment obtained after the filing of the petition. The way to prevent judgment in a pending action is to stay the suit until the adjudication in bankruptcy, and a sufficient time afterwards to afford opportunity, to obtain and plead a discharge. Possibly, if default be made, the court will, upon discharge being granted, open the judgment in order to allow it to be pleaded; but it will not vacate a judgment regularly obtained, because of the possibility of a subsequent discharge."

Kinmouth v. Braeutigam, 10 A. B. R. 85, 52 Atl. (N. J.) 226: "Being entered not within four months preceding the filing of the petition in bankruptcy, but after the filing of the petition, it was not successfully challenged on a motion to vacate it."

In re Engel, 5 A. B. R. 372 (D. C. Pa.): "It has been recently decided in *St. Cyr v. Daignault* that a judgment by default taken since adjudication is void, and that a permanent stay of proceedings should be granted. I have no doubt that the grant of a permanent stay was right, but, with great respect for the opinion of the learned judge who decided that case, I find myself unable to

ing to make distribution among creditors—the latter part of the order being the objectionable part.

Obiter, *In re Bailey*, 16 A. B. R. 291, 144 Fed. 214 (D. C. Ore.); *In re Kavanaugh*, 3 A. B. R. 832, 99 Fed. 928 (D. C. Ky.).

Compare, *Owen v. Brown*, 9 A. B. R. 717 (C. C. A. Colo.): This case was concerned with a preference by legal proceedings as an act of bankruptcy yet lays down the broad principle that "no provision of the Bankruptcy Act of 1898 contemplates that valid judgment liens on real property acquired before the passage of the act or more than four months before the filing of the petition shall be vacated or that the due enforcement of such liens by execution shall constitute an illegal preference."

Compare, analogously, *In re Heckman*, 15 A. B. R. 501 (C. C. A. Wash.); impliedly, *In re S. Oh. Mi.*, 18 A. B. R. 138 (D. C. Hawaii).

agree with the reason given therefor. I do not think that clause 'f' of § 67 applies to judgments entered after the adjudication. It seems clear to me that this clause refers entirely to judgments and other liens obtained within four months preceding the filing of the petition; and, indeed, I do not find any provision in the act dealing with the lien of judgments entered after the proceeding in bankruptcy has been begun. The reason for this apparent omission may be found in the fact that § 70 expressly provides that, after the trustee has been appointed, the title to the bankrupt's property shall vest in him as of the date of the adjudication; and while it is true that during the interval between the adjudication and the appointment of the trustee the title to the property remains in the bankrupt, it is a title liable to be divested upon the appointment of a trustee, and a title upon which no permanent lien can be acquired. It may have been thought unnecessary, therefore, to pay any attention to what must be an unavailing effort to obtain a lien."

§ 1453. Whether Lien Obtainable by Legal Proceedings after Filing Bankruptcy Petition.—It has been broadly stated that no lien can be obtained by legal proceedings on the bankrupt's property after the filing of the petition, neither before adjudication,⁵²⁰ nor after adjudication, although before a trustee is appointed.⁵²¹

But this inability does not arise through the prohibitions of § 67 (f) as we have seen in the preceding paragraph; although, as we have also seen, preferences may be created by the act of the bankrupt after the filing of the petition if before adjudication, and may be created even by way of legal proceedings.⁵²²

'But it arises from the fact that the assets are already sequestrated in the bankruptcy court and that a seizure thereof by another court is consequently prohibited.'⁵²³

Nevertheless, in case the assets are not actually sequestrated by the bankruptcy court or no injunction be outstanding, there may be a serious doubt

^{520.} *Kinmouth v. Braeutigam*, 10 A. B. R. 83, 52 Atl. 226 (N. J.); *Kinmouth v. Braeutigam*, 4 A. B. R. 344 (N. J. Ch.); *State Bk. v. Cox*, 16 A. B. R. 32, 143 Fed. 91 (C. C. A. Ills.); compare, *In re Engle*, 5 A. B. R. 372, 105 Fed. 893 (D. C. Penn.).

It would seem on principle that liens by legal proceedings obtained before the passage of the Bankrupt Act would not be affected. And it has been held, indeed, that a creditor's action begun before the passage of the Bankruptcy Act is not abated. *Nat'l Bk. v. Hobbs*, 9 A. B. R. 190, 118 Fed. 626 (U. S. C. C. Ga.). But compare the following cases: Compare, *Owen v. Brown*, 9 A. B. R. 717, 120 Fed. 812 (C. C. A. Colo.); compare, *Nat'l Bk. of The Republic v. Hobbs*, 9 A. B. R. 190, 118 Fed. 626 (C. C. A. Ga.); contra, compare analogously, *In re Brown*, 1 A. B. R. 107 (D. C. Ore.); compare, *In re Adams*, 1 A. B. R. 94 (Ref. N. Y., distinguished in *In re Meyers*, 1 A. B. R. 352). These cases could all be equally as well decided on the four months limitations since they are instances in all cases where bankruptcy did not occur within the four months.

^{521.} *In re Engle*, 5 A. B. R. 372, 105 Fed. 893 (D. C. Penn.); *St. Cyr v. Daig-nault*, 4 A. B. R. 638, 103 Fed. 854 (D. C. Vt.).

^{522.} See definition of preference in Bankr. Act, § 60 (a).

^{523.} Inferentially, *State Bk. v. Cox*, 16 A. B. R. 32, 143 Fed. 91 (C. C. A. Ills.): "It is sufficient to remark that the alleged cause of action does not rest upon the provision relating to preferences, but upon the prohibited seizure and appropriation of property of the estate vested in the court of bankruptcy for administration." Compare, to same effect, *In re Engle*, 5 A. B. R. 372, 105 Fed. 893 (D. C. Penn.).

as to whether or not the lien by legal proceedings may not be good.

§ 1454. **Computation of Time.**—The time is to be computed by excluding the day the act was committed and including the day the petition was filed;⁵²⁴ and it is held that fractions of a day are not to be considered.⁵²⁵

§ 1455. **Attachment or Other Lien Effected before Four Months, but Judgment Not Rendered until within, Lien Good.**—Where an attachment or execution is levied or the summons upon a creditor's bill served more than four months before the debtor goes into bankruptcy, the lien thus obtained is not annulled, although the judgment or decree determining it to be proper is not rendered until within four months before the bankruptcy.⁵²⁶

^{524.} Bankr. Act, § 31; *Dutcher v. Wright*, 94 U. S. 553; *In re Dupree*, 97 Fed. 28; *In re Stevenson*, 2 A. B. R. 66, 94 Fed. 110 (D. C. Del.); *In re Planing Mill Co.*, 6 A. B. R. 38 (Ref. N. Y.); *Jones v. Stevens*, 5 A. B. R. 571, 48 Atl. 170 (Sup. Jud. Ct. Me.). See *Leidigh Carriage Co. v. Stengel, et al.*, 95 Fed. 637 (C. C. Ohio). Compare, ante, § 1375.

^{525.} *In re Warner*, 16 A. B. R. 519 (D. C. Conn.); *In re Planing Mill Co.*, 6 A. B. R. 38 (Ref. N. Y.); *Jones v. Stevens*, 5 A. B. R. 571, 48 Atl. 170 (Sup. Jud. Ct. Me.). Compare (analogously—fraudulent conveyance under § 67 [e]), *In re Hill*, 15 A. B. R. 499 (D. C. Calif.). Contra, *Manufacturing Co. v. Grant*, 60 Me. 88. It is the date of the filing of the petition, not of the issuance nor service of the subpoena that controls. *In re Lewis*, 1 A. B. R. 458 (D. C. N. Y.).

^{526.} *In re Blumberg*, 1 A. B. R. 633, 94 Fed. 476 (D. C. Tenn.).

Pepperdine v. Bk. of Seymour, 10 A. B. R. 570 (Court of Appeals St. Louis): "Under the interpretation of the statutory provisions by the courts of this State a specific lien is secured from the moment of levy by attachment upon the property seized, matured by the judgment, and the execution thereunder relates back to the time of the levy, so that a sale thereunder passes a title divested and discharged of all succeeding incumbrances. The lien is created by the attachment levy, and bears date thereof, but is fixed by the judgment."

Nat'l Bk. v. Moses, 11 A. B. R. 772 (Sup. Ct. N. Y.); *In re Beaver Coal Co.*, 7 A. B. R. 542, 113 Fed. 889 (C. C. A. Ore., affirming 6 A. B. R. 404); *Owen v. Brown*, 9 A. B. R. 717, 120 Fed. 812 (C. C. A. Colo.); *In re Blair*, 6 A. B. R. 206, 108 Fed. 529 (D. C. Mass.); *In re Chapman*, 3 A. B. R. 607, 99 Fed. 395 (D. C. Ga.); *In re Frazier v. Trust Co.*, 3 A. B. R. 710, 99 Fed. 707 (C. C. A. N. Car.); *In re Kavanaugh*, 3 A. B. R. 832, 99 Fed. 928 (D. C. Ky.); *Pickens v. Dent*, 5 A. B. R. 644, 106 Fed. 653 (C. C. A. W. Va.); impliedly, *Bank v. Katz*, 1 A. B. R. 19 (Superior Ct. Ills.); impliedly, *Reid v. Cross*, 1 A. B. R. 34 (Superior Ct. Ills.); *Taylor v. Taylor*, 4 A. B. R. 211, 59 N. J. Eq. 86; *Doyle v. Heath*, 4 A. B. R. 705, 22 R. I. 213.

In re De Lue, 1 A. B. R. 387, 91 Fed. 510 (D. C. Mass.): But perhaps this case is based rather on the error that 67 "f" applies only to involuntary bankruptcies. Compare, *Peck Lumber Mfg. Co. v. Mitchell*, 1 A. B. R. 701, 95 Fed. 258 (Com. Pleas Pa.). Compare, *Bank v. Elliott*, 6 A. B. R. 409, 85 N. W. 417. Compare, analogously, *In re English*, 10 A. B. R. 133 (D. C. N. Y.). In this case the lien was created more than four months prior to the filing of the petition in bankruptcy, not by legal proceedings, but by the transfer of an interest in the partnership estate.

But in some States the lien has been held as not attaching until judgment. In such States a contrary rule, therefore, would obtain; thus as to creditor's bills; and thus as to attachments: *In re Lesser*, 5 A. B. R. 326, 108 Fed. 201 (C. C. A. N. Y., disapproved in *In re Blair*, 6 A. B. R. 206, 108 Fed. 529, and reversed by U. S. Sup. Court in *Metcalf v. Barker*, 9 A. B. R. 36, 187 U. S. 165); *In re Johnson*, 6 A. B. R. 202, 108 Fed. 373 (D. C. Vt.); *In re Tobias Lesser*, 5 A. B. R. 326 (D. C. N. Y.).

Perhaps these latter cases are also to be considered as overruled by *Metcalf v. Barker*, 9 A. B. R. 36, 187 U. S. 165.

The lien itself was obtained when the levy was made—the subsequent decree simply established the fact that it was rightly obtained.

Metcalf v. Barker, 9 A. B. R. 36, 187 U. S. 165 (reversing *In re Lesser Bros.*, 5 A. B. R. 320, which in turn had affirmed 3 A. B. R. 185): "In our opinion the conclusion to be drawn from this language is that it is the lien created by a levy, or a judgment, or an attachment, or otherwise, that is invalidated, and that where the lien is obtained more than four months prior to the filing of the petition, it is not only not to be deemed to be null and void on adjudication, but its validity is recognized. When it is obtained within four months the property is discharged therefrom, but not otherwise. A judgment or decree in enforcement of an otherwise valid pre-existing lien is not the judgment denounced by the statute, which is plainly confined to judgments creating liens. If this were not so the date of the acquisition of a lien by attachment or creditor's bill would be entirely immaterial.

"Moreover other provisions of the act render it unreasonable to impute the intention to annul all judgments recovered within four months.

"By § 63a, fixed liabilities evidenced by judgments absolutely owing at the time of the filing of the petition, or founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of application for discharge, may be proved and allowed, while under § 17 judgments in actions of fraud are not released by a discharge, and other parts of the act would be wholly unnecessary if § 67f must be taken literally."

And where a creditor's petition was begun or levy made before the passage of the Bankruptcy Act, the creditor's bill is not abated nor the lien annulled, although final judgment in the creditor's bill or in the attachment suit, or in the suit to enforce the execution lien, may not be rendered until within the four months or until after adjudication.⁵²⁷

§ 1456. But Where State Court Attempts Further Distribution.—But where the State court goes further within the four months period than to make effectual the lien obtained by the legal proceedings prior to the four months period, and attempts further distribution of the remaining assets, a different question arises.

Compare, *In re English*, 11 A. B. R. 674, 127 Fed. 940 (C. C. A. N. Y., reversing 10 A. B. R. 133): "As to the residue of the funds, however, in the hands of the state court receiver, the situation is different. The state court judgment has settled the rights of the contending tenants in common, and distributed the property between them. The funds remaining after Anna English has had her share are now no longer undivided property of tenants in common, but have been held to belong in severalty to the bankrupts. So much of the judgment of the state court as directs the distribution of these funds of the bankrupts to their creditors is void, being within the four months. Therefore the receiver now holds them only as a custodian temporarily until he can turn them over to the bankrupts. But the trustee in bankruptcy now stands in the shoes of the bankrupts, and it is to him that they should be turned over. And they should be turned over in their entirety, because there is no lien upon them in favor of any creditor which the bankrupt act respects. There is no

⁵²⁷. *Metcalf v. Barker*, 9 A. B. R. 36, 187 U. S. 165.

pretense that any of the 60 creditors had any lien for his claim prior to the judgment of August 5, 1901, and whatever lien that judgment gave him was cut off a week later by the filing of petition and the subsequent adjudication of bankruptcy."

§ 1457. **Conversely, Suit Started before but Lien Obtained within Four Months, Lien Falls.**—Conversely, where the suit was started before the four months limit, but the attachment was obtained within it, the attachment falls.⁵²⁸

In re Higgins, 3 A. B. R. 364, 97 Fed. 775 (D. C. Ky.): "There does not seem to me to be any sound reason for supposing that Congress could have intended to refer to anything except the beginning of that part of the proceeding which secured the writ under which there was a seizure of, and consequent lien upon, some of the debtor's property, whereby it was put in a position where other creditors could see that a lien was being claimed upon it to the exclusion of their otherwise equal right to share in it."

§ 1458. **Likewise Levy within Four Months on Judgment Rendered before, Annulled.**—And a levy of execution within the four months upon a judgment rendered before the four months, is also annulled;⁵²⁹ unless the judgment itself was a lien, in which event the execution of the court's judgment might not contravene. Sec. 67 "f."⁵³⁰

§ 1459. **State Law Controls as to Nature of Lien, Time Takes Effect, Abandonment, etc.**—The law of the State will control as to the nature of the lien (for instance, whether it be a "lien by legal proceedings" or not), the time it takes effect and the facts sufficient to constitute an abandonment or vitiation of it.⁵³¹

^{528.} In re Friedman, 1 A. B. R. 511 (Ref. N. Y. since D. J.).

^{529.} Peck Lumber Co. v. Mitchell, 1 A. B. R. 701 (Penn. Com. Pleas); In re S. Ah. Mi., 18 A. B. R. 141 (D. C. Hawaii).

In re Darwin, 8 A. B. R. 703 (C. C. A. Tenn.): In this case it was held, that the rule of the Common Law prevailed—that the lien of the execution related back to the teste thereof which is the first day of the term at which the judgment was rendered; but that this fiction might be rejected when necessary to the attainment of justice.

Obiter, possibly contra, In re Shoemaker, 7 A. B. R. 437, 112 Fed. 648 (D. C. Va.).

Contra, In re Collins, 2 A. B. R. 1 (Ref. Iowa): This case follows the case of De Lue, which was based on a misconception of § 67 "f."

Impliedly, contra, White v. Thompson, 9 A. B. R. 653 (C. C. A. Ala.).

^{530.} Bankr. Act, § 67 (f); analogously, Owen v. Brown, 9 A. B. R. 717, 120 Fed. 812 (C. C. A. Colo.). Obiter, impliedly, In re S. Ah. Mi., 18 A. B. R. 141 (D. C. Hawaii).

^{531.} See ante, discussion of nature of trustee's title, § 1139, et seq. As to time it takes effect, inferentially, Thompson v. Fairbanks, 13 A. B. R. 437, 196 U. S. 516; In re De Lue, 1 A. B. R. 387, 91 Fed. 510 (D. C. Mass.); Pepperdine v. Bank, 10 A. B. R. 576 (St. Louis Ct. Appeals).

Obiter, In re Shoemaker, 7 A. B. R. 437, 112 Fed. 648 (D. C. Va.): This case, however, was taken up with the question of comity and simply held the rights were to be left to the State Court for determination.

Inferentially, In re S. Ah. Mi., 18 A. B. R. 140 (D. C. Hawaii); contra, In re Darwin, 8 A. B. R. 703 (C. C. A. Tenn.). Compare, Mohr & Sons v. Mattox, 12 A. B. R. 333, 120 Ga. 962; compare, Doyle v. Heath, 4 A. B. R. 705, 22 R. I. 213. Compare, apparently but not really contra, In re Engle, 5 A. B. R. 372, 105 Fed. 893 (D. C. Pa.).

In *re Thackara Mfg. Co.*, 15 A. B. R. 259, 140 Fed. 126 (D. C. Pa.): "The question raised in the present case is whether such a lien, which would be protected if duly prosecuted, has been abandoned or has become vacated, through the action of the lien creditor in issuing an execution, and allowing the same to be retained by the sheriff over a long period of time, under an arrangement with the debtor by which the greater part of the indebtedness was gradually liquidated; subsequent executions being in several cases paid in full.

"If the lien thus obtained, which was valid in its inception, continued to be valid as against other creditors, it is no doubt protected by the Bankrupt Act and the claim must be allowed, but the referee (Richard S. Hunter, Esq.) held it to be invalid under the law of Pennsylvania—by which law it must be judged—and refused to award priority for the unpaid balance of the debt. This ruling is now before the court on review, and its correctness has been vigorously attacked. I am of opinion, however, that the referee was right."

And the time of the actual creation of the judgment lien or of the levy of execution or attachment does not necessarily control where the statutes or decisions of the State declare that the lien of a judgment or levy shall revert to the beginning of the term or to the attesting of the writ or to some other date.

Inferentially, but not necessarily supporting the proposition, In *re Fellerath*, 2 A. B. R. 40, 95 Fed. 121 (D. C. Ohio): "The first day of that term of court was on November 1st, 1898, so that the judgment lien dated back to that day, although the sheriff could make no levy on the judgment until January 14, 1899."

But compare, In *re Engle*, 5 A. B. R. 373 (D. C. Pa.): "The bonds accompany and are secured by a mortgage, and it is argued in support of the validity of the executions that the lien of the judgments is carried back by the law of Pennsylvania to the date when the mortgage was recorded, and should, therefore, be considered as if the lien had originated at that time. This may be true for certain purposes, but, under the present circumstances, I must decline to assign a fictitious date to the existence of the lien. It is no doubt true that the bonds are for the same debt that is secured by the mortgage, but the judgments are general judgments, capable of being levied upon any real or personal property belonging to the debtor, as well as upon the property mortgaged, and in all essential respects are like a judgment recovered after trial. Their lien, therefore, must be considered as beginning, if at all, upon the date of entry."

But it has been held that the lien of a levy under an execution on an old judgment upon property acquired by the bankrupt, within the four months period, while insolvent, is void under § 67 "f" of the Bankrupt Act, in a state where the rule of the common law prevails, that the lien of the execution relates back to the test thereof, which is the first day of the term at which the judgment was rendered, although such first day of the term was more than four months before the bankruptcy.⁵³²

§ 1460. Fourth Element to Nullify Lien—Insolvency.—The debtor must have been insolvent at the time it was obtained.⁵³³

^{532.} In *re Darwin*, 8 A. B. R. 703 (C. C. A. Tenn.).

^{533.} Bankr. Act, § 67 (f); *Simpson v. VanEtten*, 6 A. B. R. 204, 108 Fed. 199 (D. C. Penn.); *Levor v. Seiter*, 5 A. B. R. 576 (N. Y. Sup. Ct., reversed, on other grounds, in 8 A. B. R. 459, 74, N. Y. Supp. 499); incidentally, *Clarke v. Larre-*

§ 1461. **Fifth Element to Nullify Lien by Legal Proceedings—Debtor Must Eventually Be Adjudged Bankrupt.**—The debtor must eventually be adjudged bankrupt, else the lien is not invalidated. Thus, before adjudication, the lien is not annulled and no power exists to compel summary surrender of the property levied on, although injunction may issue to preserve the status quo.⁵³⁴ Likewise, a receiver may not, before adjudication, be required summarily to surrender the assets in his hands, though the receivership has been created within the four months preceding the bankruptcy.

Obiter, impliedly, *In re Kersten*, 6 A. B. R. 519, 110 Fed. 929 (D. C. Wis.): "The further question as to jurisdiction over the assets of the bankrupts, now in the possession of the receiver appointed by the Circuit Court of Calumet County, which is set up in a plea by the answering creditors, is not one affecting the jurisdiction of the court to proceed to an adjudication in bankruptcy, and cannot be raised at this stage of the proceedings, nor in the form here presented. It is true that jurisdiction over the estate of a bankrupt is essential for its due administration under the provisions of the act of Congress, but if the jurisdiction of the bankruptcy court to that end is ultimately questioned, the issue can arise only after bankruptcy is adjudged and a trustee or other custodian is appointed and qualified to take possession."

State ex rel Strohl v. Sup. Ct. of Kings Co., 2 A. B. R. 97 (Sup. Ct. Wash.): "It would seem that a corporation created under the laws of this State should be subject to the chancery jurisdiction of the courts, and that creditors of such corporations should have their ordinary remedies under existing State laws until such corporation is adjudged a bankrupt under the law of Congress and by the proper tribunal. Unquestionably, upon such adjudication the power of the State court to further proceed ceases."

Thus, likewise, liens by legal proceedings upon an individual partner's property obtained by an individual creditor are not nullified, where the partnership is adjudicated bankrupt but the partner is not adjudicated bankrupt as an individual.⁵³⁵

more, 9 A. B. R. 476, 188 U. S. 486; impliedly, *Hardt v. Schuykill, etc., Co.*, 8 A. B. R. 481, 74 N. Y. Supp. 549; *In re Collins*, 2 A. B. R. 1 (Ref. Iowa): Insolvency, however, admitted by agreement of parties.

As to What Constitutes Insolvency, "Fair Valuation," etc., and the Time the Insolvency Is to Be Taken, see ante, "Sixth Element of a Preference," § 1342, et seq.

Adjudication of Bankruptcy as Proof of Insolvency.—The adjudication of bankruptcy itself is proof of insolvency if based on an act of bankruptcy involving insolvency at the date of the levy, *Levor v. Seiter*, 5 A. B. R. 576, 69 N. Y. Supp. 987 (reversed, on other grounds, in 8 A. B. R. 459, 74 N. Y. Supp. 499). See also, post, § 1776.

In re Friedman, 1 A. B. R. 510 (Ref. N. Y.): "* * * it is essential that the bankrupt should be insolvent at the time the attachment is levied."

534. See post, "On Adjudication, Invalidating of Lien Relates Back, etc.," § 1467.

535. Contra, and that assignee of individual may be ordered summarily to surrender assets: *In re Stokes*, 6 A. B. R. 262, 106 Fed. 312 (D. C. Penn.). And this is so notwithstanding the partnership bankruptcy draws in the individual estates of the members even though they be not adjudged bankrupt individually.

The lien is not invalidated by the mere filing of the petition. It is null and void only "in case the debtor be adjudged bankrupt."⁵³⁶

§ 1462. Invalidity of Liens by Legal Proceedings Ultimately Rests on Basis of Preference.—Upon reflection, it becomes evident that the invalidity of such liens rests on almost the same basis as the voidability of preferences.

In *re Kenney*, 5 A. B. R. 357, 105 Fed. 897 (C. C. A. N. Y., affirmed, on other grounds, in *Clarke v. Larremore*, 188 U. S. 486): "There can be no doubt that it was the intention of Congress by this section to prohibit creditors of a bankrupt from obtaining preferences over other creditors, as the result of any legal proceedings against him, during the period of four months prior to the filing of the petition; and apt words are used to express that intention. The property of the bankrupt is safeguarded against all such proceedings by the provisions that such of them as would ordinarily be liens against such bankrupt shall be deemed null and void, and the property wholly discharged and released from the same. A broad and liberal construction of the section should be adopted if necessary to effect this intent, but no strained construction is necessary in the face of language so comprehensive."

First Nat'l Bk. *v. Staake*, 15 A. B. R. 645, 202 U. S. 141: "If the interest of Baird in this property were sold solely for the benefit of the attaching creditors, it would obviously result in a preference to those creditors over the general creditors of his estate, and in fraud of the Bankruptcy Act, which is designed to secure equality among all creditors."

In *re Tune*, 8 A. B. R. 291, 115 Fed. 906 (D. C. Ala.): "The main reason for the four months provision was to prevent the race by creditors to seize the estate of the insolvent when it is found that he is in failing circumstances and to prevent the preferences which would follow if liens and attachments were allowed during that period."

In the case of legal liens to be sure, it is not necessary to prove that the judgment lien was obtained by a creditor—as the term creditor is used in bankruptcy—a judgment lien obtained by anyone being equally void; nor is it necessary to prove that the effect of the enforcement of the lien would be to give such a one a greater percentage of his claim than some one else; nor is it necessary to prove the lienholder had reasonable cause for believing anything—beliefs and intents, in short, cutting no figure in considering the invalidity of legal liens.⁵³⁷

Yet the theoretical basis of the invalidity of legal liens is the same as that of the voidability of preferences—protection of the trust fund belonging to all the creditors, so that the maxim, "Equality is equity" may have full sway.

In *re Richards*, 3 A. B. R. 153, 96 Fed. 935 (C. C. A. Wis.): "It asserts the principle that, as between creditors, 'equality is equity' and that the race of diligence must cease, with respect to legal proceedings against a person who

⁵³⁶ Bankr. Act, § 67 "f."

⁵³⁷ In *re Richards*, 3 A. B. R. 145, 96 Fed. 935 (C. C. A. Wis.); In *re Baird*, 11 A. B. R. 435 (D. C. Va.).

is insolvent, at the commencement of four months preceding the filing of the petition."

In *re Baird*, 11 A. B. R. 437 (D. C. Va.): "While the State law gives to diligent creditors who attach a priority of payment—a preference—over those who do not attach, it is beyond dispute that the intent of the Bankrupt Law (except as to rights gained more than four months before the filing of the petition in bankruptcy) is just the reverse. The intent of the latter, except as aforesaid, is to pro rata all available assets, and to prevent any priority of payment being obtained by any creditor within the four months, whether by consent of the debtor or by the diligence of the creditor."

Nevertheless the operation of § 67 (f) is not confined to liens that create a preference.⁵³⁸

§ 1463. Clause "f" of § 67 Supersedes Clause "c" Where in Conflict.—Clause "f" of § 67 supersedes clause "c" of the same section,⁵³⁹ wherever they are in conflict.

In *re Richards*, 3 A. B. R. 145, 96 Fed. 935 (C. C. A. Wis.): "These two subdivisions, 'c' and 'f,' in our judgment, are plainly antagonistic and irreconcilable. The former saves a lien obtained through legal proceedings begun within four months, unless it was obtained and permitted while the debtor was insolvent, or the creditor had reasonable cause to believe such insolvency, or the lien was sought and permitted in fraud of the provisions of the act. The question of the pecuniary condition of the debtor and knowledge upon the part of the creditor are influential in determining the validity of the lien so obtained. But subdivision 'f' is broader in its scope, and avoids all liens obtained through legal proceedings within the time stated against a person who is insolvent, within the meaning of the subdivision, irrespective of knowledge on the part of the creditor of the fact of insolvency, and irrespective of the question whether the obtaining of the lien was in any way suffered and permitted by the debtor. It avoids all liens obtained through legal proceedings against a person who is

⁵³⁸. See ante, this subdivision, paragraph, § 1431.

⁵³⁹. Bankr. Act § 67 (c): "A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt if (1) it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provisions of this Act; or if the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened."

In *re Tune*, 8 A. B. R. 285, 115 Fed. 906 (D. C. Ala.); impliedly, *Bear v. Chase*, 3 A. B. R. 746, 99 Fed. 920 (C. C. A. S. C.); compare, In *re Hopkins*, 1 A. B. R. 209 (Ref. Ala.), where clause 67 (c) is held to apply to "new" liens created by legal proceedings. Also, for peculiar but erroneous construction, see In *re Collins*, 2 A. B. R. 1 (Ref. Iowa), begun within the four months period while clause 67 (f) applies to liens created within the four months on old proceedings instituted before that time. This construction was rejected: In *re Friedman*, 1 A. B. R. 510 (Ref. N. Y.).

insolvent within four months before the filing of the petition. We are unable to reconcile these provisions. They are broadly and clearly in antagonism. It is a question, therefore, how they may be reconciled, for that is impossible. The question is, which shall prevail? The rule in such cases is stated by Puffendorf (Potter, Dwar. St. [Ed. 1871] p. 132): "‘When we meet with a seeming repugnancy in the terms, conjectures are necessary to work out the genuine sense, by reconciling it, if it is possible, to those terms that seem to be repugnant. But, if there be a clear, evident repugnancy, the latter vacates the former. This rule applies to the making of laws, wills and contracts.’"

"Under this rule, subdivision 'f' must control, and we find confirmation of the justice of this rule in the history of this act. Two bills in bankruptcy were presented to Congress; one to the Senate and one to the House of Representatives. They were broadly divergent in spirit. One was supposed to be largely in the interest of the creditor; the other largely in the interest of the debtor. Subdivision 'c' of § 67 was contained in the House bill; subdivision 'f' was contained in the Senate bills. The two houses were at disagreement respecting these bills, and the matter was referred to a conference committee of the two houses near the end of the session, resulting in the incorporation into the House bill of subdivision 'f,' which was in the Senate Bill. Mr. Henderson, in presenting the conference report to the House, stated that subdivision 'f,' was incorporated into the bill to strengthen the bill. 31 Congressional Record, pt. 7, p. 6428, June 28, 1898. The confusion results from the omission of the conference committee to modify the language of subdivision 'c,' or to strike it out altogether; but the passage of the bill by the House with subdivision 'f,' contained in it, after this report of the conference committee, must be taken as an indication of the will of the lawmaking power that the provisions of subdivision 'f' shall prevail, notwithstanding anything antagonistic to them previously found in the act. We are of opinion, therefore, under the rule stated, corroborated and justified by the action of Congress, that the provisions of subdivision 'f' must prevail over those of subdivision 'c,' and that all liens obtained through legal proceedings within the time stated against a person who is insolvent, and irrespective of any sufferance or permission thereof by the debtor and of any knowledge by the creditor of the debtor's insolvency, are avoided if that subdivision can be held to apply to voluntary proceedings in bankruptcy, and if another objection, hereinafter considered, is unavailing."

In re Rhodes, 3 A. B. R. 380 (D. C. Pa.): " * * * under the rule that when there is a clear and evident repugnancy between two classes of the same statute, the latter vacates the former."

Since clause "f" covers in great part the same transactions and is broader than clause "c," clause "c" need not be considered here further than simply to observe that the persistence of both these clauses indicates the conflict that wages all through the law between the two different theories that struggled for supremacy in the framing of the law. The first theory—that embodied in clause "c"—introduced the element of intent and knowledge; whilst the other theory—that embodied in clause "f"—cast aside all consideration of the intent with which a preference was given or received and made the result of the transaction the real test, that is to say, made its effect upon the trust fund the test—as to whether the shares of the other creditors were going to be made less by the transaction than was proportionate. Clause "c," makes the invalidity depend upon the knowledge of the

creditor as to its working a preference or, at any rate, upon the debtor's "permitting" of the lien.⁵⁴⁰

Nevertheless, clause (c) is not to be entirely disregarded, for it is still part of the statute.⁵⁴¹ And it is upon this clause, no doubt, that the superseding of the custody of the State courts rests in cases of assignments for the benefit of creditors, receiverships, etc.,⁵⁴² and it is rather under this section than under § 67 "f" that such general assignments, receivership, etc., within the four months, are to be declared null and void as liens by legal proceedings, since § 67 "f" requires insolvency to exist as an essential element to the nullification; whilst § 67 "c" would not so require but would declare such assignments, receiverships, etc., within the four months, absolutely null and void, as being sought and permitted in fraud of the provisions of this Act.⁵⁴³

§ 1464. Clause "f" Applies to Voluntary Bankruptcies as Well as to Involuntary.—Clause "f" applies to voluntary bankruptcies as well as to involuntary bankruptcies, notwithstanding it refers in its mere wording only to cases where a petition is filed "against" a person;⁵⁴⁴ for clause (1) of § 1 says: "A person 'against' whom a petition has been filed shall include a person who has filed a voluntary petition."

§ 1465. Does Not Impair Obligations of Contract nor Divest Vested Rights.—Clause "f" does not impair the obligation of a contract nor divest the attaching creditor of a vested right.⁵⁴⁵

^{540.} In re Arnold, 2 A. B. R. 180 (D. C. Ky.); compare, In re Burrus, 3 A. B. R. 296, 97 Fed. 926 (D. C. Va.).

^{541.} Compare reference thereto, First Nat'l Bk. v. Staake, 15 A. B. R. 642, 202 U. S. 141.

^{542.} See discussion, post, § 1603, et seq.

^{543.} In re Gutwillig, 1 A. B. R. 392, 92 Fed. 337 (C. C. A. N. Y.).

^{544.} Peck Lumber Co. v. Mitchell, 1 A. B. R. 701 (Penn. Com. Pleas); Brown v. Case, 6 A. B. R. 744, 61 N. E. 279 (Mass. Sup. Jud. Ct.); Mencke v. Rosenberg, 9 A. B. R. 323, 202 Penn. St. 131; In re Benedict, 8 A. B. R. 463 (Sup. Ct. N. Y.); In re Richards, 2 A. B. R. 518 (affirmed in 3 A. B. R. 145, C. C. A. Wis., 96 Fed. 935); McKenney v. Cheney, 11 A. B. R. 54, 118 Ga. 387; Mohr & Sons v. Mattox, 12 A. B. R. 332 (Sup. Ct. Ga.); In re Blair, 6 A. B. R. 206 (D. C. Mass., disapproving In re De Lue, 1 A. B. R. 387, 91 Fed. 510); In re Vaughan, 3 A. B. R. 363, 97 Fed. 560 (D. C. N. Y.); In re Lesser, 3 A. B. R. 815, 100 Fed. 433 (D. C.); In re McCartney, 6 A. B. R. 367, 109 Fed. 621 (D. C.); Jones v. Stevens, 94 Me. 582, 48 Atl. 170, 5 A. B. R. 571; obiter, In re Higgins, 3 A. B. R. 367 (D. C. Ky.); In re Dobson, 3 A. B. R. 420 (D. C. Ills.); In re Fellerath, 2 A. B. R. 40, 95 Fed. 121 (D. C. Ohio); In re Brown, 1 A. B. R. 107, 91 Fed. 359 (D. C. Oregon); In re Friedman, 1 N. B. N. 208; Mfg. Co. v. Mitchell, 1 N. B. N. 262; obiter, Bear v. Chase, 3 A. B. R. 746, 99 Fed. 920 (C. C. A. S. C.); Doyle v. Heath, 4 A. B. R. 705, 22 R. I. 213.

Contra, In re De Lue, 1 A. B. R. 387, 91 Fed. 510 (D. C., disapproved in In re Blair, 6 A. B. R. 206, and in Brown v. Case, 6 A. B. R. 744, Supreme Jud. Ct. Mass.); also, contra, In re Easley, 1 A. B. R. 715, 93 Fed. 419 (D. C., disapproved in Brown v. Case, 6 A. B. R. 744, Supreme Jud. Ct. Mass.); also, contra, In re O'Connor, 95 Fed. 943 (D. C., disapproved in Brown v. Case, 6 A. B. R. 744, Supreme Jud. Ct. Mass.); also, contra, In re Collins, 2 A. B. R. 1 (Ref. Iowa, disapproved in McKenney v. Cheney, 11 A. B. R. 58, 118 Ga. 387).

^{545.} Wood v. Carr, 10 A. B. R. 577 (Ky. Court of App.).

§ 1466. Operates Only on Liens Obtained before Filing of Petition.

—Clause “f” avoids only liens obtained before the filing of the petition, and does not affect those sought to be obtained afterwards. The latter are to be reached in other ways, if at all.⁵⁴⁶

In *re Engle*, 5 A. B. R. 372, 105 Fed. 893 (D. C. Pa.): “I do not think that clause ‘f’ of § 67 applies to judgments entered after the adjudication. It seems clear to me that this clause refers entirely to judgments and other liens obtained within four months preceding the filing of the petition; and, indeed, I do not find any provision in the act dealing with the lien of judgments entered after the proceeding in bankruptcy has been begun. The reason for this apparent omission may be found in the fact that § 70 expressly provides that, after the trustee has been appointed, the title to the bankrupt’s property shall vest in him as of the date of the adjudication; and while it is true that during the interval between the adjudication and the appointment of the trustee the title to the property remains in the bankrupt, it is a title liable to be divested upon the appointment of a trustee, and a title upon which no permanent lien can be acquired. It may have been thought unnecessary therefore, to pay any attention to what must be an unavailing effort to obtain a lien. A similar view concerning the scope of § 67f has been expressed in the Supreme Court of New Jersey. *Kinmouth v. Braeutigam*, 4 Am. B. R. 344, 46 Atl. 769. I have been speaking of voluntary bankruptcy merely. In a case of involuntary bankruptcy a question might be presented concerning the lien of a judgment entered after the filing of the petition, but before the entry of adjudication, and this question I have not considered.”

§ 1467. On Adjudication, Invalidating of Lien Relates Back to Inception of Lien.—The invalidity relates back to the inception of the lien, so that, for all purposes, the lien may be said never to have existed.⁵⁴⁷

Mohr & Sons v. Mattox, 12 A. B. R. 332 (Sup. Ct. Ga.): “The adjudication of the defendant as a bankrupt on a petition filed within four months of the entering of the judgments rendered the judgments null and void, and the nullity and invalidity related back to the time of entry of the judgments, and affected them and all subsequent proceedings.”

Thus, a sheriff may not be mulcted by an execution creditor for failure to proceed with diligence to realize upon an execution, where the execution debtor subsequently goes into bankruptcy within the four months, although had he proceeded with diligence, he might have made the money on his execution and safely turned it over to the execution creditor before the bankruptcy.

Mohr & Sons v. Mattox, 12 A. B. R. 333 (Sup. Ct. Ga., distinguishing *Levor v. Seiter*, 8 A. B. R. 459; also, *McKenney v. Cheney*, 11 A. B. R. 54): “The judgment creditor, obtains his lien subject to its being defeated if the defendant is adjudicated a bankrupt upon a petition filed within four months from the entry of judgment. It was not the laches of the sheriff which caused the movants to lose their rights under their judgment, but the bankruptcy law, which nullified their lien.”

⁵⁴⁶. *Contra*, *St. Cyr v. Daignault*, 4 A. B. R. 638, 103 Fed. 854 (D. C. Vt.); compare, *Kinmouth v. Braeutigam*, 10 A. B. R. 83, 63 N. J. Eq. 103; apparent instance, *Evans v. Stalle*, 11 A. B. R. 182 (Minn.). See ante, § 1452.

⁵⁴⁷. *Clarke v. Larremore*, 9 A. B. R. 478, 188 U. S. 486.

§ 1468. **Lien Absolutely Void and Falls of Itself.**—The lien falls of itself and becomes null and void without the necessity of bringing an action to annul it. It is ipso facto void. In other words, it is absolutely void, not simply voidable.⁵⁴⁸

Schmilovitz v. Bernstein, 5 A. B. R. 265 (Sup. Ct. R. I.): "It was conceded in the argument of the case, and it is well settled by adjudications under the Bankrupt Act of 1867, that an attachment on mesne process made within four months before the commencement of proceedings under the United States Bankrupt Act by or against the defendant in an action in a State court was dissolved ipso facto by the bankruptcy proceedings. * * * The provisions of the Act of 1898 have the same effect with respect to attachments by mesne process, and work the dissolution of other specified liens as well."

In *re Tune*, 8 A. B. R. 285, 115 Fed. 906 (D. C. Ala.): "There is no longer any right of possession in the officer of the State Court who then holds merely as bailee for the person rightfully entitled to possession, and becomes a trespasser if he fails to deliver on proper demand."

In *re Beals*, 8 A. B. R. 639, 116 Fed. 530 (D. C. Ind.): "The moment that Thomas C. Beals was adjudged a bankrupt, the statute operated ex proprio vigore to nullify and render void the judgment set up in the answer of the Pennsylvania Company, and to wholly release and discharge the debt due the bankrupt from such judgment. On what principle can this court hold the judgment to be of any force and effect in the face of a valid statute which declares such a judgment to be a nullity? The adjudication under this statute wipes out the judgment of the justice as effectually as though it never existed, and releases and discharges the debt due the bankrupt from the garnishee judgment as completely and effectually as would a formal release executed by the judgment plaintiff. In obedience to the positive mandate of the statute, the court must deem the attachment null and void, and the wages due the bankrupt wholly released and discharged from the same. It is too firmly settled to be open to doubt that, if a garnishee pays over money on a void judgment, he must bear the loss. He will not be heard to say that he paid it in obedience to a void judgment after notice and knowledge that the judgment has been rendered null and void by operation of law. The adjudication having rendered the judgment against the bankrupt and the Pennsylvania Company null and void, it must be treated as a nullity whenever and wherever drawn in question, either in a direct or in a collateral proceeding. Here the judgment is drawn in question collaterally, and its nullity results from the subsequent adjudication by this court of Thomas C. Beals as a bankrupt."

Laches, therefore, cannot be urged as against the trustee.

Hardt v. Schuylkill Plush & Silk Co., 8 A. B. R. 479, 69 App. Div. 90, 74 N. Y. Supp. 549: "I know of no laches on the part of the trustee that would make this attachment valid, which is made void by the provision of the Bankrupt Act."

§ 1469. **Nevertheless Creditors Not to Sit by, Else Estopped.**—Nevertheless it would hardly be the law that creditors could sit by, and,

⁵⁴⁸. In *re Breslauer*, 10 A. B. R. 33, 121 Fed. 910 (D. C. N. Y.); *Mohr & Sons v. Mattox*, 12 A. B. R. 332 (Sup. Ct. Ga.); In *re Richards*, 2 A. B. R. 506 (D. C. N. Car.); In *re Jennings*, 8 A. B. R. 365 (Ref. N. Y.); inferentially, *Bear & Co. v. Chase*, 3 A. B. R. 746, 99 Fed. 920 (C. C. A. S. C.).

without bringing to the officer's attention the fact of the filing of the bankruptcy petition, permit him to pay over the proceeds of an execution sale to the execution creditor.

§ 1470. Requisite to Bring Situation to Notice of Court or Officer Seeking to Enforce Lien.—However, in practice it will be found that, while it is not necessary to institute an action to annul the lien, it is usually necessary, and is certainly proper, to institute proceedings of some kind, to bring the matter to the notice of the court or officer in charge.⁵⁴⁹

§ 1471. May Come into Court Where Lien Obtained and Ask for Surrender.—Thus, the trustee in bankruptcy may come into the case where the lien was obtained and ask the court there for the surrender of the property.⁵⁵⁰

Hardt v. Schuylkill, etc., Co., 8 A. B. R. 481, 74 N. Y. Supp. 549: "Although by the express provision of the statute the attachment is to be deemed null and void and the property affected by the attachment deemed wholly discharged and released from the same, we agree with the court below that it was the proper practice to apply to the court for an order formally discharging the attachment and releasing the goods of the bankrupt from the levy. Certainly the sheriff could not be required to assume the responsibility of releasing a levy valid but for the adjudication of bankruptcy. It is the duty of the court, upon these facts being called to its attention, to vacate the attachment and remove the lien so that the trustee in bankruptcy can take the proper proceedings to recover the property of the bankrupt's estate."

In re Lesser Bros., 5 A. B. R. 320 (C. C. A. N. Y., reversed, on other grounds, sub nom. *Metcalf v. Barker*, 187 U. S. 165): "Inasmuch as the fund was in the custody of the State court and had been in such custody prior to the institution of the proceedings in bankruptcy, it was proper to make no order in regard to the action of that court, but to direct the trustee in bankruptcy to apply to it for its order upon the receivers to make payment to him."

§ 1472. Comity Requires Resort First to Court Wherein Lien Obtained.—Comity requires that resort be first had to the State Court wherein the proceedings involving the lien are pending.⁵⁵¹

Obiter, *Scheyer v. Book Co.*, 7 A. B. R. 390, 112 Fed. 407 (C. C. A. Ga.): "In opposition to the adjudication, it has been very vigorously insisted in this court that the adjudication in bankruptcy should not be rendered, because

^{549.} *Hardt v. Schuylkill Silk Co.*, 8 A. B. R. 481, 74 N. Y. Supp. 549.

^{550.} Instance, *In re Benedict*, 8 A. B. R. 463, 75 N. Y. Supp. 165 (N. Y. Sup. Ct.).

^{551.} Impliedly, *In re Shoemaker*, 7 A. B. R. 437, 112 Fed. 648 (D. C. Va.): "Solely on the ground that the State court had acquired jurisdiction of the subject matter of this controversy prior to the institution of the bankruptcy proceedings, comity requires that this court should decline to enjoin the officer of that court."

Compare, *In re Lengert Wagon Co.*, 6 A. B. R. 535, 110 Fed. 927 (D. C. N. Y.); *In re Hanks*, 2 A. B. R. 634 (D. C. Ala.); impliedly, *Maurau v. Carpet Lining Co.*, 6 A. B. R. 734, 50 Atl. (R. I.) 331; *Wilson v. Parr*, 8 A. B. R. 234, 115 Ga. 629; (1867) *Ex parte Waddell*, Fed. Cas. 17,027.

the State Chancery Court, through its receiver and under the judgment of dissolution, has taken possession of all the property of the corporation, and that by reason of the comity which does and ought to prevail between courts of the States and courts of the United States, the adjudication in bankruptcy can result in no administration or other beneficial effect. For the purposes of this case, we may concur with the learned counsel in his views on this matter of comity, but we are of opinion, notwithstanding, that the petitioning creditors have the right to have their insolvent debtor adjudged a bankrupt, if for no other reason still for the purpose of insisting upon the application of the provisions of the Bankrupt Law annulling preferences in certain cases.

"Section 67f of the act of 1898 reads; * * *

"Even if the State court shall, on proper application, refuse to deliver over the estate of the corporation to the trustee in bankruptcy, which may be properly requested of the State court by the trustee on the ground that, under the Bankrupt Law of the United States, which is paramount to the Insolvency and Liquidation Laws of the State of Alabama, the bankruptcy court has exclusive jurisdiction in the administration and settlement of the bankrupt's estate, still the trustee may intervene in said proceedings in the State court, and pray that the provisions of the Bankrupt Law applicable to the administration of the estate of the insolvent and defunct corporation shall be applied in behalf of the general creditors, and thereby procure a ruling in the State court annulling the preferences herein complained of, or other rulings in harmony with the Bankrupt Laws of the United States."

In re Lesser, 3 A. B. R. 823, 100 Fed. 439 (D. C. N. Y., reversed, on other grounds, sub nom. Metcalf v. Barker, 9 A. B. R. 36, 187 U. S. 165): "Although the partnership receivers, under the adjudication in the Court of Appeals, have no legal title to the property, they are still the custodians of it, as officers of the State court appointed in the second equity suit as above stated. The fund is, therefore, in the custody of the State court, and the trustee should apply to that court to make the proper order for the payment thereof by its receiver to the trustee, in whom it is vested by the Bankrupt Act. The obligations of the Bankrupt Act are as binding upon that court as upon this; and it is not to be doubted that on proper application the State court will give appropriate directions."

In re Kersten, 6 A. B. R. 516, 110 Fed. 931 (D. C. Wis): "If the adjudication of bankruptcy so operates, as remarked in the recent decision of the Supreme Court in Bryan v. Bernheimer (5 Am. B. R. 623, 629, U. S.), that the property of the bankrupts is 'thereby brought within the jurisdiction of the court of bankruptcy,' it nevertheless rests with the State court, in the first instance, at least, to determine its course when such contingency is duly presented. Moreover, the judicial custody can be changed only through action by the State court for its release, or through plenary procedure, in conformity with the law which governs both jurisdictions, and in accord with comity.

In re Seebold, 5 A. B. R. 364, 105 Fed. 910 (C. C. A. La.): "The State court had the amplest possession of the subject of the controversy and full jurisdiction of the parties at the date of the institution of the bankruptcy proceedings. There is no provision in the present bankrupt law which authorizes or permits the courts of bankruptcy, by the use of either summary or plenary process, to stop the proceedings of the State court in a suit in which it had already, before the institution of the proceedings in bankruptcy, obtained possession of the subject matter and jurisdiction of the parties. What effect the provisions of the Bankrupt Act may have to stay proceedings in a State court is a question of which that court has full jurisdiction to decide, subject to prescribed methods of re-

view, and which the courts of bankruptcy may not attempt to limit or control without a manifest disregard of that comity which is an essential element of our public law, and under which our State and national systems of judiciary work is admirable harmony. Certainly with, and probably without, an order of the court of bankruptcy, the trustee in this case could have made his application to the State court in the suit therein pending, setting up his claim, or the claim of the estate he represents, to the proceeds in question."

Carling v. Seymour Lumber Co., 8 A. B. R. 30, 113 Fed. 483 (C. C. A. Ga.): "When the State court is in possession, through its receiver, of assets that it is without jurisdiction or authority to hold against a receiver or trustee appointed in bankruptcy proceedings, instead of making a peremptory order on the receiver of the State court to surrender the funds, an injunction, if necessary, might be granted by the bankruptcy court to prevent the unlawful distribution of the assets, until application could be made to the State court for an order to its receiver to surrender the assets to the proper custodian. The laws of the United States being equally binding on all the courts, we cannot assume that the State court would refuse to administer them. We are not now called on to decide what course should be taken in the event of a disregard of the Bankrupt Law by the State court. That such application should be made in the first instance to the State court is sustained, not only by the analogous cases relating to comity; but by adjudications directly in point on this question of practice under the Bankrupt Law."

In re Knight, 11 A. B. R. 1, 125 Fed. 35 (D. C. Ky.): "It would not only be unseemly, but altogether disagreeable, to this court, to pursue any course which would be wanting in the utmost respect and courtesy to the State tribunal, and orders will be made directing the trustee to apply to that court for leave to enter a special appearance in the case there pending, styled 'First National Bank of Fulton v. Henry Knight and others,' for the purpose of filing a copy of this opinion, the orders made in pursuance thereof, a copy of the adjudication in bankruptcy, and an accompanying application for an order of that court directing its receiver to turn over to the trustee in bankruptcy the property of the bankrupt held by the receiver."

And injunction by the Bankruptcy Court will be refused if sought in the first instance;⁵⁵² except perhaps long enough to enable the trustee to apply to the State Court for a surrender.⁵⁵³

But resort to the State Court will not defeat the right of the Bankruptcy Court to issue a restraining order subsequently, the doctrine of election of forum not applying.⁵⁵⁴

And the requirement is simply by way of comity, and where an emergency exists, the trustee need not apply first to the State Court, and the bankruptcy court has the right to proceed at once by direct summary proceedings against the court officer.⁵⁵⁵

⁵⁵². *In re Shoemaker*, 7 A. B. R. 437, 115 Fed. 648 (D. C. Va.): The court, whilst deciding the case properly, evinces somewhat of a misunderstanding of the principles underlying the avoiding of legal liens in bankruptcy and the jurisdiction of courts of bankruptcy. Compare, *In re Lengert Wagon Co.*, 6 A. B. R. 535, 110 Fed. 927 (D. C. N. Y.).

⁵⁵³. *Carling v. Seymour*, 8 A. B. R. 41, 113 Fed. 483 (C. C. A. Ga.); *In re Lengert Wagon Co.*, 6 A. B. R. 535, 110 Fed. 927 (D. C. N. Y.).

⁵⁵⁴. *Bear v. Chase*, 3 A. B. R. 746, 99 Fed. 920 (C. C. A. S. C.). See post, § 1637.

⁵⁵⁵. Analogously, *In re Hornstein*, 10 A. B. R. 308, 122 Fed. 266 (D. C. N. Y.).

§ 1473. **Bankruptcy Court May Enjoin.**—The trustee or other proper party, if any there be, to the bankruptcy proceedings may enjoin.⁵⁵⁶

In re Kimball, 3 A. B. R. 161 (D. C. Penn.): "Where the personal property of the bankrupt at the date of the adjudication is subject to the levy of a pending execution, the right of this court to enjoin the execution creditor, if the execution is an unlawful preference and contrary to the provisions of the Bankrupt Act, is clear."

Bear v. Chase, 3 A. B. R. 755, 99 Fed. 920 (C. C. A. S. C.): "The power of the United States District Court to enjoin and restrain the parties from the further prosecution of the suits in the State court was plenary, and should have been exercised because necessary to the maintenance of its jurisdiction and the due administration of the bankrupt law."

In re Lesser Bros., 5 A. B. R. 320 (C. C. A. N. Y., reversed, on other grounds, sub nom. Metcalf v. Barker, 9 A. B. R. 36, 187 U. S. 165): "The District Court had jurisdiction to stay the appellants by virtue of its power as a court of bankruptcy, * * * and, as § 67 gives the court of bankruptcy power to make orders in the premises, it was also proper for that court to proceed as a court of bankruptcy, by order after notice upon a summary petition, and direct the Metcalfs not to go into the State court upon their own motion and attempt to obtain payment."

§ 1474. **Or May (after Adjudication) Issue Order to Surrender.**—The bankruptcy court may, after adjudication of bankruptcy, issue an order upon the State Court officer to turn over the property.⁵⁵⁷

^{556.} In re Kenney, 2 A. B. R. 494, 95 Fed. 427 (D. C. N. Y., affirmed in 3 A. B. R. 353, 5 A. B. R. 355, C. C. A. and reaffirmed sub nom. Clarke v. Larremore, 9 A. B. R. 47, 188 U. S. 486); In re Northrop, 1 A. B. R. 427 (Ref. N. Y.); In re Globe Cycle Wks., 2 A. B. R. 447 (Ref. N. Y.); Blake v. Francis Valentine, 1 A. B. R. 372, 89 Fed. 691 (D. C. Calif.): This case is not approved in its full extent. In re Chas. D. Adams, 1 A. B. R. 94 (Ref. N. Y.); instance, In re Breslauer, 10 A. B. R. 33, 121 Fed. 910 (D. C. N. Y.); instance, where injunction refused, In re Shoemaker, 7 A. B. R. 437 (D. C. Va.).

As to whether referee may issue the restraining order, see ante, as to "Jurisdiction of Referees," § 527.

And the Bankruptcy Court does not lose the right to issue the restraining order in the bankruptcy proceedings themselves, by the trustee's previous application in the State Court; at any rate, where he had had no order to make the previous application.

^{557.} In re Francis-Valentine Co., 2 A. B. R. 522, 89 Fed. 691 (C. C. A. Calif., affirming 2 A. B. R. 188); In re Kenney, 3 A. B. R. 353, 97 Fed. 554 (D. C. N. Y., affirmed by C. C. A., 5 A. B. R. 355, 105 Fed. 897, and by Supreme Court sub nom. Clarke v. Larremore, 9 A. B. R. 477, 188 U. S. 486); In re Hoffman, 1 A. B. R. 587 (Ref. Penn.); instance, In re Peiser, 7 A. B. R. 690, 115 Fed. 199 (D. C. Pa.).

Instance where order refused, In re Seebold, 5 A. B. R. 358, 105 Fed. 910 (C. C. A. La.): This case, in its last syllabus and also in the language of the opinion, seems to deny the right of the bankruptcy court to order surrender of the proceeds of a levy made within four months, but it is not, perhaps, really contra, since the facts show the levy was simply the giving of the effect to an inchoate landlord's lien already existing and so was not within the inhibitions of § 67 (f) but rather within the doctrine of paragraph 1214, ante.

In re Fellerath, 2 A. B. R. 40, 95 Fed. 121 (D. C. Ohio); contra, In re Franks, 2 A. B. R. 634, 95 Fed. 635 (D. C. Ala.).

Even if a replevin proceedings is pending against the sheriff by a stranger who claims the property for himself and asserts it did not belong to the bank-

And it has been held that the marshal or receiver may be ordered to seize the property,⁵⁵⁸ but this hardly would be justified, for the lien is not annulled by the mere filing of the petition, but only by the adjudication.

§ 1475. **Trustee May Replevin.**—Of course, the trustee in bankruptcy may resort to replevin to gain possession.

§ 1476. **Or May Sue State Court's Officer for Money Had and Received.**—The trustee may sue the State Court's officer for money had and received; and this latter method is held in one case to be the only proper course where the property has been sold and the State court been appealed to without effect.⁵⁵⁹ And in all these cases, of course, it is necessary for the attorney of the trustee to prove the five elements making the lien void, in order to gain possession of the property levied on.

§ 1477. **Where Sheriff Already Paid Over Proceeds to Execution Creditor Latter becomes Adverse Party Not to Be Summarily Dealt with.**—Where the sheriff has already paid over to the execution creditor the whole or a part of the proceeds of the execution sale, the execution creditor becomes an adverse party and cannot be required summarily to surrender what he has received: he can be reached only by plenary action.⁵⁶⁰

Levor v. Seitor, 8 A. B. R. 459, 74 N. Y. Supp. 499: "While proceedings are pending for the enforcement of a lien created by judgment or otherwise, and before the lien is in fact satisfied by the lienor receiving the amount thereof, doubtless the trustee in bankruptcy has the right to avoid the lien or to follow the proceeds of the sale of the property to which the lien attached until they are actually paid over to the lienor. * * * Until the avails of sale actually reach the possession of the judgment creditor, the proceeding to enforce the judgment may still be regarded as incomplete; but when the

rupt, yet the sheriff must turn over the property to the bankruptcy trustee, since his holding of it is, in any event, without title: the stranger must work out his rights in the bankruptcy proceedings. In *re Francis-Valentine Co.*, 2 A. B. R. 522, 89 Fed. 691 (C. C. A. Calif.).

^{558.} In *re Richard*, 2 A. B. R. 506 (D. C. N. Car.).

^{559.} In *re Franks*, 2 A. B. R. 634, 95 Fed. 635 (D. C. Ala.).

Trustee's Positive Affidavit as to Bankrupt's Insolvency.—The trustee's own positive affidavit that the bankrupt was insolvent at the time has been held sufficient proof of the element of insolvency, it not appearing that the trustee did not have the means of knowing, *Hardt v. Shuylkill Plush & Silk Co.*, 8 A. B. R. 479, 74 N. Y. Supp. 549.

^{560.} Compare, apparently contra, to the effect that the creditor may be ordered to surrender the proceeds of the sale of the attached property, In *re Hammond*, 3 A. B. R. 466, 98 Fed. 845 (D. C. Mass.). But obviously this was a case where the proceeds were still in the officer's hands although the Court says in the "creditors'" hands.

But if the lien by legal proceedings was obtained before the filing of the petition and within the four months, but the sale and turning over of the proceeds did not take place until after the filing of the petition and appointment of the receiver in bankruptcy although before the adjudication, the proceeds in the hands of the judgment creditor, who was cognizant of the receivership, may be summarily ordered surrendered, In *re Breslauer*, 10 A. B. R. 33, 121 Fed. 919 (D. C. N. Y.). But this would come rather under the rules relative to the superseding of receiverships.

proceeds are paid over, the lien of the judgment is in fact satisfied, in this case pro tanto."

In re Blair, 4 A. B. R. 220, 102 Fed. 987 (D. C. N. Y.): "Although the collection by execution and payment to the creditor constituted a 'preference' (§ 60a), yet as the money was received by the creditor before the petition in bankruptcy was filed, the transaction thereby became consummated, thus differing from Kenny's case (3 Am. B. R. 353). If the preference was received by the creditor without reasonable cause to believe a preference was intended (§ 60b), it seems not to be recoverable back by the trustee. * * *

"Under the recent decisions of the Supreme Court, I am of opinion that this transaction being completely executed by the payment of the money by the sheriff before the petition was filed, the remedy of the trustee is by plenary action alone in the State court."

Inferentially, obiter, Clarke v. Larremore, 9 A. B. R. 476, 188 U. S. 486: "A different question might have arisen if the writ had been fully executed by payment to the execution creditor."

In re Knickerbocker, 10 A. B. R. 381, 121 Fed. 1004 (D. C. N. Y.): "It is quite true that by § 67f, 30 Stat. 565, all judgments, liens, levies, and other liens are invalidated by adjudication in bankruptcy, and the property affected by them passes to the trustee; but where the proceeds of an execution sale have actually been paid to the judgment creditor—in other words, where the transaction is completely executed—the execution creditor ceases to be a lienor, but has title to the proceeds of his execution. This title may or may not be defeasible, as may be disclosed by an action brought to recover these proceeds. * * *

"The referee was of the opinion that, as the judgment was not satisfied in full by the money realized on the execution sale, the respondents were creditors of the bankrupt, and that jurisdiction may therefore be exercised over this controversy. This contention is without merit. The respondents are not now before this court in the capacity of creditors. They are not seeking to prove a claim, and no order has been made directing a surrender of a preference as a condition of its allowance. * * * The remedy of the trustee, however, must be sought in a plenary suit brought under the provisions of § 23 (b), as amended, either in this court or the proper State tribunal, at his election."

In re Bailey, 16 A. B. R. 289, 144 Fed. 214 (D. C. Ore.): "Being invalidated, the property is divested of the encumbrance and the trustee takes it by succession from the bankrupt as if none had ever existed or had been claimed. The distinction should be held in mind between the lien claimed on the property by virtue of the levy, attachment, etc., and the property itself. It is the lien that § 67 'f' treats of and is designed to affect directly. The property is only affected indirectly by a discharge of the lien. * * * The case at bar, however, presents a different condition from either of the foregoing, by reason of the fact that the purchaser, who is the judgment creditor, has come into the property by virtue of the sheriff's sale, which had been consummated prior to the filing of the petition in bankruptcy, and everything had been done that was required by law to be done for a transfer of the debtor's property to the purchaser, through the process of the court, so that, at the time of the filing of the petition in bankruptcy, the debtor was not the owner of the property, and not being the owner, a fortiori he was not the owner of the proceeds thereof. Keeping in mind, now, that it is the lien that is declared void by virtue of § 67f, and not the transfer, one can readily understand that the

section does not affect the transaction vitally, or render it void. * * * But, while there seems to be some contradiction among the authorities as to when the summary proceeding will be entertained, it is well settled that it is not appropriate for the recovery of the property, or the proceeds thereof, after the same has passed into the hands of the purchaser, all prior to the petition and adjudication in bankruptcy. After the property has passed under such conditions, it amounts to a transfer, and it becomes a preference, if liable at all to the suit of the trustee, and the manner of recovery is prescribed by § 60a and § 60b of the Bankruptcy Act. In such event, it is also necessary to show that the preference was received by the beneficiary under a belief on his part, or having reasonable grounds therefor, that it was intended for such purpose. Otherwise, even the transfer is not voidable."

§ 1478. And Recovery Only to Be Had on Other Grounds than § 67 (f).—And in case the sheriff has already paid the proceeds over to the execution creditor at the time of the filing of the bankruptcy petition, recovery can be had only on proof of a voidable preference or of some other ground of recovery than simply § 67 itself, for the proviso in § 67 (f) applies only to cases where the lien was still in existence at the time of the filing of the bankruptcy petition.⁵⁶¹

Leyor v. Seiter, 8 A. B. R. 459, 74 N. Y. Supp. 499, reversing S. C., 5 A. B. R. 576, 69 N. Y. Supp. 987: "If the amount were received by the creditor without reasonable cause to believe a preference was intended, it seems not to be recoverable back by the trustee.

"It is not shown in the case at bar, that the sheriff paid the money over to the judgment creditors after the petition in bankruptcy was filed. We have, therefore, a case which in our opinion does not fall within § 67f of the Bankrupt Law, and in which a recovery cannot be had under § 60, because of the failure to prove the requirements of that section."

Botts v. Hammond, 3 A. B. R. 775, 99 Fed. 916 (C. C. A. N. Y.): "Both of these subdivisions ('c' and 'f' of § 67) deal with the lien as existing. But in the case before us the lien had been merged in the judgment; the property had been sold under lawful orders of the court, having full jurisdiction; the money has been distributed, and the lien gone. There is nothing upon which the subdivision of this section can act or to which these provisions can apply. Were it possible for the District Court, sitting in bankruptcy, to go back, and set aside every step taken, put the trustee in possession of the property, let him administer the same de novo, and pursue all the steps which have been taken, only with increased cost and expense, the petitioning creditors have lost all claim on the process of the court by their delay, after full notice; in taking any steps until the money was distributed, and all the other creditors had committed themselves and had discharged their debtor."

Compare, inferentially, to same effect, *Johnson v. Anderson*, 11 A. B. R. 294 (Sup. Ct. Neb.): "In an action by a trustee in bankruptcy to recover the

⁵⁶¹ Compare, obiter, *Clarke v. Larremore*, 9 A. B. R. 477, 188 U. S. 486. In *re Kenney*, 2 A. B. R. 494, 95 Fed. 427, 3 A. B. R. 353, 97 Fed. 554, 5 A. B. R. 355, 105 Fed. 897 (affirmed sub nom. *Clarke v. Larremore*, supra); In *re Bailey*, 16 A. B. R. 289, 144 Fed. 214 (D. C. Ore.), quoted, § 1477; In *re Blair*, 4 A. B. R. 220, 102 Fed. 987 (D. C. N. Y.), quoted, § 1477; compare, to same effect, *Mohr & Sons v. Mattox*, 12 A. B. R. 330 (Sup. Ct. Ga.); compare, to same effect, In *re Sharp*, 1 A. B. R. 379 (Ref. Kv.).

proceeds of the property of the bankrupt paid over to a creditor on a judgment in completed attachment proceedings in his favor within four months before the bankruptcy it must be alleged in the petition that the creditor had reasonable grounds to believe the bankrupt was insolvent and that by suffering the attachment proceedings and judgment to be taken against him thereby intended to make a preference."

Peck v. Connell, 6 A. B. R. 93 (Penn. Com. Pleas, affirmed in 8 A. B. R. 500): "If the proceedings have been allowed to go on and the lien has been enforced by sale, there is nothing which enables the money realized or the value of the property to be reached in the hands of the lien creditor. Before it had got to that point the bankrupt court might have intervened and stayed the process; or the court from which it issued, at the instance of creditors who had or were about to institute bankruptcy proceedings, might itself have done so. But the execution went on, a sale was had, and the proceeding is now closed in consequence, leaving nothing for either the bankruptcy court or this court to act upon."

And if such ground is that of preference, then reasonable cause for believing a preference was intended must, of course, be proved.⁵⁶²

§ 1479. Proceeds of Execution or Attachment Sale in Sheriff's Hands Pass to Trustee.—The proceeds of an execution or attachment sale still in the sheriff's hands, or in the hands of the State Court at the time of the debtor's bankruptcy, pass to the trustee, if the levy had been made within the four months while the bankrupt was insolvent.⁵⁶³

Clarke v. Larremore, Trustee, 9 A. B. R. 476, 188 U. S. 486 (affirming *In re Kenney*, 5 A. B. R. 355): "It is said that that money was not the property of the bankrupt but of the creditor in the execution. Doubtless as between the judgment creditor and debtor, and while the execution remained in force, the money could not be considered the property of the debtor, and could not be appropriated to the payment of his debts as against the rights of the judgment creditor, but it had not become the property absolutely of the creditor. The

^{562.} *Levor v. Seiter*, 8 A. B. R. 459, 74 N. Y. Supp. 499; *In re Knickerbocker*, 10 A. B. R. 381, 121 Fed. 1004 (D. C. N. Y.); *In re Bailey*, 16 A. B. R. 289, 144 Fed. 214 (D. C. Ore.), quoted at § 1477.

But perhaps if the creditor files his claim in the bankruptcy proceedings the referee has jurisdiction to require the property seized under the void legal process to be turned over on proof of the voidability of the lien. Inferentially, *In re Huffman*, 1 A. B. R. 587 (Ref. Penn.).

^{563.} *In re Richards*, 2 A. B. R. 518 (D. C. Wis., affirmed in 3 A. B. R. 145, 96 Fed. 935, C. C. A.); *In re Franks*, 2 A. B. R. 634, 95 Fed. 635 (D. C. Ala.); *Schmilovitz v. Bernstein*, 5 A. B. R. 265, 47 Atl. 884 (Sup. Ct. R. I.).

In re Kenney, 5 A. B. R. 355, 105 Fed. 897 (C. C. A. N. Y., affirming 3 A. B. R. 353, 97 Fed. 554, and 2 A. B. R. 494 and itself affirmed sub nom. *Clarke v. Larremore*, 9 A. B. R. 477, 188 U. S. 486). *Jones v. Stevens*, 5 A. B. R. 571, 48 Atl. 170 (Sup. Jud. Ct. Mo.), in which case, however, it does not appear whether the proceeds were still in the sheriff's hands or not. Inferentially, *In re Northrop*, 1 A. B. R. 427 (Ref. N. Y.); *In re Hammond*, 3 A. B. R. 466, 98 Fed. 845 (D. C. Mass.).

For a peculiar instance of contempt where a constable turned back to a purchaser at execution sale the excess of the proceeds of sale after satisfying a judgment for labor, but denied receipt of more than enough and failed to pay anything over to the trustee, *In re Geiser*, 12 A. B. R. 208 (D. C. Mont.).

writ of execution had not been fully executed. Its command to the sheriff was to seize the property of the judgment debtor, sell it and pay the proceeds over to the creditor. The time within which that was to be done had not elapsed, and the execution was still in his hands not fully executed. The rights of the creditor were still subject to interception. Suppose, for instance, there being no bankruptcy proceedings, the judgment had been reversed by an appellate court and the mandate of reversal filed in the trial court, could it for a moment be claimed that, notwithstanding the reversal of the judgment, the money in the hands of the sheriff belonged to the judgment creditor, and could be recovered by him, or that it was the duty of the sheriff to pay it to him? The purchaser at the sheriff's sale might keep possession of the property which he had purchased, but the money received as the proceeds of such sale would undoubtedly belong and be paid over to the judgment debtor. The bankruptcy proceedings operated in the same way. They took away the foundation upon which the rights of the creditor, obtained by judgment, execution, levy and sale, rested. The duty of the sheriff to pay the money over to the judgment creditor was gone, and that money became the property of the bankrupt, and was subject to the control of his representative in bankruptcy."

Obiter, Mohr & Sons v. Mattox, 12 A. B. R. 332 (Sup. Ct. Ga.): "If the sheriff had immediately levied the executions and sold the property, but had not turned over the proceeds to the plaintiffs, the trustee in bankruptcy would have been entitled to the same for administration in the bankruptcy court."

Bear v. Chase, 3 A. B. R. 746, 99 Fed. 920 (C. C. A. S. C.): "But the proceeds arising from such sale must stand in lieu of the property sold, for it is expressly provided that such property shall pass to the trustee as a part of the estate, unless the lien be preserved for the benefit of the estate."

But if the levy was not made within the four months, then the mere continued possession by the sheriff of the proceeds of sale will not cause the proceeds to pass to the trustee in bankruptcy.⁵⁶⁴

§ 1480. Or Property Itself May Be Pursued and Recovered.—The property itself may be pursued and recovered, unless it is in the hands of a bona fide purchaser.⁵⁶⁵

Watschke v. Thompson, 7 A. B. R. 505 (Minn.): "When the trustee received his appointment * * * there was one of two courses of action open to him—to accept the result of the dissolution, and pursue the property, wherever it might be, or upon due notice, to obtain an order preserving the benefit of the attachment, if for any purpose the interests of the estate would thereby be best conserved."

§ 1481. Bona Fide Purchasers at Legal Sales Protected.—Bona fide purchasers at sales by officers of courts are protected in case subsequent bankruptcy invalidates the lien by legal proceedings.⁵⁶⁶

⁵⁶⁴. *In re Easley*, 1 A. B. R. 715, 93 Fed. 419 (D. C. Va.). But see as to right of bankruptcy court to order summary delivery of the property subject to the lien of the levy, post, § 1816.

⁵⁶⁵. Bankr. Act, § 67 (f); *In re Breslauer*, 10 A. B. R. 33, 121 Fed. 910 (D. C. N. Y.).

⁵⁶⁶. Bankr. Act, § 67 (f): "Provided that nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment

Clarke v. Larremore, 9 A. B. R. 478, 188 U. S. 486: "It is true that the stock and fixtures, the property originally belonging to the bankrupt, had been sold, but having, so far as the record shows, passed to a 'bona fide purchaser for value,' it remained by virtue of the last clause of the section the property of the purchaser, unaffected by the bankruptcy proceedings."

In *re Franks*, 2 A. B. R. 634, 95 Fed. 635 (D. C. Ala.): "The property, however, has passed into the hands of a third person under a sale by the sheriff, and it may be assumed that such person is a bona fide purchaser for value, and that the trustee cannot for that reason recover and reclaim it from him. But whether this be so or not, the trustee has an equal right to claim and recover the proceeds of the sale."

§ 1482. **Purchaser Has Burden of Proof of Bona Fides.**—The purchaser at a judicial sale has the burden of proof that he is within the proviso of § 67 (f).⁵⁶⁷

§ 1483. **Sheriff Paying Over Proceeds before Filing of Petition Protected.**—If the sheriff or other officer pays over the proceeds of the sale under the judicial process that was levied within the four months preceding the filing he may not be sued therefor, at any rate, if he pays them over before the filing of the petition.⁵⁶⁸

§ 1484. **But Perhaps Liable if Pays after Petition Filed.**—But if he pays them over after the filing of the bankruptcy petition, probably he is liable therefor.⁵⁶⁹

attachment or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

Inferentially, *obiter*, *Jones v. Stevens*, 5 A. B. R. 571, 94 Me. 582 (Sup. Jud. Ct. Me.); *obiter*, In *re Kenney*, 2 A. B. R. 494 (D. C. N. Y.), and 3 A. B. R. 353, affirmed by 5 A. B. R. 355, 105 Fed. 897.

Instances where held not bona fide purchasers without notice, etc.: 1. Son purchasing \$500 of property at attachment sale of his father's goods for \$50, where the sale was made the day after the petition in bankruptcy was filed against the father, was held not within the protection of the proviso, In *re Goldberg*, 10 A. B. R. 97 (D. C. N. Y., Ray, J.). Also, same case in 9 A. B. R. 156, 117 Fed. 692.

2. Purchaser at execution sale: assignee's attorney present, forbidding sale and flourishing a copy of the debtor's general assignment: debtor himself present proclaiming his own insolvency: thereafter bankruptcy: held, purchaser not a purchaser without notice nor reasonable cause for inquiry, *Brown v. Case*, 6 A. B. R. 744, 61 N. E. 279 (Mass. Sup. Jud. Ct.).

3. Attaching creditor not purchaser for value in good faith under the bankruptcy act, notwithstanding statutory provisions of the State, In *re Kaupisch Creamery Co.*, 5 A. B. R. 790, 107 Fed. 93 (D. C. Ore.).

4. Purchaser at execution sale after filing of petition but before adjudication, In *re Breslauer*, 10 A. B. R. 33, 121 Fed. 910 (D. C. N. Y.).

⁵⁶⁷ *Mencke v. Rosenberg*, 9 A. B. R. 323, 202 Penn. St. 131.

Injunction may issue to restrain proceedings until the question of setting aside the sale may be decided, In *re Goldberg*, 9 A. B. R. 156, 117 Fed. 692 (D. C. N. Y.).

⁵⁶⁸ But compare, perhaps contra, *Jones v. Stevens*, 5 A. B. R. 571, 48 Atl. 170, 94 Me. 582.

⁵⁶⁹ Compare, In *re Richard*, 2 A. B. R. 506 (D. C. N. Car.); compare, In *re Breslauer*, 10 A. B. R. 33, 121 Fed. 910 (D. C. N. Y.).

And the trustee and creditors can hardly be charged with laches, because the lien is absolutely null and void.⁵⁷⁰

§ 1485. Lien for Costs Falls with the Rest.—The lien for the plaintiff's costs falls with the execution or attachment lien itself and the sheriff has no right to retain his fees out of the property turned over, nor are the costs entitled to priority of payment out of the bankrupt estate,⁵⁷¹ unless the lien is preserved for the benefit of the estate.

In *re Allen*, 3 A. B. R. 38, 96 Fed. 912 (D. C. Calif.): "It is true that, under the laws of the State of California, the Sullivan-Kelley Company acquired a lien upon the property attached in its suit against the bankrupt for the satisfaction of any judgment which it might recover in that action, and which judgment would of course, include the costs of the action; but this lien was dissolved by the adjudication in bankruptcy (Subdivisions c, f, § 67. Id.; In *re Ward*, 9 N. B. R. 349, Fed. Cas. No. 17145), leaving to that company only the right to

570. *Hardt v. Schuylkill Plush & Silk Co.*, 8 A. B. R. 479 (Sup. Ct. N. Y. App. Div.).

571. In *re Jennings*, 8 A. B. R. 358 (Ref. N. Y.); In *re Beaver Coal Co.*, 5 A. B. R. 787, 107 Fed. 98; also, 6 A. B. R. 404, 107 Fed. (D. C. Ore.), affirmed in 7 A. B. R. 542.

In *re Francis-Valentine Co.*, 2 A. B. R. 522 (affirming 2 A. B. R. 188, 93 Fed. 935, D. C. Calif.): In the case in the District Court, the court did not decide whether the lien itself was void but merely that the sheriff must turn over all the proceeds and work out his lien, if he had any, in the bankruptcy court.

In *re The Copper King*, 16 A. B. R. 149, 144 Fed. 689 (D. C. Calif.); In *re Young*, 2 A. B. R. 673, 96 Fed. 606 (D. C. N. Y.); In *re Thompson Mercantile Co.*, 11 A. B. R. 579 (Ref. Minn.); (1867) In *re Fortune*, 2 B. Reg. 662; (1867) *Gardner v. Cook*, 7 B. Reg. 346; (1867) In *re Ward*, 9 B. Reg. 349; (1867) In *re Hatje*, 12 B. Reg. 548; (1867) In *re Preston*, 6 B. Reg. 545. (1867) But contra, apparently, In *re Foster*, 2 Story 131; (1867) In *re Housberger*, 2 Ben. 504, 2 B. Reg. 92; (Eng.) *London v. King*, 50 Geo. 302.

And it is perhaps to be inferred from one case that the sheriff or other court officer may be entitled to his costs as an equitable lien, like assignees on turning over assigned property in case perhaps the attachment operated to benefit all creditors. In *re Francis-Valentine Co.*, 2 A. B. R. 522 (affirming 2 A. B. R. 188, 93 Fed. 945, D. C. Calif.). Such right, however, could not be deemed a right of "priority" for the "actual and necessary expense of preserving the estate" under § 64 (b) except perhaps as to such part thereof as accrued "subsequent to the filing of the petition;" nor could it come within the other priority accorded by § 64 (b) (2) unless it operated to "recover property fraudulently transferred or concealed," which an attachment could hardly be said to accomplish. Compare, to such effect, under the law of 1867, In *re Fortune*, 2 B. Reg. 662; *Gardner v. Cook*, 7 B. Reg. 346; In *re Ward*, 9 B. Reg. 349; In *re Jenks*, 15 B. Reg. 301; *Zeiber v. Hill*, 8 B. Reg. 239; In *re Holmes*, 14 B. Reg. 493.

And in cases where State or United States laws give priority to the costs, they will have the same priority in bankruptcy under § 64 (b) (5).

In *re Lewis*, 4 A. B. R. 51, 99 Fed. 935 (D. C. Mass.): "Priority of a sheriff's (attachment) fees under the Massachusetts statute (insolvency) will be recognized and enforced in the bankruptcy court by virtue of § 64 (b) (5) giving priority to debts owing to any person who by the laws of the State or the United States is entitled to priority."

In *re Goldberg Bros.*, 16 A. B. R. 521, 144 Fed. 566 (D. C. Me.); apparently contra, In *re Copper King*, 16 A. B. R. 149, 144 Fed. 689 (D. C. Calif.). See post, §§ 1618, 1619.

And if the attachment does not fall, neither does the sheriff's lien for costs. In *re Beaver Coal Co.*, 7 A. B. R. 542 (C. C. A. Ore., affirming 6 A. B. R. 404, 110 Fed. 630).

prove the debt sued for, and the costs incurred in good faith prior to the filing of the petition in bankruptcy, as an unsecured claim against the estate of the bankrupt."

§ 1486. **Sheriff No Right to Retain Creditor's Costs, nor to Retain Property Till Costs Paid.**—At any rate, the sheriff has no right to retain the execution creditor's costs out of the proceeds of sale nor to retain the property until the costs are paid, for those costs are a claim only against the one who made them, namely, the creditor himself, and are not a lien on the fund; since the creditor himself has no valid lien therefor.⁵⁷²

However, it may be proper for the sheriff to retain out of the fund in his hands the costs which the bankrupt himself made.

§ 1487. **Creditor May Prove Claim Where Lien Nullified, Also Costs.**—The creditor whose lien is thus rendered null and void by the bankruptcy is not debarred from proving his claim as an unsecured debt for sharing in the dividends.⁵⁷³ And he may also prove his costs.⁵⁷⁴

§ 1488. **Creditor Whose Lien Nullified under No Duty to Keep Officer in Possession.**—The creditor whose lien is thus dissolved is under no duty to keep the sheriff or other officer in possession, but may turn the property back to the bankrupt, if no receiver or trustee has been appointed;⁵⁷⁵ if, however, he does retain possession, the bankruptcy court is to determine for itself what is the reasonable expense of the preservation, and is not bound by the amount actually paid for keeper's fees;⁵⁷⁶ nor by the sheriff's statutory costs.

§ 1489. **Preservation of Lien for Benefit of Estate.**—The court may, on due notice, order that the right under such levy, judgment,

^{572.} In re Francis-Valentine Co., 2 A. B. R. 522, affirming 2 A. B. R. 183, 93 Fed. 935 (D. C. Calif.); (1867) In re Ward, 9 B. Reg. 349; (1867) Zeiber v. Hill, 8 B. Reg. 239; (1867) In re Stevens, 5 B. Reg. 298; (1867) Harmon v. Jamieson, 1 Cranch C. C. 288. (Eng.) Compare, however, London v. King, 50 Geo. 302. (1867) Also compare In re Fortune, 1 Low 306. (1867) Also compare In re Foster, 2 Story 131. (1867) Also compare In re Preston, 5 B. Reg. 293 and 6 B. Reg. 545. (1867) Also compare In re Housberger, 2 B. Reg. 92. (1867) Also compare In re Jenks, 15 B. Reg. 301. (1867) Also compare In re Holmes, 14 B. Reg. 493. (1867) Also compare Gardner v. Cook, 7 B. Reg. 346.

^{573.} In re Gerson Richard, 2 A. B. R. 506, 94 Fed. 633 (D. C. N. Car.); impliedly, In re Richard T. Richards, 2 A. B. R. 518 (D. C. Wis.); In re Allen, 2 A. B. R. 39, 95 Fed. 512 (D. C. Calif.).

^{574.} In re Allen, 3 A. B. R. 38, 95 Fed. 512 (D. C. Calif.); In re Thompson Mercantile Co., 11 A. B. R. 579 (Ref. Minn.). [1867] Contra, In re Ward, 9 B. Reg. 349. [1867] Contra, Zeiber v. Hill, 8 B. Reg. 239.

^{575.} In re Allen, 3 A. B. R. 38, 96 Fed. 912 (D. C. Calif.).

For case of subrogation to lien of nullified attachment, see In re Hammond, 3 A. B. R. 491, 98 Fed. 845 (D. C. Mass.).

For case of allowing suit to proceed to enable creditor to obtain lien on exempt property; In re Jackson, 8 A. B. R. 594 (D. C. Penn.).

No costs against successful claimer, In re Neely, 7 A. B. R. 312, 113 Fed. 210 (C. C. A. N. Y.).

^{576.} In re Allen, 3 A. B. R. 38, 96 Fed. 912 (D. C. Calif.).

attachment or other lien be preserved for the benefit of the estate, and thereupon the same may pass to and be preserved by the trustee for the benefit of the estate, although void as to the particular creditor so levying.⁵⁷⁷

First Nat'l Bk. *v.* Staake, 15 A. B. R. 642, 202 U. S. 141: "This section (67f) makes two distinct provisions for the disposition of the property of an insolvent attached within four months prior to the filing of a petition in bankruptcy against him. First, such attachments shall be declared null and void, and the property affected shall be deemed released, and shall pass to the trustee of the estate of the bankrupt; or second, the court may order that the right acquired by the attachment shall be preserved for the benefit of the estate. In the first case the whole property passes free from the attachment. In the second, so much of the value of the property attached as is represented by the attachments passes to the trustee for the benefit of the entire body of creditors that is 'for the benefit of the estate'—in other words the statute recognizes the lien of the attachment, but distributes the lien among the whole body of creditors.

"The first provision contemplates the attachment of property to which the bankrupt has the complete legal and equitable title, which, as soon as the attachment is dissolved, passes at once to the bankrupt's trustee as part of his estate. The second provision evidently does not apply to this, as there is no object in preserving the lien of the attachment for the benefit of the estate, since under the first clause the entire value of the property attached passes to the trustee free from the attachment. The second clause contemplates property in which the bankrupt has an interest which has been secured to attaching creditors by the levy of the writ, but which might have passed to another person, as, for instance, a purchaser under an unrecorded deed, but for the fact that the attaching creditors had acquired a prior lien thereon. In such case the statute recognizes the validity of the lien, but preserves it for the benefit of the entire body of creditors, by reason of the fact that the attachment was

577. Bankr. Act, § 67 (f): "Unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid."

Also, Bankr. Act, § 67 (b): "Whenever a creditor is prevented from enforcing his rights as against a lien created by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate."

Obiter, impliedly, *In re Hinsdale*, 7 A. B. R. 85, 111 Fed. 502 (D. C. Vt.); *In re Lesser*, 5 A. B. R. 326 (C. C. A., affirming 3 A. B. R. 815, but itself reversed sub nom. *Metcalf v. Barker*, 9 A. B. R. 36, 187 U. S. 165; *Patten v. Carley*, 8 A. B. R. 482 (N. Y. Sup. Ct. App. Div.); *Thompson v. Fairbanks*, 13 A. B. R. 446, 196 U. S. 516; impliedly, *In re Howland*, 6 A. B. R. 495 (Ref. N. Y.); *In re Merrow*, 12 A. B. R. 615, 131 Fed. 993 (D. C. Mass.); *In re Kenney*, 5 A. B. R. 355, 105 Fed. 897 (C. C. A. N. Y., affirming 3 A. B. R. 353, and 2 A. B. R. 494 and itself affirmed sub nom. *Clarke v. Larremore*, 9 A. B. R. 476, 188 U. S. 486); *In re Adams*, 1 A. B. R. 94 (Ref. N. Y.).

Instance, *In re S. Ah. Mi.*, 18 A. B. R. 138 (D. C. Hawaii): Indirect Order of Preservation: "Judgment was obtained by a creditor against the bankrupt more than four months previous to adjudication, and execution taken out and levy made within the four months. Sale of the property had been advertised and was about to be made, at the date of adjudication. On motion of plaintiff and for saving of expense to the estate, the court of bankruptcy ordered the officer making the levy to proceed with the sale."

dissolved as a preferential lien in favor of the attaching creditors, by the institution of proceedings in bankruptcy.

"In the present case Baird had contracted to convey the property to the Roanoke Furnace Company, possession had been taken and the consideration paid, but the deed was not actually executed and recorded until after the attachment had been levied. Hence, under the Virginia statute, the validity of which is not questioned, the lien of the attachment took precedence of the deed, and would have remained a prior lien, had it not been for the institution of the bankruptcy proceedings within four months. This dissolved the attachment, and had the case rested here, the property would have apparently passed to the Furnace Company, or to its trustee in bankruptcy, Shimer; but at this point the court, under the second proviso of 67f, interposed and recognized the lien of the attachment, not, however, solely for the benefit of the attaching creditors, but for the benefit of Baird's estate. Shimer made no objection, and the court declined to express an opinion as to his rights.

"This is one of the very contingencies provided for by the second clause of the section, which apparently vests in the court a certain discretion with regard to the preservation of the right acquired under the attachment or other lien. In this case the court recognized the validity of the lien, the trustee of the Furnace Company making no objection to this; but the attaching creditors insist that, as the lien was acquired for their own benefit, they should not be required to share with the general creditors of Baird's estate."

In *re New York Economical Printing Co.*, 6 A. B. R. 615, 110 Fed. 518 (C. C. N. Y.): "Subdivision 'b' § 67 (Act of 1898), preserves for the benefit of the estate in bankruptcy a right which some particular creditor has been prevented from enforcing by the intervention of the debtor's bankruptcy. If a creditor, by an execution or a creditors' bill, has secured a legal or equitable lien upon the mortgaged property before the mortgagor has been adjudicated a bankrupt, under this provision his rights will or will not inure to the benefit of the estate, depending upon the time when the lien was acquired. If acquired more than four months before the commencement of the bankruptcy proceeding, his lien would inure to his own exclusive benefit; but, if acquired at any time within the four months, it would be null and void, under subdivision 'f' of the section, except as preserved for the benefit of the estate as provided in that subdivision and in subdivision 'b.'"

In *re Baird*, 11 A. B. R. 438, 126 Fed. 845 (D. C. Va.): "The power of the court, and indeed its duty to take away from the attaching creditors the benefit of their liens and give it to the trustee is found specifically in § 67f." *Obiter*, *Watschke v. Thompson*, 7 A. B. R. 504 (Sup. Ct. Minn.): "The adjudication in bankruptcy had the effect of dissolving the attachment against the property of the bankrupt and restoring the title of the property to the estate. When the trustee received his appointment, on Nov. 29th, there was one or two courses of action open to him; to accept the result of the dissolution, and pursue the property, wherever it might be, or, upon due notice, to obtain an order preserving the benefit of the attachment, if for any purpose the interests of the estate would thereby be best conserved."

Obiter, In *re Sentenne & Green Co.*, 9 A. B. R. 648, 120 Fed. 436 (D. C. Pa.): In this case the question arose as to whether certain after-acquired property came under the lien of a chattel mortgage attempting to cover after-acquired property and if so, whether attachments cut off the mortgagee's right as to such property and should be preserved for the benefit of the creditors in bankruptcy; the court finally refusing to order preservation because of inequity, saying, however, *obiter*, "But it is conceded that, In *re New York Economical*

Printing Co., 6 Am. B. R. 615, 49 C. C. A. 133, 110 Fed. 514, the Circuit Court of Appeals of this circuit determined that a trustee was not permitted to attack the mortgage unless he represented a creditor 'armed with process;' but the trustee urges that he is thus enabled by the fact that he has been subrogated by the order of this court to the rights of the creditors who levied attachments upon the after-acquired property, even before there was any attempt to foreclose the mortgage. If the order of subrogation be allowed to stand, the trustee's position seems to be correct."

The levying creditor derives no special benefit from the preserving of the lien. It is not preserved for his benefit. Thus the trustee is obliged to assume two apparently inconsistent attitudes—in the State Court, that the lien is valid, in the bankruptcy court, that it is void. These attitudes are really not inconsistent, however, for the lien is valid in the State Court and invalid in the bankruptcy court.

Subrogation to nullified attachment liens, which under State law would have cut off chattel mortgagees' rights to after-acquired property, has been both granted⁵⁷⁸ and refused⁵⁷⁹ on grounds of equity.

Likewise, the preservation of other attachment liens, which would have cut off intervening rights, have been granted⁵⁸⁰ or refused as the court has deemed equitable.

Likewise, subrogation to the nullified liens of creditors' bills has been sometimes granted,⁵⁸¹ and at other times refused⁵⁸² as the court has deemed equitable.

Of course orders of subrogation are improper, where the lien by legal proceedings was obtained more than four months before the filing of the bankruptcy petition.⁵⁸³

No order of subrogation will be granted where the lien is upon property not exempt as to the lien but exempt as to others.

In *re Jackson*, 8 A. B. R. 594 (D. C. Pa.): "The referee refused to make the order holding that exempt property could not be administered by a court of bankruptcy and that the effect of the order prayed for would be to draw the administration of such property into this court. I agree with him."

§ 1490. Costs of Court Remain Lien in Cases of Preservation.—Costs of Court in cases where liens are thus preserved for the benefit of the estate probably would not fall, but would be a lien on the fund as it comes into the bankruptcy court.⁵⁸⁴

⁵⁷⁸. In *re New England Piano Co.*, 9 A. B. R. 763, 122 Fed. 937 (C. C. A. Mass.).

⁵⁷⁹. *Thompson v. Fairbanks*, 13 A. B. R. 437, 196 U. S. 516; In *re Moore*, 6 A. B. R. 175, 107 Fed. 234 (D. C. Vt.); In *re Sentenne & Green Co.*, 9 A. B. R. 648, 120 Fed. 436 (D. C. Penn.).

⁵⁸⁰. *Receivers v. Staake*, 13 A. B. R. 281, 133 Fed. 717 (C. C. A. Va.); In *re Merrow*, 12 A. B. R. 615, 131 Fed. 993 (D. C. Mass.).

⁵⁸¹. *Patten v. Colley*, 8 A. B. R. 482 (N. Y. Sup. Ct. App. Div.).

⁵⁸². *Kohout v. Chaloupka*, 11 A. B. R. 265 (Sup. Ct. Neb.).

⁵⁸³. *Nat'l Bk. v. Moses*, 11 A. B. R. 772 (Sup. Ct. N. Y.).

⁵⁸⁴. *Obiter*, In *re Thompson Mercantile Co.*, 11 A. B. R. 579 (Ref. Minn.); inferentially, In *re Goldberg Bros.*, 16 A. B. R. 522, 144 Fed. 566 (D. C. Me.); *Receivers v. Staake*, 13 A. B. R. 281, 133 Fed. 717 (C. C. A. Va.). See ante, § 693.

§ 1491. **Order of Preservation Requisite.**—The bankruptcy court must enter some order to the effect that the lien is preserved for the benefit of the estate, otherwise it is not preserved.⁵⁸⁵

In *re Baird*, 11 A. B. R. 438, 126 Fed. 845 (D. C. Va.): "It is further argued that the case at bar is not within the intent of the Act, because the right here contended for by the trustee is not mentioned in § 70 (a) of the Act. This argument does not seem to me to be of any force. Section 70 (a) is an enumeration of those properties the title to which passes to the trustee by operation of law. The right here asked for by the trustee can be given him only by order of court. It would have been inconsistent, even absurd, to have provided in § 70 (a) that the rights of attaching creditors in a case such as we have here shall vest in the trustee by operation of law, when it had been provided in 67 (f) that such rights should be vested in the trustee by order of court."

Watschke v. Thompson, 7 A. B. R. 504 (Sup. Ct. Minn.): "Such an action cannot be maintained unless it is based upon the order of the court provided for in subdivision 'f' of § 67, preserving the attachment for the benefit of the estate."

Thompson v. Fairbanks, 13 A. B. R. 437, 196 U. S. 516: "The mortgage assigned to the bank, and the attachment obtained by Ryan, having been dissolved by the bankrupt proceedings, the defendant's rights under his mortgage of April 15, 1891, stood the same as though there had been no subsequent mortgage given, or attachment levied. This is the view taken by the State court of the effect of the dissolution of the mortgage and attachment liens under the Bankrupt Act, and we think it is a correct one. It is stated in the opinion of the State court as follows:

"It is urged that with the annulment of the attachment, the property affected by it passed to the trustee as a part of the estate of the bankrupt under the express provisions of section 67f. There would be more force in this contention were it not for the provision that, by order of the court, an attachment lien may be preserved for the benefit of the estate. If there is no other lien on the property, there can be no occasion for such order; for, on the dissolution of the attachment, the property, unless exempt, would pass to the trustee anyway. It is only when the property for some reason may not otherwise pass to the trustee as a part of the estate that such order is necessary. We think such is the purpose of that provision, and that unless the lien is preserved, the property, as in the case at bar, may be held upon some other lien, and not pass to the trustee. *Re Sentenne & G. Co.*, 9 A. B. R. 648, 120 Fed. 436."

And a reasonable time is allowed the trustee to apply for such order.

Watschke v. Thompson, 7 A. B. R. 504 (Sup. Ct. Minn.): "Of course, a reasonable time would be permitted for a trustee in which to acquaint himself with the facts, and to apply to the court and obtain the necessary order, but until such order is obtained appellant has no authority to maintain an action which seeks to secure the benefit of the attachment."

But if the order is not made until after the property is surrendered by the creditor, it is, perhaps, too late; since, then, there is no longer any lien in existence to which the trustee might be subrogated.^{585a}

585. Obiter and impliedly, In *re Hinsdale*, 7 A. B. R. 85, 111 Fed. 502 (D. C. Vt.): "The property had been attached before the bankruptcy proceedings, but, if that attachment became a lien paramount, it could probably be preserved only by the trustee being allowed to be subrogated to the rights of the creditor, under the provisions of § 67, 'Liens,' cl. 3, no question in respect to which is presented here."

In *re Sentenne & Green Co.*, 9 A. B. R. 648, 120 Fed. 435 (D. C. N. Y.).

Indirect order of preservation—order directing sheriff to proceed to sell under the levy. In *re S. Ah. Mi.*, 18 A. B. R. 138 (D. C. Hawaii).

585a. *Davis v. Crompton*, 20 A. B. R. 64 (C. C. A. Pa.).

§ 1492. Lien Not Preserved, Is Void as to Other Lienholders, on Same Property.—And if the lien is not preserved by order, it is void as to other lienholders on the same property.

Thompson v. Fairbanks, 13 A. B. R. 437, 196 U. S. 516: "The trustee moved under § 67f * * * on notice to the defendant, for an order that the right or lien under the Ryan attachment should be preserved, so that the same might pass to the trustee for the benefit of the estate, as provided for in that section. This was denied. And unless such permission had been granted, the lien of the attachment was not preserved by the Act, but, on the contrary, it was dissolved under § 67c."

And this is so notwithstanding the dissolution of the lien is, as held in *In re Merrow*, 12 A. B. R. 615, 131 Fed. 993 (D. C. Mass.) for the benefit of the estate. Although the dissolution be for the benefit of the estate, the benefit, by the neglect of the trustee, has been relinquished to the lienholders. It is, indeed, precisely because the other liens are valid and that the lienholders and not the trustee would get the benefit of the dissolution that the lien is to be preserved. The dissolution of liens by legal proceedings under § 67 (f) was intended for the benefit of the estate, not for that of other lienholders, no matter how valid might be their own liens.

SUBDIVISION "C."

FRAUDULENT TRANSFERS WITHOUT PROOF OF TRANSFEREE'S PARTICIPATION IN FRAUD UNDER § 67 (e).

§ 1493. Third Branch of Trustee's Peculiar Title and Rights Conferred by Bankruptcy Act—Fraudulent Transfers within Four Months.—Under the last class of titles obtained by the trustee in bankruptcy, the third subject added is not comprehended within the ordinary common-law rights of creditors.⁵⁸⁶

For the bankruptcy act by its peculiar provisions makes void all transfers made by a bankrupt within four months of his bankruptcy, where such transfers were made with the intent on his part to hinder, delay or defraud creditors, although the transferee in no way participated in such intent; unless such transferee shall prove, by way of defense, his own bona fides and his giving of a present, fair consideration therefor.⁵⁸⁷

^{586.} *In re Gray*, 3 A. B. R. 647, 47 App. Div. N. Y. 554 (N. Y. Sup. Ct. App. Div.).

^{587.} Bankr. Act, § 67 (e).

Other distinctions as to § 67 (e). (1) The distinction is also made in one case that fraudulent conveyances made within the four months period are absolutely void upon the filing of the bankruptcy petition while those made before that time are voidable merely. *In re Grohs*, 1 A. B. R. 465 (Ref. Ohio). This seems to be a misconception of the object of the statute.

(2) In another case, § 67 (e) is considered to include "frauds upon the Act" as contradistinguished from other frauds upon creditors. *In re Gray*, 3 A. B. R. 649, 47 App. Div. N. Y. 554 (N. Y. Sup. Ct. App.).

This simply throws upon the transferee the burden of proving good faith and present consideration, instead of throwing upon creditors the burden of proving his participation in the fraudulent intent.

In view of the fact that all property fraudulently conveyed passes to the trustee by operation of § 70 of the Act, it is evident no reason for the adding of this § 67 (e) could have existed had it not been that by this peculiar provision conveyances, transfers and incumbrances made by the bankrupt within the four months preceding bankruptcy are void, even if made with merely his own intent to hinder, delay and defraud creditors, unless the transferee prove his own good faith and adequate consideration. At common law and under the statutes, except this bankruptcy statute in its § 67 (e), a *prima facie* case for setting aside a transfer as fraudulent is not complete unless proof be made by the creditor of the transferee's participation in the fraudulent intent; and a suit to set aside a fraudulent conveyance, may fail precisely because of this inability to prove affirmatively the transferee's participation in the fraudulent intent.

By this provision of § 67 (e), then, fraudulent conveyances within the four months are voidable if made with solely the debtor's intent to hinder, delay or defraud creditors, even if there be no participation of the transferee in the intent, unless the transferee himself prove his own good faith and his giving of a present, fair consideration therefor.

§ 1494. *Prima Facie Case without Proof of Transferee's Participation.*—It is not necessary, then, in order to make a case for setting aside a fraudulent conveyance made within four months of bankruptcy, to prove in the first instance a participation in the fraudulent intent on the part of the person receiving the conveyance, but good faith and present, fair consideration is a defense to be pleaded and proved by the transferee.⁵⁸⁸

Sherman v. Luckhardt, 11 A. B. R. 26 (Sup. Ct. Kansas, overruling *Sherman v. Luckhardt*, 9 A. B. R. 312 Sup. Ct. Kas.): "The clauses quoted from § 57 and § 60 treat alone the subject of preferences. No mention is there made of fraud. The lawmaking power dealt with the subject of fraud in clause "e" of

^{588.} Also, see *Friedman v. Vorhofsky*, 105 Ill. App. 414. *Unmack v. Douglass*, 55 Atl. 12; evidently under such a construction *Egan State Bk. v. Rice*, 9 A. B. R. 437 (C. C. A. S. Dak.). *McNulty v. Wiesen*, 12 A. B. R. 341, 130 Fed. 1012 (D. C. Pa.): The reasoning of the court in this case is not, however, to be approved in its entirety.

And also compare, to the effect that 67 (e) does not, at any rate, refer to payments of money, *Blakey v. Boonville Bk.*, 2 A. B. R. 462 (D. C. Ind.). This case was reversed in *Boonville Nat'l Bk. v. Blakey*, 6 A. B. R. 13, 107 Fed. 241 (C. C. A. Ind.), but not on this ground.

Inferentially, *In re Knopf*, 16 A. B. R. 445, 144 Fed. 245 (D. C. S. C.); instance, *In re Head and Smith*, 7 A. B. R. 556 (D. C. Ark.), the latter being a case where one partner sold out to other partner when the partnership was insolvent: held to be a hindering, delaying and defrauding of firm creditors in an attempt to convert firm property into individual property.

Instance, *In re Steininger Mercantile Co.*, 6 A. B. R. 68, 107 Fed. 669 (C. C. A. Ga.): Executing mortgages in behalf of favored creditors who are not pressing for payment nor asking for security, the mortgages covering all the debtor's property and being concededly made with the intent that the debtors

section 67 of the act, and, in language so plain, concise, exact and unequivocal as to leave no room for doubt or construction, there inhibited all transfers of the property of an insolvent debtor made within four months prior to the institution of bankruptcy proceedings under the act wherein the debtor, with the intent on his part of hindering, delaying or defrauding his creditors, parted with his property regardless of the knowledge of or participation in such fraud by the creditor. This is a case of first instance in this State in construing the above provisions of the act. In other jurisdictions a like view of the act has been reached. *Friedman v. Verchofsky*, 105 Ill. App. 414; *Unmack v. Douglass* (Conn.), 55 Atl. 12. There are cases holding a contrary view. *Congleton v. Schreihofer* (N. J. Ch.), 54 Atl. 144; *Gamble v. Elkin* (Pa.), 54 Atl. 782. However, the reasoning employed in these cases, contrary to the view expressed in this opinion, does not commend itself to our judgment or meet our approval. Such a construction of the act would nullify one of its most important and beneficial provisions."

In *re McLam*, 3 A. B. R. 245, 97 Fed. 922 (D. C. Vt.): "The provision of the latter act is more prohibitive than that of the former, for no reasonable cause of belief of insolvency and fraud on the act, by the person receiving the preference, is necessary to avoid it. The purpose and intent of the bankrupt only is looked at, and if contrary to the act, is sufficient."

In *re Moody*, 14 A. B. R. 276, 131 Fed. 525 (D. C. Iowa): "By the plain language of this section, if Moody intended by the sale to hinder, delay or defraud his creditors, the conveyance is null and void as to such creditors, except as against good faith purchasers for a present, fair consideration. It is not necessary that the purchaser should participate in the fraudulent purpose of Moody to render the transaction void as against the trustee. Such purpose being shown it must then be made to appear that the purchase was in good faith, and for a present fair consideration, paid at the time of such purchase."

In *re Hill*, 15 A. B. R. 499, 140 Fed. 984 (D. C. Calif.): "The evidence is, in my opinion, sufficient to justify the finding of the referee that the intention of the bankrupt in executing the mortgage was to hinder, delay, and defraud his other creditor. It is clear from the evidence that it was the bankrupt's

might thereby enforce indulgence from other creditors and further advances from the mortgagees.

Instance, In *re Egan State Bk. v. Rice*, 9 A. B. R. 437, 119 Fed. 107 (C. C. A. S. Dak., affirming In *re Platte*, 6 A. B. R. 568): Chattel mortgage with power of sale, where the proceeds of the sales are not applied on the debt (no participation in the fraudulent intent appearing on the mortgagees' part).

Instance held not invalid under § 67 (e). Chattel mortgage within the four months and duly recorded, there being an oral agreement that the goods should be filled to customers supplied by a particular commission house and in its name and net proceeds to be applied to payment of mortgage debt, justifies no inference that the mortgage was made with intent to hinder, delay or defraud creditors. In *re Durham*, 8 A. B. R. 115, 114 Fed. 750 (D. C. Md.).

Instance held not invalid under § 67 (e): Partner pledging his insurance policies to creditor of firm with stipulation not to become firm property, all under advice of counsel—not under § 67 (e) nor fraudulent: In *re Bloch*, 15 A. B. R. 748 (C. C. A. N. Y.).

Instance, In *re Pease*, 12 A. B. R. 66, 129 Fed. 446 (D. C. Mich.): Chattel mortgage executed within four months period, for presently passing consideration, namely, a loan to be used in making preferential payments, known by mortgagee or of which he had reasonable grounds for inference, is void under 67 (e).

Contra, obiter, in *Jacobs v. Van Sickle*, 11 A. B. R. 470 (C. C. A. N. J.). And see contra, to main proposition, note to In *re McLam*, 3 A. B. R. 245, 97 Fed. 925. Also, contra, compare, under law of 1867, *Tiffany v. Lucas*, 15 Wall. 410.

intention in executing this mortgage to give a preference to the petitioner. Such an intent upon his part is one 'to hinder, delay, or defraud his creditor,' within the meaning of subdivision 'e' of § 67 of the Bankruptcy Act; and, in determining whether a conveyance or transfer of property made by a bankrupt was in violation of that section, 'the purpose and intent of the bankrupt only is looked at, and, if contrary to the Act, is sufficient' to render such conveyance or transfer void."

The commonly recurring instance of an insolvent merchant selling out his entire stock in trade for less than fair value and to close out;⁵⁸⁹ and the selling out of the entire stock of a retail merchant without inventory,⁵⁹⁰ have been held in several cases to come under this section, throwing the burden of proof of bona fides upon the purchaser.

§ 1495. But Transferee's Good Faith and Valuable Consideration, Defense.—But that the transferee was acting bona fide and gave a present, fair consideration is a defense.⁵⁹¹

McNulty v. Wiesen, 12 A. B. R. 341, 130 Fed. 1012 (D. C. Pa.): "Nor is the averment in the answer that the assignment was made to the respondents without any intent on their part to hinder, delay or defraud the creditors of the bankrupt impertinent, for the reason that under § 67e * * * they are required to show that they are purchasers of these accounts in good faith, and for a present, fair consideration."

In re Moody, 14 A. B. R. 276, 134 Fed. 631 (D. C. Iowa): "Such purpose (transferor's fraudulent purpose) * * * being shown, it must then be made to appear that the purchase was in good faith, and for a present, fair consideration, paid at the time of such purchase."

And the burden of proof of such good faith is on the transferee.⁵⁹²

§ 1496. What Constitutes "Good Faith."—The standard of good faith as a defense for the transferee under § 67 (e) is the same as that of a creditor in accepting payments, or transfers of property as payment, or as security, from an insolvent debtor.

In re Moody, 14 A. B. R. 276, 134 Fed. 631 (D. C. Iowa): "And it is uniformly held that each (a creditor or purchaser), when dealing with one who is in fact insolvent and may be adjudged a bankrupt within four months, to exercise ordinary prudence and diligence to ascertain whether or not such insolvent can make a transfer of his property to him that will not be in violation of the Bankruptcy Law."

Thus, transactions known by the purchaser to be out of the usual and ordinary course of business tend to negative good faith; such as the sale of an entire stock of goods at less than cost.⁵⁹³

⁵⁸⁹. *In re Moody*, 14 A. B. R. 272, 134 Fed. 631 (D. C. Iowa).

⁵⁹⁰. *In re Knopf*, 16 A. B. R. 432 (D. C. S. C.).

⁵⁹¹. *Dokken v. Page*, 17 A. B. R. 228, 147 Fed. 439 (C. C. A. N. Dak.).

⁵⁹². *Horne-Gaylord Co. v. Miller & Bennett*, 17 A. B. R. 257, 147 Fed. 295 (D. C. W. Va.).

⁵⁹³. *In re Moody*, 14 A. B. R. 272, 134 Fed. 631 (D. C. Iowa). Compare, § 1504.

Walburn v. Babbit, 16 Wall. 577: "But it is wholly a different thing when he sells his entire stock to one or more persons. This is an unusual occurrence, out of the ordinary mode of transacting such business, is prima facie evidence of fraud, and throws the burden of proof on the purchaser to sustain the validity of his purchase. * * *

"But the law will not let him escape in this way. The question raised by the statute is not his actual belief, but what he had reasonable cause to believe. In purchasing in the way and under the circumstances he did, the law told him that a fraud of some kind was intended on the part of the seller, and he was put on inquiry to ascertain the true condition of Mendelson's [the bankrupt vendor] business. This he did not do, nor did he make any attempt in that direction. Indeed, he contented himself with limiting his inquiries to the object Mendelson had in selling out, and to his future purposes. Something more was required than this information to repel the presumption of fraud which the law raised in the mere fact of a retail merchant selling out his entire stock of goods. If this sort of information could sustain the sale, the provision of the bankrupt law we are considering would be no protection to creditors, for any one in Mendelson's situation, and with the purpose he had in view, would be likely to give the party with whom he was dealing a plausible reason for his conduct. The presumption of fraud arising from the unusual nature of the sale in this case can only be overcome by proof on the part of the buyer that he took the proper steps to find out the pecuniary condition of the seller. All reasonable means, pursued in good faith, must be used for this purpose. If Summerfield [the vendee] had employed any means at all directed to this end, he would have discovered the actual insolvency of Mendelson. In choosing to remain ignorant of what the necessities of his case required him to know, he took the risk of the impeachment of the transaction by the assignee in bankruptcy, in case Mendelson should, within the time limited in the statute, be declared a bankrupt."

Dokken v. Page, 17 A. B. R. 228, 147 Fed. 438 (C. C. A. N. Dak.): "The claim of the intervenor is a palpable fraud on the Bankrupt Act. It is full time that speculating purchasers from insolvent debtors should know that under the bankrupt act they cannot stop their ears and shut their eyes lest they may hear or see that such a merchant as Tveten was selling out his entire stock of goods in order to defeat his creditors in the collection of their just claims. Such speculators on chance seem to think that they can escape the statute by studiously and cunningly placing themselves in a position to half satisfy conscience by saying:

"I did not know the vendor was bankrupt. He did not so inform me; and I did not ask him. I did not know about his creditors, as I did not examine his books. I did not take an inventory of the goods or carefully examine them, as I had a general knowledge of their character, and did not look further"—and the like.

"Under the Bankrupt Act such a purchaser, within the four months' limitation, is presumptively a purchaser with knowledge. To protect his purchase the burden rests upon him to show satisfactorily that he was a purchaser in good faith; that he paid a present, fair consideration for the property; and that he did not know or have reason to believe that the vendor was insolvent."

Thus, likewise, purchasers from one known to be insolvent, or purchasing an entire stock at less than cost, are put upon inquiry, and are bound to

investigate, and are not exercising good faith if they do not investigate.⁵⁹⁴

And it has apparently been held that a mortgagee who gives present and adequate consideration but who knows the proceeds are to be used to defeat the purpose of the Bankrupt Act, as, for instance, to create, indirectly, a preference, is not acting in "good faith" in the transaction, and that his mortgage is voidable.⁵⁹⁵

§ 1497. Section 67 (e) Not Applicable to Mere Preferential Transfers.—Section 67 (e) does not apply to mere preferential transfers.⁵⁹⁶

§ 1498. And Trustee Must Show Bankrupt's Actual Fraud.—And the trustee must, of course, as part of his case in chief show the bankrupt's fraud in making the transfer. The rule of 67 (e) simply relieves the trustee from the necessity, otherwise existing, of showing the transferee's participation therein.

Thompson v. Fairbanks, 13 A. B. R. 443, 196 U. S. 516: "There is no finding that in parting with the possession of the property, the mortgagor had any purpose of hindering, delaying or defrauding his creditors or any of them. Without a finding, to the effect that there was an intent to defraud, there was no invalid transfer of the property under the provisions of § 67 (e) of the Bankruptcy Law."

§ 1499. Transfer Must Have Been within Four Months.—The transfer must have been made within the four months to be voidable; but if made on the same day of the month of the fourth month preceding, it is "within four months."⁵⁹⁷

Voluntary conveyances by way of gift, to avoid creditors, are not limited to four months and do not have to come under § 67 (e).⁵⁹⁸

DIVISION 4.

PROTECTION OF LIENS WHICH ARE NOT CONTRARY TO THE BANKRUPT ACT.

§ 1500. Protection of Liens Which Are Not in Contravention of Act.—Liens given or accepted in good faith and not

⁵⁹⁴. *Dokken v. Page*, 17 A. B. R. 228, 147 Fed. 439 (C. C. A. N. Dak.); *In re Moody*, 14 A. B. R. 272, 134 Fed. 631 (D. C. Iowa). Also, see *Wager v. Hall*, 16 Wall. 584; *Walburn v. Babbitt*, 16 Wall. 577.

⁵⁹⁵. *Roberts v. Johnson*, 18 A. B. R. 136, 151 Fed. 567 (C. C. A. Md.).

⁵⁹⁶. *In re Bloch*, 15 A. B. R. 748, 142 Fed. 674 (C. C. A. N. Y.).

Contra, *In re Jones*, 9 A. B. R. 262 (D. C. S. C.): In this case a preference was held to be voidable under 67 (e) without participation of the transferee in the intent. This decision was manifestly placed upon the wrong ground. It was not voidable under 67 (e) for the reason that it was a conveyance made to hinder, delay or defraud creditors, but was simply a preference voidable under 60 (b). The court evidently labored under a confusion between the intent to prefer and the intent to defraud, as to which see *In re Duffy*, 9 A. B. R. 358; *Githens v. Shiffler*, 7 A. B. R. 453, 112 Fed. 505, and ante, §§ 1397, 1221, 113.

⁵⁹⁷. *In re Hill*, 15 A. B. R. 499, 140 Fed. 981 (D. C. Calif.).

⁵⁹⁸. *In re Scheuch*, 8 A. B. R. 727, 116 Fed. 555 (D. C. Wash.); *In re Toothacker Bros.*, 12 A. B. R. 99, 128 Fed. 187 (D. C. Conn.).

in contemplation of or in fraud upon the act and for a present consideration, which have been recorded according to law, if record be necessary to impart notice, are not affected.⁵⁹⁹

Liens given at any time before the filing of the petition upon a presently passing consideration, that is to say, not in payment of a pre-existing debt—not in consideration, in other words, of a reduction of liabilities, but in consideration of the contemporaneous increase or at least replacing of assets—are valid, if they are given or accepted in good faith and not in contemplation of or fraud upon the Bankruptcy Law, and if, also, they have been duly recorded where the State laws require recording in order to impart notice.⁶⁰⁰

Hiscock v. Varick Bk., 18 A. B. R. 9, 206 U. S. 28: "The contracts under which they were pledged were valid and enforceable under the laws of New York where the debt was incurred and the lien created. The Bankruptcy Act did not attempt by any of its provisions to deprive a lienor of any remedy which the law of the State vested with him; on the other hand, it provided, § 67 (d) etc."

In *re Soudan's Mfg. Co.*, 8 A. B. R. 45 (C. C. A. Ind.): "It is equally clear that § 67 (d) saves from invalidity the security thus founded upon a present consideration if accepted in good faith and not in contemplation of or in fraud upon the Act, and in the absence of notice which impeaches the good faith of the transaction as so defined the mortgagee is entitled to the benefits of his lien notwithstanding the fraud, if any there was, on the part of the mortgagor."

Darby v. Inst., 1 Dill 144, Fed. Cas. 3571: "An insolvent person may properly make efforts to extricate himself from his embarrassment, and therefore he may borrow money, and give at the time security therefor, provided, always, the transaction be free from fraud in fact, and upon the Bankrupt Act. And hence it is a settled principle of bankrupt law, both in England and in this country, that advances made in good faith to a debtor to carry on business, upon security taken at the time, do not violate either the terms or policy of the Bankrupt Act."

In *re Porterfield*, 15 A. B. R. 11, 138 Fed. 192 (D. C. W. Va., reversed, on other grounds, sub nom. *Moore v. Green*, 16 A. B. R. 651, 145 Fed. 480): "Both the State and Bankrupt Act recognize the right to make a transfer giving prefer-

^{599.} See cases involving liens under various subjects ante and post, "Title of Trustee as Successor to Bankrupt;" "Fraudulently Conveyed Property;" "Preferences;" etc., etc. Necessarily the subject of valid liens would be involved in many such cases and other cases.

^{600.} Bankr. Act, § 67 (d): "Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act."

In *re Wolf*, 3 A. B. R. 555, 98 Fed. 84 (D. C. Iowa); *Tiffany v. Boatman's Inst.*, 18 Wall. 375; *Crim v. Woodford*, 14 A. B. R. 302, 136 Fed. 34 (C. C. A. W. Va.); *Bank v. Bruce*, 6 A. B. R. 312, 109 Fed. 69 (C. C. A. S. C.); In *re Clifford*, 14 A. B. R. 283, 136 Fed. 475 (D. C. Iowa); *Davis v. Turner*, 9 A. B. R. 705, 716, 120 Fed. 605 (C. C. A. N. Car.); *obiter*, *Farmers' Bk. of Edgfield v. Carr*, 11 A. B. R. 733, 127 Fed. 690 (C. C. A. S. Car.); instance, In *re Cobb*, 3 A. B. R. 129, 96 Fed. 821 (D. C. N. Car.); impliedly, In *re U. S. Food Co.*, 15 A. B. R. 329 (Ref. Mich.); *cibiter*, *Roberts v. Johnson*, 18 A. B. R. 135, 151 Fed. 567 (C. C. A. Md.); *obiter*, In *re Wright*, 2 A. B. R. 366, 96 Fed. 187 (D. C. Ga.).

ence for a new, and not an existing consideration or debt, if made in good faith."

Stedman v. Bk. of Monroe, 9 A. B. R. 4, 117 Fed. 237 (C. C. A. Iowa): "But no such result followed in respect to the \$3000 actually loaned when the mortgage was given. As to that sum the security of the mortgage was valid under the terms of § 67d unless it was given in contemplation of bankruptcy or in fraud upon the act."

In re Brown, 5 A. B. R. 221 (D. C. Pa.): " * * * and such liens are declared by clause 'd' of § 67 to be unaffected by the Act. The term 'unaffected' may perhaps be too broad, other sections do affect such liens in some respects not material, but the general meaning of the phrase is clear. Such liens are left as the act finds them and (passing the question whether the Court may interfere in the case of a fraudulent or oppressive enforcement) they may be proceeded upon according to their terms." But the court in *In re Brown* implies that the burden of showing bad faith is upon the trustee. The facts do not disclose whether the transfer was within the four months period or not.

Thus, an embarrassed debtor may borrow money and give a mortgage to carry on his business, and if the lender lend in good faith, his mortgage is valid.⁶⁰¹

Obiter, *In re Pease*, 12 A. B. R. 68, 129 Fed. 446 (D. C. Mich.): "The propositions that advances may be lawfully made in good faith to a debtor to carry on his business, and that the lender may lawfully take security at the time for such advances without violating the Bankrupt Act, are beyond denial."

But if the loan be in bad faith, it is void even though on a present consideration.⁶⁰²

Likewise, mortgages to secure future advances are valid if made in good faith, at any rate to the amount of the advances at the time of the bankruptcy.⁶⁰³

It will be useful to explicate this clause in some detail.

§ 1501. Is Converse of Avoidance of Liens Opposed to Bankruptcy Act.—This provision of the law protecting certain liens is, substantially, simply the converse of other provisions of the statute invalidating certain transfers. Thus, transfers that are fraudulent as to creditors certainly are not "bona fide," so we find that the right to avoid fraudulent conveyances of property, which we have heretofore discussed as one of the trustee's rights, has its converse in the protection given by § 67 (d) to "bona fide" liens. Again, the avoidance of preferences and fraudulent conveyances is one of the chief objects and purposes of the Bankruptcy Act, and therefore we find, in § 67 (d) the converse of the trustee's peculiar rights conferred by

⁶⁰¹. *In re Wolf*, 3 A. B. R. 555, 98 Fed. 974 (D. C. Iowa); *Davis v. Turner*, 9 A. B. R. 704, 120 Fed. 605 (C. C. A. N. Car.); *In re Soudans Mfg. Co.*, 8 A. B. R. 45, 113 Fed. 804 (C. C. A. Ind.).

⁶⁰². *In re Pease*, 12 A. B. R. 66, 129 Fed. 446 (D. C. Mich.); impliedly, *Roberts v. Johnson*, 18 A. B. R. 135, 151 Fed. 567 (C. C. A. Md.).

⁶⁰³. *In re U. S. Food Co.*, 15 A. B. R. 329 (Ref. Mich.). See also, ante, "Third Element of a Preference," § 1319.

the Bankruptcy Act to avoid preferences and fraudulent conveyances in the provision protecting liens "not in contemplation of nor in fraud upon the Act and upon present consideration."⁶⁰⁴

Compare, *Young v. Upson*, 8 A. B. R. 377, 115 Fed. 192 (D. C. N. Y.): "The security was given for a present consideration and therefore no fraud on creditors, under the Bankruptcy Act."

Again, we find the converse of the right of the trustee to recover property in cases of unrecorded liens, in the exception of § 67 (e) that the liens, to be protected, must be recorded, if recording is necessary in order to impart notice. Thus, this § 67 (d), protecting certain liens, is simply the converse of other provisions of the Act prohibiting certain other transfers.

It is probable that, even had there been no specific enactment protecting such liens, yet, under the doctrine of "expressio unius exclusio alterius" bona fide, duly recorded liens, based on present consideration and not in contravention of the Bankruptcy Act, would have been protected.⁶⁰⁵

In *re Soudans Mfg. Co.*, 8 A. B. R. 51, 113 Fed. 804 (C. C. A. Ind.): "In the bankruptcy act of 1867 no express provision appeared for this class of security, but in *Tiffany v. Institution*, 18 Wall. 375, 388, 21 L. Ed. 868, the Doctrine applicable to security given upon a present consideration was thus stated: * * *

"There is nothing in the Bankrupt Law which interdicts the lending of money to a man in Darby's condition (an insolvent), if the purpose be honest, and the object not fraudulent. And it makes no difference that the lender had good reason to believe the borrower to be insolvent, if the loan was made in good faith, and without any intention to defeat the provisions of the Bankrupt Act. It is not difficult to see that in a season of pressure the power to raise money may be of immense value to a man in embarrassed circumstances. With it he might be saved from bankruptcy, and without it financial ruin would be inevitable. If the struggle to continue his business be an honest one, and not for the fraudulent purpose of diminishing his assets, it is not only not forbidden, but is commendable."

§ 1502. Lien within Four Months Valid if Other Essentials Exist.

—It will be observed that the lien may be given even during the four months period preceding bankruptcy—it may be given at any time right up to the hour of adjudication, provided the other essentials of good faith, present consideration and recording exist.

Obiter, In *re Wright*, 2 A. B. R. 366, 96 Fed. 187 (D. C. Ga.): "This shows that this paragraph refers to liens given or accepted within four months preceding the bankruptcy proceedings. Otherwise, if a lien had been given or accepted even though not for a present consideration, but for an antecedent debt, the lien would be good under all the provisions."

§ 1503. First Essential to Protection of Lien—Unless Both Parties Guilty, Lien Protected.—The lien must either be given or be accepted in

⁶⁰⁴. Compare, In *re Brown*, 5 A. B. R. 221 (D. C. Penn.).

⁶⁰⁵. *Davis v. Turner*, 9 A. B. R. 704, 716, 120 Fed. 605 (C. C. A. N. Car.).

good faith; that is to say, the bad faith of either party alone will be insufficient; they must both participate in the bad faith to make the lien bad on that account.⁶⁰⁶

Thus, for instance, where the loan is made at the time and the lender has reason to suppose that the purpose of the loan is to give encouragement to the borrower, the security is upheld.⁶⁰⁷

Thus, likewise, where a borrower is actually insolvent, but is a man of good standing; having a large number of supposedly profitable contracts and the necessity was supposed to be simply to tide over temporary business embarrassment.⁶⁰⁸

§ 1504. **What Constitutes "Good Faith."**—"Good faith" means that the creditor should not act in such a way as to intentionally defeat the Bankrupt Act, but should let the debtor have the money or property for some honest purpose.⁶⁰⁹

Thus, mere knowledge of the borrower's insolvency, without more, is not enough to destroy the good faith.⁶¹⁰

Tiffany v. Boatman's Sav. Inst., 18 Wall. 376: "There is nothing in the Bankrupt Act which interdicts the lending of money to a man in Darbis' condition, if the purpose be honest and the object not fraudulent. And it makes no difference that the lender had good reason to believe the borrower to be insolvent if the loan was made in good faith, without any intention to defeat the provisions of the Bankrupt Act. It is not difficult to see that in a season of pressure the power to raise ready money may be of immense value to a man in embarrassed circumstances. * * * His estate is not impaired or diminished in consequence, as he gets a present equivalent for the securities he pledges for the payment of the money borrowed. Nor in doing this does he prefer one creditor over another. * * * The preference at which the law is directed can only arise in case of an antecedent debt."

Obiter, *In re Pease*, 12 A. B. R. 68, 129 Fed. 446 (D. C. Mich.): "These two elements must have concurred in the transaction, to avoid the conveyance. It was not enough that the grantor was believed to be insolvent in order to defeat the title of the grantee, but it must also appear that the grantee knew that the conveyance was made with a view to effect any (some) purpose prohibited by the Act."

It has been held that the fact that neither the creditor nor debtor knew or had reason to know that the debtor was insolvent, or in failing circumstances, must be made to appear.

And in some cases it has been held, that such fact must be made to appear clearly and without question.⁶¹¹

606. Inferentially, *Farmers' Bk. v. Carr*, 11 A. B. R. 733 (C. C. A. S. C.).

607. *Obiter*, *Sebring v. Wellington*, 6 A. B. R. 673 (Sup. Ct. N. Y. App. Div., citing *Tiffany v. Institution*, 85 U. S. 375, and *Clark v. Iselin*, 88 U. S. 360).

608. *Crim v. Woodford*, 14 A. B. R. 302, 136 Fed. 34 (C. C. A. W. Va.).

609. *Kaufman v. Treadway*, 12 A. B. R. 685, 195 U. S. 271. See ante, § 1496.

610. Inferentially, *In re Wolf*, 3 A. B. R. 555, 96 Fed. 974 (D. C. Iowa); inferentially, *Crim v. Woodford*, 14 A. B. R. 310, 136 Fed. 34 (C. C. A. W. Va.); *obiter*, *Sebring v. Wellington*, 6 A. B. R. 673 (Sup. Ct. App. Div.).

611. *Farmers' Bk. v. Carr*, 11 A. B. R. 733 (C. C. A. S. C., citing *McNair v. McIntyre*, 7 A. B. R. 639, 113 Fed. 113).

But this is an erroneous statement of the rule. The rule is not that both parties must show good faith, but that if *either* party show good faith, the lien will not be destroyed because of the other party's bad faith.

And, at any rate, notice of the insolvency of the borrower to impeach the bona fides of the loan, must be based on a valuation of assets in the condition when the loan was made with the works in operation and not on the appraised value after adjudication.⁶¹²

And, likewise, liens given for a presently passing consideration, but the proceeds of which are used in making preferences, are nevertheless good, if the mortgagee is ignorant of its intended use as a means of giving preferences.⁶¹³

But where the lienholder is not acting in good faith, but is aiding a creditor to obtain a preference by a colorable transaction, the lien will not be good.⁶¹⁴

Thus, similarly, a debtor may give a mortgage on his property or sell it to raise the money to make his statutory deposit in going into bankruptcy, and the mortgage will be good.⁶¹⁵

Again, a debtor may, in contemplation of voluntary bankruptcy proceedings by him or involuntary proceedings against him, prepay or secure an attorney for services to be rendered in the future in relation to the bankruptcy.⁶¹⁶

§ 1505. Second Essential to Protection of Lien—Not to Be Given and Accepted in Contemplation of Bankruptcy or in Fraud of Act.—The lien must not be given and accepted (for the word "or" should be construed "and" here) in contemplation of bankruptcy proceedings nor in fraud upon this Act.⁶¹⁷

The word "or" must be construed "and" here because otherwise a debtor who is about to file his petition in bankruptcy could not make an advantageous sale to any one cognizant of the fact that he is contemplating bankruptcy, although thereby a fund—already well converted into money—would be brought into the bankruptcy court much to the advantage of creditors. As long as no fraud is thus perpetrated, it is perfectly valid.⁶¹⁸

612. *In re Soudans Mfg. Co.*, 8 A. B. R. 51, 113 Fed. 804 (C. C. A. Ind.).

613. *In re Soudans Mfg. Co.*, 8 A. B. R. 51, 113 Fed. 804 (C. C. A. Ind.); *In re Durham*, 8 A. B. R. 115, 114 Fed. 750 (D. C. Md.); *Davis v. Turner*, 9 A. B. R. 705, 120 Fed. 605 (C. C. A. N. Car.).

614. *Roberts v. Johnson*, 18 A. B. R. 132, 151 Fed. 567 (C. C. A. Md.); *Hackney v. Raymond Bros. Clarke Co.*, 10 A. B. R. 213 (Neb.); compare, same case, on reconsideration and reversal, in 13 A. B. R. 164, 68 Neb. 624. *In re Beerman*, 7 A. B. R. 431, 112 Fed. 663 (D. C. Ga.), where mortgage was given to raise money to prefer a creditor, mortgagee knowing of the proposed use and taking a bond of indemnity from the creditor. Inferentially, *In re Pease*, 12 A. B. R. 66, 129 Fed. 446 (D. C. Mich.). Compare the facts in *In re Pease*, 12 A. B. R. 148, 101 Fed. 107 (D. C. Iowa).

615. (1867) *In re Keefer*, 4 N. B. Reg. 126.

616. Bankr. Act, § 60 (d); *Furth v. Stahl*, 10 A. B. R. 442, 205 Penn. 439; *In re Morris*, 11 A. B. R. 145, 125 Fed. 841 (D. C. N. Car.).

617. *In re Pease*, 12 A. B. R. 66, 129 Fed. 446 (D. C. Mich.).

618. Compare, *Kaufman v. Treadway*, 12 A. B. R. 685, 195 U. S. 271.

The taking of possession within the four months period of after-acquired property under a chattel mortgage covering after-acquired property, in contemplation of bankruptcy proceedings, may or may not be valid, dependent upon the state law determining whether such taking of possession reverts to the date of the original mortgage or not.⁶¹⁹

In States where, as in New Hampshire and Vermont, neither assignees nor administrators occupy the position of levying creditors, bankruptcy will not so operate.

Compare, *In re Peasley*, 14 A. B. R. 499, 137 Fed. 190 (D. C. N. Y.): Under New Hampshire law assignees, as for instance an administrator of an insolvent estate are neither attaching creditors nor purchasers for value."

§ 1506. **Third Essential to Protection of Lien—"Present Consideration."**—The lien must be given for a "present consideration."⁶²⁰

§ 1507. **Fourth Essential to Protection of Lien—"Recording" Where State Law "Requires to Impart Notice."**—The lien must be recorded if the laws in force affecting the particular kind of lien involved require recording in order to impart notice. This is simply a reaffirmation of clause (a) of § 67.⁶²¹

§ 1508. **Chattel Mortgages and Conditional Sales Contracts, Withheld for Time but Filed before Bankruptcy.**—Chattel mortgages and conditional sales contracts, withheld from record by agreement, although recorded or filed before bankruptcy, are not void for lack of record, although they may be void as being a fraud upon creditors under the State law.⁶²²

619. *Thompson v. Fairbanks*, 13 A. B. R. 437, 196 U. S. 516.

620. *In re Gesas*, 16 A. B. R. 872, 146 Fed. 734 (C. C. A. Idaho).

As to the meaning of the term "present consideration" in this connection, and for cases where liens are involved, see ante, "Third Element of Preference," § 1314.

As to liens given in part for presently passing consideration and in part by way of preference, being good pro tanto and void as to the rest, see ante, "Third Element of Preference," § 1326.

621. Bankr. Act, § 67 (a): "Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate."

Bank v. Bruce, 6 A. B. R. 311, 109 Fed. 69 (C. C. A. S. C.); *In re Andrae Co.*, 9 A. B. R. 135, 117 Fed. 561 (D. C. Wis.).

Instance held proper place of filing, *In re Franklin*, 18 A. B. R. 218, 151 Fed. 642 (D. C. N. Car.). See ante, "Third Element of Preference," § 1379; see ante, "Liens Void for Want of Record," § 1229, et seq.

It has been held, although the holding is of doubtful authority that if the prior lien for which the present one was given in exchange was not recorded as required by statute the present one is avoidable as a preference, *Contra, Deland v. Miller*, 11 A. B. R. 744, 119 Iowa 368.

622. Compare, *Gove v. Morton Trust Co.*, 12 A. B. R. 297, 96 App. Div. N. Y. 177 (N. Y. Sup. Ct. App. Div.). See, also, ante, this chapter, division "2", subdiv. "A", § 1222.

§ 1509. **Chattel Mortgages Covering Future-Acquired Property.**—The subject of the protection of a lienholder's rights as to future-acquired property is considered elsewhere.⁶²³

DIVISION 5.

RIGHTS OF CREDITORS AGAINST THIRD PARTIES JOINTLY OR SECONDARILY LIABLE.

§ 1510. **Rights of Creditors against Sureties for Bankrupt, etc.**—The rights of the creditor against third parties liable jointly with the bankrupt or secondarily for him, are not impaired by the bankruptcy adjudication nor by the bankrupt's discharge.⁶²⁴

§ 1511. **Applies to Secondary Liability on Obligation Itself, Not to Sureties in Court Proceedings—Attachment and Appeal Bonds Released if Liability Dependent on Judgment.**—The provision of § 16 applies only to those secondarily liable on the obligation itself and not to those who become surety for the bankrupt in court proceedings instituted against the bankrupt. Wherever the liability of the surety is dependent upon judgment being obtained against the bankrupt, as usually is the case with attachment and appeal bonds, then his discharge, preventing judgment, will prevent the surety's liability from attaching.⁶²⁵

Wolf v. Stix, 99 U. S. 1: "The cases are numerous in which it has been held—and, we believe, correctly—that, if one is bound as surety for another to pay any judgment that may be rendered in a specified action, if the judgment is defeated by the bankruptcy of the person for whom the obligation is assumed the surety will be released. The obvious reason is that the event has not happened on which the liability of the surety was to depend. Of this class

⁶²³. See ante, §§ 1199, 1238.

⁶²⁴. Bankr. Act, § 16 (a): "The liability of a person who is a codebtor with, or guarantor, or in any manner a surety for a bankrupt shall not be altered by the discharge of such bankrupt."

Bankr. Act, § 4 (b): "The bankruptcy of a corporation shall not release its officers, directors, or stockholders, as such, from any liability under the laws of a State or Territory or of the United States." Compare, § 33 of Act of 1867. *National Bank v. Sawyer*, 6 A. B. R. 154 (Sup. Jud. Ct. Mass.).

Elsbree v. Burt, 9 A. B. R. 87 (R. I. Sup. Ct.): Stockholders' liability for corporate debts not discharged by corporation's discharge.

In re *Marshall Paper Co.*, 4 A. B. R. 469, 102 Fed. 872 (C. C. A. Mass.): This was a case of directors' and stockholders' liability. *Hoyt v. Freel*, 4 N. B. Reg. 34, 8 Abb. Pr. (N. S.) 220; *Jacquith v. Rowley*, 9 A. B. R. 525, 188 U. S. 620.

Impliedly, *Terry v. Johnson*, 12 A. B. R. 17 (C. C. A. La.): "The court of bankruptcy, it appears, was not able to see how seizure of a stranger's property to satisfy an admitted debt of a bankrupt could harm the bankrupt or his creditors, or why, if the party whose property was seized did not complain, others should be heard to do so. It is clear to us that the demurrer to the bill is well taken. The judgment of the District Court is therefore affirmed."

Penn. Trust Co. v. McElroy, 7 A. B. R. 391 (D. C. Penn.): Guarantor of paper bound to creditor although some paper is forged or fictitious.

⁶²⁵. Compare, *Terry v. Johnston*, 12 A. B. R. 17. (C. C. A. La.); (1867) *Odell v. Wootten*, 4 N. B. Reg. 183, 38 Ga. 225.

of obligations are the ordinary bonds in attachment suits to dissolve an attachment, appeal bonds, and the like."

Klipstein v. Allen-Miles, 14 A. B. R. 15, 136 Fed. 385 (C. C. A. Ga.): "The question is not whether the discharge of the defendant released the liability of the surety, but whether the discharge prevented the happening of the contingency upon which the liability of the surety was to arise. If no judgment can be rendered against the defendant because of the discharge in bankruptcy, then no liability exists on the part of the surety. * * * The liability of the surety on the dissolving garnishment bond is not altered by the discharge of the bankrupt defendant, but the discharge prevents the happening of the contingency on which that liability depends. * * * Moreover, we think that § 16 of the Bankrupt Act manifestly refers to co-debtors, guarantors, or sureties for the bankrupt on the same or original debt—the debt on which the release is given by the discharge."

Goyer v. Jones, 8 A. B. R. 437, 440, 79 Miss. 253: "The appellant insists that, as § 16 of the Bankrupt Law preserves the liability of any person who is in any manner a surety of a bankrupt he should have been permitted to take a judgment in the Circuit Court on the appeal bond against both M. B. and R. A. Jones, with a view of having the execution of said judgment stayed perpetually as to M. B. Jones, and for the sole purpose of enforcing the judgment as to R. A. Jones. The bond stipulates only for the payment of such judgment as may be rendered in the Circuit Court against M. B. Jones."

Likewise, where judgment against the principal is prevented through the operation of § 67 "f" annulling liens obtained by legal proceedings within four months of bankruptcy.

Klipstein v. Allen-Miles, 14 A. B. R. 15, 136 Fed. 385 (C. C. A. Ga.): "Besides this, the garnishment proceedings being had within four months prior to the bankruptcy proceedings, the surety is not relieved because of the discharge of the debtor, but because his bankruptcy avoided the lien acquired by the garnishment and destroyed the remedy by which a judgment could be recovered against the defendant, which is indispensable to make the lien of any avail to the plaintiff."

§ 1512. **Creditor Entitled to All Remedies against Sureties.**—A creditor may pursue all remedies against sureties for the bankrupt.

§ 1513. **Conversely, Rights and Defenses of Sureties of Bankrupt Not Affected.**—Conversely, the rights and defenses of sureties and joint obligors of the bankrupt are not affected.⁶²⁶

§ 1514. **Right to Retain Indemnity Given at Signing Unaffected.**—The rights of the surety to retain and reimburse himself from funds that have been left with him for indemnity by the bankrupt principal are unaffected where the indemnity was given at the time of becoming surety.⁶²⁷

⁶²⁶ *Penn. Trust Co. v. N. Y. Elroy*, 7 A. B. R. 391 (C. C. A. Penn.), wherein a guarantor was held pro tanto released by the creditor's acceptance of other security for part. See cases in the following section.

⁶²⁷ Compare, *In re Franklin*, 6 A. B. R. 285, 106 Fed. 646 (D. C. Mass., affirmed by Sup. Ct. U. S. in *Jacquith v. Rowley* 9 A. B. R. 325, 188 U. S. 620). *Obiter*, *In re Eastern Commission & Importing Co.*, 12 A. B. R. 305, 129 Fed. 847 (D. C. Mass.).

§ 1515. No Duty on Creditor to Prove Claim against Bankrupt Principal.—It is not incumbent upon the creditor to take any steps to prove the claim, where, at any rate, the surety does not demand it; nor to notify the surety or endorser, nor tender the note, so as to give the latter an opportunity to present it.⁶²⁸

§ 1516. Right of Surety or Endorser to Prove Creditor's Claim against Bankrupt Principal.—If the surety or endorser demands of the creditor that he prove the claim, and the creditor fails or refuses to do so, the surety or endorser may prove the claim himself.⁶²⁹ He undoubtedly may prove it without demand, provided he is able to attach the written instrument to his proof of claim.

§ 1517. Where Creditor Refuses to Let Surety Have Written Instrument to Attach to Proof, Surety Not Released.—If the creditor himself fails to prove the claim and refuses to permit the surety to have the written instrument to file with the proof of claim as required by statute, the surety is nevertheless not released. His remedy is to pay the debt.⁶³⁰

§ 1518. Unless Surety Offers to Indemnify Creditor against Expense.—But, if the surety should offer to indemnify the creditor against expense and the creditor should still refuse, then, doubtless, the surety would be released, at least to the extent of dividends lost.⁶³¹

§ 1519. Creditor Entitled to Prove against Both Principal and Surety Where Both Bankrupt.—A creditor may prove the full amount of his note or other commercial paper against both maker and endorser where both are in bankruptcy, and may collect from both estates dividends until his whole debt is satisfied.⁶³²

§ 1520. But Bankrupt Estate Not to Pay Two Dividends on Same Claim.—But a sound and well-established rule applicable to the settlement of insolvent estates is that the estate must never pay two dividends with respect to the same claim.⁶³³

First Nat'l Bk. *v.* Eason, 17 A. B. R. 593, 149 Fed. 204 (C. C. A. Tex.): "The appellant has two obligations of the bankrupt, one is on a note of \$15,000, of which the bankrupt was maker, the other is on an indorsement on a forged note for \$15,000, given as collateral to secure the first-mentioned note. The appellant seeks to prove both obligations against the bankrupt's estate. There

628. *Bank v. Sawyer*, 6 A. B. R. 154 (Sup. Jud. Ct. Mass.).

629. Bankr. Act, § 57 (i). See ante, §§ 611, 642, 645.

630. Compare *Bank v. Sawyer*, 6 A. B. R. 154 (Sup. Jud. Ct. Mass.).

631. *Obiter*, *Bank v. Sawyer*, 6 A. B. R. 154 (Sup. Jud. Ct. Mass.).

632. *In re Swift*, 5 A. B. R. 415, 106 Fed. 65 (D. C. Mass.). But compare, *In re Martin*, 5 A. B. R. 424, 105 Fed. 753 (D. C. N. Y.).

633. (1841) *In re Sterling, Ahrens & Co.*, 1 Fed. 169; *Oriental Bank v. European Bank*, 7 L. R. (Ch. App.) 69.

was only one consideration, really only one debt, and the appellant is entitled to only one satisfaction. The payment of either obligation would extinguish the other. The District Court held that the appellant could not prove both and thus establish a double liability against the bankrupt's estate.

"The decree appealed from is affirmed."

§ 1521. Creditor Receiving Dividends Out of Maker's Estate First, May Prove Only for Unpaid Balance against Surety.—But if the creditor receives dividends out of the maker's estate before he has proved his claim against the endorser, he may prove against the endorser merely for the unpaid balance.⁶³⁴

§ 1522. Creditor Receiving Dividends Out of Surety's Estate First, Surety Entitled to Subrogation to Creditor's Claim against Maker's Estate in Proportion to Dividend Paid by Surety.—And if the creditor shall have received his dividend on his full claim from the surety's estate first, the surety's estate will be entitled to subrogation to the creditor's claim against the maker to the extent of the dividends paid by the surety's estate.

[1841] In re Sterling, Ahrens & Co., 1 Fed. 169: "It is quite obvious, that if this proof is allowed the Oriental Bank will pay a double dividend on the same debt. It appears to me clearly that it is substantially the same debt, because, if all parties had been solvent, whatever sums the Oriental Bank might have paid to the Agra Bank, although they would have paid it, no doubt, for the purpose of performing the contract they had entered into by their indorsement, yet, substantially, whatever sums they might have paid to the Agra Bank would have gone in reduction of the sum which the Oriental had promised to pay to the European Bank. In that case the Oriental Bank could never have been called upon to pay these bills twice over. It would have made no difference that they had entered into two contracts with the two separate parties that they would pay the bills, namely, with the European Bank as acceptors, and with the Agra Bank as holders. It is clear that they would have performed both contracts by paying the bills once. * * * It has been the law for a great number of years, with reference to proofs in bankruptcy, that if an acceptor accepts bills for the accommodation of the drawer, and the drawer enters into a contract, express or implied, (and I do not think there is any difference between the two), that he will provide for the bills when they become due, and then the drawer becomes bankrupt, there cannot be a double proof against his estate, namely, one proof by the holder of the bill, and the other proof by the acceptor of the bill on the contract of indemnity. * * * The principle itself—that an insolvent estate, whether wound up in chancery or in bankruptcy, ought not to pay two dividends in respect of the same debt—appears to me to be a perfectly sound principle. If it were not so a creditor could always manage, by getting his debtor to enter into several distinct contracts with different people for the same debt, to obtain higher dividends than the other creditors, and perhaps get his debt paid in full. I apprehend that is what the law does not allow; the true principle is that there shall only be one dividend in respect of what is in substance the same debt, although there may be two separate contracts."

⁶³⁴. In re Swift, 5 A. B. R. 415, 106 Fed. 65 (D. C. Mass.). Compare, to same general effect, In re Martin, 5 A. B. R. 423, 105 Fed. 753 (D. C. N. Y.).

§ 1523. Discharge of Bankrupt Principal, Equivalent to Return of Execution Unsatisfied.—Discharge of the bankrupt maker is equivalent to a return of execution wholly or partly unsatisfied, so far as the creditor's rights against the surety are concerned.⁶³⁵

§ 1524. Staying Discharge and Permitting Creditor to Take Judgment to Fix Liability on Surety.—It is proper for the bankruptcy court to stay proceedings for a discharge and to refuse to stay proceedings against the bankrupt, in order to permit a qualified judgment to be taken, where the obtaining of such a judgment or the taking of other steps is necessary in order to perfect the creditor's rights against a third party, surety or guarantor.⁶³⁶

In re Remington Auto & Motor Co., 9 A. B. R. 533, 119 Fed. 441 (D. C. N. Y.): "Some of the creditors of this alleged bankrupt corporation are now seeking to put their respective claims in judgment, issue execution, and thus place themselves in a position to bring an action in equity of the nature and for the purpose mentioned. If this preliminary action be necessary when bankruptcy has intervened, the injunction should not be made permanent or continued; for, if such a liability exists, and it can be enforced only by a creditor with judgment and execution returned unsatisfied, or by the trustee, when appointed, after a creditor or creditors have put themselves in this position, then to grant or make permanent this injunction will be to deprive the creditors of their rights. Is this liability an asset of the corporation, and, if so, will it pass to the trustee when appointed, and may he enforce it for the benefit of all? Will the proof of the insolvency of the corporation and the adjudication of its bankruptcy, followed by the proof in due course of the claims of creditors, be a substitute for judgment against the corporation and execution returned unsatisfied? If so, then action by creditors against the stockholders of the corporation may be unnecessary. But suppose the trustee, when appointed, should refuse to bring the action, must the creditors lose their rights to proceed against the stockholders which they might, should they be denied the right to put their claims against the corporation into judgment? * * * So long as uncertainty exists as to the effect of enjoining these creditors from prosecuting their claims against this corporation to judgment, the wise course is to permit the creditors to bring their actions and prosecute them to judgment; otherwise the creditors may be deprived of a valuable part of the assets of the corporation."

Obiter, In re Eastern Commission & Importing Co., 12 A. B. R. 305, 129 Fed. 847 (D. C. Mass.): "Again, if after adjudication he were seeking to proceed with his suit in order to obtain a special judgment * * * this court might refuse to exercise its discretion to stay him."

Bank v. Ellicott, 6 A. B. R. 415, 85 N. W. (Wis.) 417: "It is conceded that if a defendant is discharged in bankruptcy from a debt, pending proceedings to enforce it, he is entitled to plead such circumstances in bar of further proceedings for personal judgment, if the plaintiff does not voluntarily discontinue the

⁶³⁵ In re Martin, 5 A. B. R. 423, 105 Fed. 753 (D. C. N. Y.).

⁶³⁶ In re Marshall Paper Co., 2 A. B. R. 633 (D. C. Mass., reversed, on other grounds, in 4 A. B. R. 468, 102 Fed. 872. See note to Continental Nat. Bk. v. Katz, 1 A. B. R. 21 (Super. Ct. Ills.). Compare, analogously, as to realizing on liens notwithstanding discharge, Powers Dry Goods Co. v. Nelson, 7 A. B. R. 506, 10 N. Dak. 580.

action, and to recover on such plea. But it is said that if an action is wholly in rem, or partly in rem and partly in personam, its status as an action to reach the res is not disturbed by a discharge of the defendant in bankruptcy, if the plaintiff's interest therein be preserved by the Bankruptcy Act. The authorities seem to be uniform to that effect. *Roberts v. Wood*, 38 Wis. 60; *Bates v. Tappan*, 99 Mass. 376; *Bowman v. Harding*, 56 Me. 559; *Leighton v. Kelsey*, 57 Me. 85; *Ingraham v. Phillips*, 1 Day, 117; *Jones v. Lellyett*, 39 Ga. 64; *Pierce v. Wilcox*, 40 Ind. 70; *Stoddard v. Locke*, 43 Vt. 574; *May v. Court-nay*, 47 Ala. 185; *Kittredge v. Warren*, 14 N. H. 509; *Munson v. Railroad Co.*, 120 Mass. 81.

"In *Bowman v. Harding*, it was insisted on behalf of the discharged party that he was, by the express terms of the Bankruptcy Act, released from all his debts, and that no such discharged debt could, by implication, be considered to have sufficient life to form the basis of a judgment even in form against him. The court thought otherwise, reasoning that the language of the Bankruptcy Act, preserving a lien incident to a debt, by implication preserved the debt, notwithstanding its discharge, so far as necessary to make the lien effective. Treating of the same subject, in *Leighton v. Kelly*, supra, the court said, in substance, the provisions of the Bankruptcy Act are not to be construed so as to preclude the rendition of such a judgment as is necessary to enable a lien claimant, whose interest in property is preserved to him by the act, to perfect and realize upon it. In *Bates v. Tappan* this language was used:

"The provisions for a full discharge * * * must be construed, as they well may be, so as not to prevent the enforcement of a lien, which the statute itself permits, by any requisite proceedings therefor which do not involve a judgment in personam. A lien by attachment can be enforced in no other ways than by the qualified judgment which was rendered in the Superior Court, and it must therefore be affirmed."

"The present Bankruptcy Act has the same features as the Act of 1867, which were the foundation of the adjudications cited. It provides that 'All levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt,' etc. Section 67f. The language as clearly, by implication, preserves all liens claimed in legal proceedings, of sufficient age to be outside the four months limit, as it expressly annuls those within such limit. The preservation of certain liens necessarily left the lien claimants free to pursue the necessary legal or equitable remedies to render them effective."

Provided such third party by becoming such surety had not released property of the bankrupt from an attachment, execution or other sequestration by legal proceedings itself annulled by the bankruptcy.⁶³⁷

Hill v. Harding, 130 U. S. 699: "If an attachment of property in an action in a State court is dissolved by the defendant's entering into a recognizance, with sureties, to pay, within 90 days after any final judgment against him, the amount

⁶³⁷. Inferentially and obiter, *In re Eastern Commission & Importing Co.*, 12 A. B. R. 305, 129 Fed. 847 (D. C. Mass.); inferentially, obiter, *Klipstein v. Allen-Miles*, 14 A. B. R. 15, 136 Fed. 385 (C. C. A. Ga.); analogously, *In re Franklin*, 6 A. B. R. 285, 106 Fed. 666 (D. C. Mass., affirmed sub nom. *Jacquith v. Rowley*, 9 A. B. R. 525, 188 U. S. 620); inferentially, obiter, *Paxton v. Scott*, 10 A. B. R. 81, 92 N. W. 611 (Neb.): "If the creditor have an attachment or other lien he may have a special judgment entered in rem."

of that judgment and the defendant, after verdict against him, obtains his discharge in bankruptcy upon proceedings commenced more than four months after the attachment, the Bankrupt Act does not prevent the State court from rendering judgment against him on the verdict, with a perpetual stay of execution, so as to have the plaintiff at liberty to proceed against the sureties. Such attachment being recognized as valid by the Bankruptcy Act (Rev. St., § 5044), a discharge in bankruptcy does not prevent the attaching creditors from taking judgment against the debtor in such limited form as may enable them to reap the benefit of their attachment. When the attachment remains in force, the creditors, notwithstanding the discharge, may have judgment, against the bankrupt, to be levied only upon the property attached. *Peck v. Jenness*, 7 How. 612, 623; *Doe v. Childress*, 21 Wall. 642. When the attachment has been dissolved, in accordance with the statutes of the State, by the defendant's entering into a bond or recognizance, with sureties, conditional to pay to the plaintiffs, within a certain number of days after any judgment rendered against him on a final trial, the amount of that judgment, the question whether the State court is powerless to render even a formal judgment against him for the single purpose of charging such sureties. * * * depends upon the extent of the authority of the State court under the local law."

Thus, if the surety were simply a surety on appeal from a judgment in personam, where the judgment did not operate to sequester any property, probably such qualified judgment would be proper, or where, as in *Hill v. Harding*, 130 U. S. 699, the attachment lien vacated was good against bankruptcy, having been taken more than four months preceding bankruptcy.

But where the surety has, by becoming surety, released the bankrupt's property from an invalid lien, it would be manifestly improper to aid the creditor in obtaining the money value of that which the Bankruptcy Act forbids him to obtain in specie.⁶³⁸

Such staying of discharge and refusal to stay the creditors' proceedings are not a denial of the bankrupt's right to discharge, nor do they in the slightest degree interfere with his obtaining the full benefit of the discharge when subsequently granted. This is so for the reason that the judgment so obtained "after the filing of the petition and before the consideration of his application for discharge" is, by the express words of § 63 (b) (5) a provable debt; and, being a provable debt is, consequently, discharged by the discharge of the bankrupt. Its enforcement against the bankrupt in personam or against his subsequently acquired property may be enjoined precisely as the enforcement of any other provable judgment debt may be enjoined.

638. See, inferentially, *Klipstein v. Allen-Miles*, 14 A. B. R. 15, 136 Fed. 385 (C. A. Ga.); inferentially, *In re Eastern Commission & Importing Co.*, 12 A. B. R. 305, 306, 129 Fed. 847 (D. C. Mass.). See analogous subject under the subject of "Exemptions," ante, § 1070 and § 1102. See under subject of "Discharge," post, § 2414, et seq.

PART V.

DISCOVERING, COLLECTING AND SEPARATING ASSETS.

CHAPTER XXXI.

DISCOVERING ASSETS; GENERAL EXAMINATIONS OF BANKRUPTS AND WITNESSES.

Synopsis of Chapter.

- 1525. General Examinations of Bankrupts and Witnesses.
- 1526. Analogous to Examinations of Insolvent Debtors Elsewhere.
- 1527. Who May Be Examined—"Any Designated Person" Including Bankrupt and Wife.
- 1528. Examination of Each Witness a Separate Proceeding.
- 1529. At Whose Instance Examination to Be Had.
- 1530. One General Examination of Bankrupt a Matter of Absolute Right.
- 1531. But Examination of Other Persons Not.
- 1532. Creditor before Filing Claim May Examine, but Proof May Be Required.
- 1533. Application for Examination—Notice Not Required.
- 1534. Notice to Witness Proper, Where Second Examination Sought.
- 1535. Notice to Creditors of Examination of Bankrupt Requisite.
- 1536. None to Creditors nor Bankrupt, for Examination of Other Witnesses.
- 1537. Order for Examination to Be Entered and Served.
- 1538. None Requisite for Examination of Bankrupt at First Meeting.
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- 1540. Second Examination May Be Had.
- 1541. But Good Cause Must Be Shown.
- 1542. Bankrupt Examined at Any Time after Adjudication, Even after Discharge.
- 1543. Whether Bankrupt May Be Put under "General" Examination before Adjudication.
- 1544. No Notice Requisite Where Bankrupt Witness upon Issues between Parties.
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- 1547. Broad Scope of General Examination—"Acts, Conduct and Property."
- 1548. Production of Books, Papers and Documents Enforced.
- 1549. Whether Federal Equity Rules Govern "General" Examinations.
- 1550. Witness Not Excused because Testimony Would Reveal Private Affairs.
- 1551. But Examiner Must Develop Facts Showing Sufficient Connection with Bankrupt to Make Further Inquiry Relevant.
- 1552. General Examinations to Be in Writing.
- 1553. Objections to Be Entered on Record.
- 1554. Referee to Rule on Admissibility and to Exclude Incompetent Testimony.
- 1555. General Examination Competent as Admission in Subsequent Litigation against Same Party.
- 1556. Bankrupt's Testimony Not to Be Used in Criminal Proceedings against Him.
- 1557. Protection Applies Only to Federal Prosecution.
- 1558. Incriminating Questions—Constitutional Rights Preserved, Notwithstanding § 7 (9).

- § 1559. Where Answer by No Reasonable Possibility Could Tend to Incriminate, No Privilege.
- § 1560. Privilege Does Not Authorize Refusal to Be Sworn Altogether nor to Produce Documents.
- § 1561. Privilege to Be Claimed at Time Question Asked or Production Demanded.
- § 1562. Privilege Not Waived by Voluntary Bankruptcy.
- § 1563. Pendency of Litigation with Witness, No Excuse for Refusing to Testify.
- § 1564. Conversely, Pendency of Litigation Not Requisite.
- § 1565. Bankrupt's Wife Examined Touching "Business Relations."
- § 1566. Privileged Communications Respected.
- § 1567. Competency of Witnesses Governed by Federal Law.
- § 1568. Contempt for "Willfully Evasive" or "Flagrantly False" Testimony.
- § 1569. Attendance of Witnesses Residing Out of State or Further than Hundred Miles, Not Enforceable.
- § 1570. General Examination of Nonresident Bankrupt or Witness before Another Referee, or State Judge.
- § 1571. Method Where before Judge of State Court or Another Referee.
- § 1572. Order for General Examination of Nonresident Witness to Be Made Only by Court before Whom Bankruptcy Case Pending.
- § 1573. Witness, as Such, Not Entitled to Attorney.
- § 1574. But Is Entitled if Witness Be Creditor or Bankrupt.
- § 1575. Witness' Fees and Mileage.
- § 1576. Contempt for Disobedience of Subpoena.
- § 1577. No Witness' Fees to Bankrupt, but Expenses Where Examined Away from His Town.
- § 1578. Bankrupt Voluntarily Removing Residence after Adjudication Not Entitled to Reimbursement.
- § 1579. Employment of Stenographer.

§ 1525. **General Examinations of Bankrupts and Witnesses.**—A court of bankruptcy may, upon application of any officer, bankrupt or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before the referee, or the judge of any state court, to be examined concerning the acts, conduct or property of a bankrupt whose estate is in process of administration under the act, provided that the wife may be examined only touching business transacted by her or to which she is a party and to determine the facts whether she has transacted or been a party to any business of the bankrupt.¹

And it is made one of the statutory duties of the bankrupt, when present at the first meeting of his creditors, and at such other times as the court shall order, to submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate.²

1. Bankr. Act, § 21 (a).

2. Bankr. Act, § 7 (9).

§ 1526. **Analogous to Examinations of Insolvent Debtors Elsewhere.**—The bankruptcy law furnishes a most searching and summary method for the discovery of hidden assets, by means of the examination of the bankrupt and other witnesses, and this examination is in practice much used and has always been a feature of bankruptcy jurisprudence from the earliest statute of King Henry VIII down to the present time.³

It is true that similar provisions are to be found in other branches of jurisprudence taken up with the affairs of insolvent debtors, as, for instance, the examination of the debtor in assignment or insolvency proceedings.

Boyd v. Glucklich, 8 A. B. R. 403, 116 Fed. 131 (C. C. A. Iowa): "In some of the States there are laws providing for the examination of debtors under oath for the purpose of discovering what, if any, property they have applicable to the payment of their debts. The proceeding is analogous in all respects to the examination of the bankrupt under the Bankrupt Act."

Nevertheless, it is found in practice, that so far, at any rate, as concerns assignment proceedings, the examination of the debtor, the assignor, does not approach in its keenness the examination of the debtor which is had in bankruptcy. Perhaps the reason for this is not hard to find. In assignment proceedings the creditors have, in fact (whatever be the theory), no common agent to do the examining for them as they have in bankruptcy, and of course no one creditor cares to assume the responsibility and expense of such an examination alone when he himself will reap only a pro rata share of the benefits resulting from any discovery of hidden assets. To be sure, in theory, assignment laws afford quite as ample opportunity for such an examination as does the bankruptcy law and they also supply an officer to make the examination; but that officer is the assignee himself, who owes his office to the favor of the debtor, and most commonly is a personal friend or even the attorney of the assignor, and consequently is more interested in befriending the assignor than in exposing property concealed by him. It is not, then, a matter of surprise that an examination of the assignor under such circumstances would be likely to be lukewarm.

In bankruptcy proceedings, on the other hand, the examination of the bankrupt follows almost as a matter of course, and being conducted by the trustee elected by the creditors and responsible to them, is most searching and inquisitorial in its character.

§ 1527. **Who May Be Examined—"Any Designated Person" Including Bankrupt and Wife.**—Any designated person may be examined; including the bankrupt and his wife.⁴

Thus, a trustee or assignee in insolvency may be examined.⁵ Likewise, the officers of a corporation in which the bankrupt was a stockholder or

3. See Introd., § (g), page 6.

4. Bankr. Act, § 21 (a).

5. In re Pursell, 8 A. B. R. 96, 114 Fed. 371 (D. C. Conn.).

otherwise interested, may be examined and be required to produce corporate books for inspection.⁶ The bankrupt, of course, may be examined.⁷ And the officers and members of corporations are for certain purposes "the bankrupts" in cases of bankrupt corporations;⁸ but of course not so as to entitle them to all the privileges, or subject them to all the liabilities of bankrupts. And it is even a question whether such officers, when examined, are not entitled to witness fees, as any other witness. The bankrupt's wife may be examined.⁹

§ 1528. Examination of Each Witness a Separate Proceeding.—These general examinations of different witnesses are not all one proceedings, and need not be adjourned from day to day until all the witnesses are finished with. Each witness' examination is a separate and independent matter, and when it is concluded there should be no adjournment for other witnesses. Witnesses may be examined independently, and in fact their examinations are wholly independent.¹⁰

§ 1529. At Whose Instance Examination to Be Had.—The examination may be had at the instance of the trustee, receiver, or any other officer, or of any creditor or of the bankrupt himself.

Thus it may be had at the instance of the receiver;¹¹ likewise, at the instance of the trustee, or creditors.¹²

Ordinarily the trustee makes the application; but, in case he refuses to do so, the creditor may apply for an order directing the trustee to examine, or permitting the creditor himself to examine,¹³ at the expense of the estate.

§ 1530. One General Examination of Bankrupt a Matter of Absolute Right.—It is an absolute right, of which creditors may not be deprived, to have at some time and place an opportunity to examine the bankrupt.

6. In re Fixen & Co., 2 A. B. R. 822, 96 Fed. 748 (D. C. Calif.); In re Horgan & Slattery, 3 A. B. R. 253, 257, 98 Fed. 414 (C. C. A. N. Y.).

7. Bankr. Act, §§ 21 (a), 7 (9).

In re Fellerman, 17 A. B. R. 790, 149 Fed. 244 (D. C. N. Y.): " * * * and when examined at the first meeting of creditors it was the duty of each of them (§ 7, subsec. 9) to submit to an examination concerning 'his dealings with his creditors and other persons,' and in respect of 'all matters which may affect the administration and settlement of his estate,' and the obligation to submit to the examination involved the duty of answering truthfully and as intelligently, connectedly and fully as mental equipment would permit."

8. Alphen & Lake Cotton Co., 12 A. B. R. 653, 131 Fed. 824 (D. C. Ark.). Impliedly, In re Horgan & Slattery, 3 A. B. R. 253, 257, 98 Fed. 414 (C. C. A. N. Y.).

9. See post, § 1565, et seq.

10. Compare, inferentially, In re Cobb, 7 A. B. R. 104 (Ref. Mass.).

11. In re Fixen & Co., 2 A. B. R. 822, 96 Fed. 748 (D. C. Calif.); In re Fleischer, 18 A. B. R. 194, 151 Fed. 81 (D. C. N. Y.).

12. In re Andrews, 12 A. B. R. 267, 130 Fed. 383 (D. C. Mass.); impliedly, In re Walker, 3 A. B. R. 34, 96 Fed. 550 (D. C. S. Dak.); impliedly, In re Jehu, 2 A. B. R. 498, 94 Fed. 638 (D. C. Iowa).

13. In re Andrews, 12 A. B. R. 267, 130 Fed. 383 (D. C. Mass.): Compare similar rule as to other action in behalf of creditors, post, § 824.

§ 1531. **But Examination of Other Persons Not.**—But it is not an absolute and unqualified right that a creditor has to demand the issuance of a summons for the general examination of a third person: it lies within the discretion of the court.

In *re Andrews*, 12 A. B. R. 267, 130 Fed. 383 (D. C. Mass.): In this case a summons for the examination of the bankrupt's former assignee for creditors was asked for by a creditor, but was refused by the referee, for reasons not stated in the opinion of the reviewing court, and the refusal was sustained, the reviewing court presuming that the examination was being asked for in another interest than that of the estate. The Court said:

"This provision is not intended to give the creditor an unqualified right to demand the issuance of the summons. Ordinarily, the examination is made by the trustee, and after his appointment a creditor should ordinarily apply to him. If the trustee refuses to undertake the examination, the creditor may apply to the court for an order directing him to do so. To order the trustee to examine is manifestly a matter of discretion. Doubtless the creditor may apply to the court in order to carry on the examination himself, but the court is not wholly without discretion to refuse the application."

And cause should be shown; but the sufficiency of grounds rests within the discretion of the court, the court including the referee.

In *re Abbey Press*, 13 A. B. R. 17, 134 Fed. 51 (C. C. A. N. Y.): "Any order for examination of any witness other than the bankrupt, whether on a first or second examination, should be for a special cause shown, but the authorities cited show that it has been uniformly held that it is within the discretion of the referee to decide in each particular case what cause is sufficient and upon what information he will make the order."

§ 1532. **Creditor before Filing Claim May Examine, but Proof May Be Required.**—A creditor who has not filed his claim nor had the same allowed may examine the bankrupt and witnesses, even though he may not be entitled to vote for trustee, share in dividends or otherwise participate in creditors' meetings until his claim has been allowed. But the referee may require proof that he is a creditor.

In *re Walker*, 3 A. B. R. 35, 96 Fed. 550 (D. C. N. Dak.): "The question raised before the referee depends upon the meaning of the term 'creditor,' as employed in these sections. By § 1 of the act it is provided that, unless the same be inconsistent with the context, the word 'creditor' shall be construed to include 'any one who owns a demand or claim provable in bankruptcy.' There is nothing in the context which requires a restricted meaning of the term as employed in the sections above quoted. Throughout the act, whenever the word is used in a narrow sense, apt language is employed to indicate such an intention. For example, only those whose claims have been allowed are permitted to vote for the trustee (§ 56), or share in the dividends (§ 65), or determine whether a composition shall be accepted (§ 12b). These are some of the cases in which the context shows that the term 'creditor' is used in a narrower sense than that indicated by the definition in § 1, and, when no such restriction is declared by the context, the general terms of the definition must be held to apply. * * * If he is entitled to oppose the discharge without proving his claim, he ought likewise to be allowed to ex-

amine the bankrupt for the purpose of establishing the grounds of his objections; and it has been expressly decided that a creditor is entitled to make such examination without first filing specifications of his objections to the discharge. In *re Price*, 91 Fed. 635. [1 A. B. R. 419.] The general principle to be deduced from the entire act would seem to be that only those creditors whose claims have been proved and allowed can participate either in the management of the estate or in the dividends derived therefrom, but as to all other matters any person having a provable claim is entitled to be heard."

In *re Jehu*, 2 A. B. R. 498, 94 Fed. 638 (D. C. Iowa): "I know of no provision of the Bankrupt Act which requires that a creditor must file and prove up his claim before he is entitled to an order for the examination of the bankrupt. Before granting an order for the examination of a bankrupt, the referee should be satisfied that the party applying for the order is in fact a creditor of the bankrupt; but, if this fact be shown, no good reason exists why the examination should not be had, even though the creditor may not have proved his claim in set form."

To this end he may probably require the creditor to prove his claim in the usual manner of such proof in bankruptcy. But the referee need not require such method. And it has been held, in some cases, that the fact that the bankrupt included the person in his schedules is sufficient proof.¹⁴

In *re Walker*, 3 A. B. R. 35, 96 Fed. 550 (D. C. N. Dak.): "Was there sufficient evidence before the referee to show that the creditor has a provable claim against the estate? I think there was. The claim was listed by the bankrupt as a debt which he was owing, and he was required by § 7 of the act to state under oath the amount of the claim, and the consideration out of which it arose. This, of course, would not establish the claim, nor the right of the creditor to share in dividends; but as to such matters as the examination of the bankrupt, and as against him, it certainly makes out at least a *prima facie* case that the claim exists and is provable against the estate."

§ 1533. Application for Examination—Notice Not Required.—The application for an order for the examination should be to the court of bankruptcy, that is to say, in practice, to the referee; it need not be in writing and no particular form is necessary. No notice need be given to the witness sought to be examined, if it is his first examination; no cause need be given where it is the bankrupt whose examination is sought, although cause should be shown for the examination of other witnesses; no divulging of the questions to be propounded need be made; and neither the bankrupt nor other witness will be heard upon the propriety of issuing such order.¹⁵

In *re Howard*, 2 A. B. R. 585, 95 Fed. 415 (D. C. Calif.): "The order requiring Hyde to appear as a witness, and be examined concerning the acts, conduct, and property of the bankrupt, was valid, although there was no formal application therefor, showing what questions were proposed to be asked upon such examination, or the particular facts in relation to which he was to be examined. The statute does not contemplate that any such showing shall be made as the basis for an order of this character. The simple application

¹⁴. In *re Jehu*, 2 A. B. R. 498, 94 Fed. 638 (D. C. Iowa).

¹⁵. In *re Cobb*, 7 A. B. R. 104 (Ref. Mass., affirmed by D. C.). To same general effect. In *re Fixen & Co.*, 2 A. B. R. 822, 96 Fed. 748 (D. C. Calif.).

or demand for such an order by any of the persons named in sec. 21 of the Bankruptcy Law is all that is required to support it."

In *re Abbey Press*, 13 A. B. R. 11, 134 Fed. 51 (C. C. A. N. Y.): "Under the corresponding sections of the Act of 1867, it was held, that the register had jurisdiction to make such orders for the examination of witnesses, In *re Pioneer Paper Co.*, 7 N. B. R. 250, Fed. Cas. No. 11, 178, and that it was discretionary with the register to require a written application or to grant such order on a verbal one; and such appears to us to be the proper construction of the present law and to have been the general practice under it. In *re Pioneer Paper Co.*, *supra*; In *re Solis*, 4 N. B. R. 68, Fed. Cas. No. 13,165; In *re Vetterlein*, 4 N. B. R. 599, Fed. Cas. No. 16,926."

§ 1534. Notice to Witness Proper Where Second Examination Sought.—But if the witness has already been subjected to one full examination in the same proceedings the better practice would require notice to him of the second application, that he be given opportunity to object to another examination; and good cause should be shown by the applicant why the witness should be re-examined; but such notice, even under such circumstances, is not mandatory nor jurisdictional.¹⁶

§ 1535. Notice to Creditors of Examination of Bankrupt Requisite.—Ten days' notice by mail to all creditors must be given of every examination of the bankrupt himself.¹⁷

§ 1536. None to Creditors nor Bankrupt for Examination of Other Witnesses.—No notice to creditors is necessary of the examination of other witnesses than the bankrupt; for no provision requiring notices in such cases is found in the statute, the orders in bankruptcy or the prescribed forms.

In *re Cobb*, 7 A. B. R. 104, 106 (Ref. Mass.): "Under the present act no notice is required to be given of the examination of a witness by the trustee under § 21a, and there seems to be no better reason for giving notice to the bankrupt under that section than there was under § 26 of the earlier act. There might indeed be very good reasons why the trustee should wish to pursue his investigations without the bankrupt's knowledge, and as it is the bankrupt's duty to give his trustee all the information and assistance in his power, it would certainly seem incongruous to allow his attorney to appear and cross-examine a witness whom the trustee wishes to examine, when the purpose of cross-examination generally is adverse to the interest of the party by whom the witness is presented."

Nor is notice to the bankrupt of the examination of other witnesses requisite.¹⁸

16. Impliedly, In *re The Abbey Press*, 13 A. B. R. 11, 134 Fed. 51 (C. C. A. N. Y.).

17. Bankr. Act, § 58 (a): "Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of the bankrupt or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing of (1) All examinations of the bankrupt."

18. In *re Cobb*, 7 A. B. R. 104, 106 (Ref. Mass.).

§ 1537. **Order for Examination to Be Entered and Served.**—An order must be entered for the examination of each witness.¹⁹

Thereupon a copy of this order or a subpoena, is issued and served upon the witness. It should properly be under the seal of the court.²⁰

§ 1538. **None Requisite for Examination of Bankrupt at First Meeting.**—No order is necessary to procure the general examination of the bankrupt himself when he is present at the first meeting of creditors, because the statute itself provides in § 7 clause (9), that the bankrupt shall "submit to examination when present at the first meeting of creditors and at such other times as the court may order," and the prescribed form of the notice of the first meeting of creditors contains a notification that the bankrupt may be examined at the first meeting.²¹

§ 1539. **But Requisite in Other Cases.**—If it is desired to generally examine the bankrupt at any other time than either at the first meeting of creditors or at some adjourned session of the first meeting, an order must be entered and ten days' notice be given to all creditors.²²

§ 1540. **Second Examination May Be Had.**—After the conclusion of one general examination, a subsequent general examination of the bankrupt, or of a witness, may be had.²³

In *re Mellen*, 3 A. B. R. 226, 97 Fed. 326 (D. C. N. Y.): "But this does not necessarily supersede a further examination of the bankrupt if, on application by objecting creditors, the referee shall deem a further examination reasonable and necessary."

19. Form for order: "Upon this _____ day of _____, 1903, upon application of the trustee (or if such be the case, upon application of _____, a creditor), at the hearing whereof no adverse interest was present, it is ordered that John Smith be and he hereby is ordered to appear before the referee in bankruptcy, at his offices, etc., etc., upon the _____ day of _____, 1903, at 10:00 o'clock in the forenoon to be examined concerning the acts, conduct and property of the above named bankrupt, in accordance with law."

In *re Fixen & Co.*, 2 A. B. R. 825, 96 Fed. 748 (D. C. Calif.).

20. General Order III: "All process, summons and subpoenas shall issue out of the court, under the seal thereof, and be tested by the clerks; and blanks, with the signature of the clerk and seal of the court, may, upon application, be furnished to the referees."

Inferentially, In *re Abbey Press*, 13 A. B. R. 13, 134 Fed. 51 (C. C. A. N. Y.): "The subpoena did not bear the seal of the court. The petitioner, however, attended before the referee, and does not seem to have made the objection there. This defect was, therefore, waived by the appearance of the witness without objection on that ground, and, as he was actually before the referee when the order to be sworn was made, the absence of the seal is immaterial."

21. **Whether Bankrupt Must Attend Other Meetings unless Ordered.**—Nevertheless, apparently, the bankrupt need not attend the first meeting nor any other meeting of creditors unless ordered so to do. See Bankr. Act, § 7 (a) (9).

Obiter, In *re Shanker*, 15 A. B. R. 109, 138 Fed. 863 (D. C. Penn.).

Although he must attend the hearing upon his application for discharge without being ordered so to do: In *re Mellen*, 3 A. B. R. 226, 97 Fed. 326 (D. C. N. Y.); In *re Shanker*, 15 A. B. R. 109, 138 Fed. 862 (D. C. Penn.).

22. In *re Price*, 1 A. B. R. 419, 91 Fed. 635 (D. C. N. Y.). As to orders for examinations of bankrupts or nonresident witnesses before a State Judge or before another referee than the one before whom the case is pending, see post, § 1570.

23. In *re Smelting Co.*, 15 A. B. R. 83, 85, 146 Fed. 336 (D. C. Penn.).

§ 1541. **But Good Cause Must Be Shown.**—But such subsequent examination cannot be obtained except for good cause and upon notice to him of the application for a second examination.²⁴

§ 1542. **Bankrupt Examined at Any Time after Adjudication, Even after Discharge.**—A bankrupt may be required to attend for examination whenever reasonably required by creditors.

In re Mellen, 3 A. B. R. 226, 97 Fed. 326 (D. C. N. Y.): "The correct practice, is to require the bankrupt to attend for examination whenever reasonably required by creditors for the purpose of establishing their objections to his discharge."

He may be examined even after his discharge;²⁵ at any rate to see if he has concealed anything since his discharge.²⁶

But there seems no good reason for limiting the right of examination to the discovery of assets concealed since the discharge, nor to restrict it to a period of one year from the discharge. As long as the estate is not closed, the right of general examination exists, subject of course to the right of the bankrupt not to be subjected to unnecessary or repetitious examination.

§ 1543. **Whether Bankrupt May Be Put under "General" Examination before Adjudication.**—But whether the bankrupt may properly be put under "general" examination before adjudication is doubtful, although undoubtedly he may be examined upon any specific *issue* raised by controversy before adjudication, precisely as any other witness. It has been held that the alleged bankrupt may be put upon such general examination before adjudication.²⁷

And the bankruptcy court, early in the practice under the present law, ordered a "general" examination of the officers of a debtor corporation prior to adjudication.²⁸

Under the old law of 1867, it appears to have been possible, upon good cause shown, to obtain an order for the "general" examination of the bankrupt prior to adjudication.²⁹

In re Salkey, 9 Bank Reg. 107, Fed. Cases No. 12,952 (D. C. Ills.): "The question is whether it is competent for a District Judge to make an order for examination of a debtor prior to an adjudication. * * * The question arises under the 26th section of the bankrupt law. That section provides that the Court might, on the application of the assignee in bankruptcy, or

24. In re Price, 1 A. B. R. 419, 91 Fed. 635 (D. C. N. Y.). Compare, In re Abbey Press, 13 A. B. R. 17, 134 Fed. 51 (C. C. A. N. Y.).

25. In re Westfall Bros. Co., 8 A. B. R. 431 (Ref. N. Y.).

26. In re Peters, 1 A. B. R. 248 (Ref. Mass.).

27. In re Fleischer, 18 A. B. R. 194, 151 Fed. 81 (D. C. N. Y.). Obiter, In re Herskovitz, 18 A. B. R. 249, 152 Fed. 316 (D. C. N. Y.).

28. In re Fixen & Co., 2 A. B. R. 822, 96 Fed. 748 (D. C. Calif.).

29. (1867) In re Gilbert, 3 N. B. Reg. 152, Fed. Cas. 5,410.

of any other creditor, at all times require the 'bankrupt' to submit to an examination.

"It is said that the word 'bankrupt' is used here and that there is a distinction made in the bankrupt law subsequent to an adjudication in bankruptcy. * * * It is insisted that the word 'bankrupt' indicates that an examination cannot be had until after an adjudication. * * *

"In one sense this is true. He does not necessarily become technically a bankrupt until he is so decided to be by the Court. The argument urged that there should not be this inquisitorial power exercised over the debtor for the purpose of prying into his business affairs, and because the examination might be injurious to his credit by disclosing facts affecting the same, can hardly have much weight when it is recollected that the law provides certain means by which the Court may proceed to determine whether or not the debtor committed an act of bankruptcy. The power of the Court seems to be plenary, prior to the adjudication, not only over the debtor's property, but over his person.

"It might be said with as much reason that the Court should not exercise this power over either his property or his person until it had actually decided him to be a bankrupt, because, if, upon a trial of the fact of bankruptcy, he should be decided not a bankrupt, of course all the proceedings would become irregular.

"An examination under the order as made in this case, is something which necessarily grows out of the administration of the law, which gives to the Court, under certain circumstances prescribed therein, power over the person and property of the debtor, for the purpose of protecting the rights of creditors. * * *

"Independently of the 26th section, however, it would seem to follow as a necessary consequence, from the general scope of the bankrupt law, that circumstances might exist after the commencement of proceedings in bankruptcy, and after the debtor is brought within the control of the Court, which would warrant an immediate examination. * * *

"The bankrupt law allows proceedings in bankruptcy to be commenced under a certain state of facts. * * * That being done, a prima facie case exists, and then the law clothes the Court with all the powers necessary to accomplish the great object in view, namely, to protect the general creditors of the debtor by discovering and taking possession of all his property for equal distribution among them.

"One of the principal objects of the law would be frustrated if adequate means were not provided for the ascertainment of all the facts affecting the property of the debtor. * * *

"So that, on the whole, in view of the purpose of the 26th section, and the general scope of the bankrupt law, I cannot doubt the existence of the power exercised, in the instance, by the District Court."

Likewise, under the law of 1841.³⁰

But such power is seriously to be questioned. Thus, the "general" examination of the bankrupt and witnesses under § 21 (a) was undoubtedly never designed to furnish opportunity for "fishing expeditions" for evidence upon which to prepare for trial upon the petition for adjudication; but the rule laid down in the *Fleischer* case would at once be applied to that end. In this way, before the status of the debtor has been established in the com-

30. [1867] *Ex parte Lee*, Fed. Cases 8,178 (D. C. N. Y.).

munity to be that of a bankrupt, he and any number of witnesses may be dragged in to make full exposition of all his affairs, without pleading filed, without issue raised—subjected to a general ransacking of all his affairs—all his “acts, conduct and property.” The ruling in *In re Fleischer* is based upon the theory that the filing of the bankruptcy petition is similar to the filing of a creditor’s bill in equity. Such theory has been recently and most emphatically repudiated by the Supreme Court of the United States in *York Mfg. Co. v. Cassell*. The Circuit Court of Appeals in analyzing the nature of a bankruptcy proceedings says, in the case of *Smith v. Mottley*, 17 A. B. R. 867:

“There would seem to be a valid distinction in the application of the rule that the misappropriated fund must be found in the assets, between the settlement of an estate in bankruptcy proceedings and proceedings upon a bill filed for the marshaling and appropriation of assets according to the principles of equity. In the latter case there is a seizure of the res for the direct purpose of fastening the inchoate rights of creditors. In the former the trustee takes the estate as he finds it.”

Again, if there may be a “general” examination of the bankrupt prior to trial and adjudication, what purpose is subserved by the elaborate requirement of § 3 that the bankrupt must appear at the trial with his books and papers and submit to examination on the subject of his insolvency, under penalty that the burden of proving solvency will shift to him? This provision was undoubtedly inserted in order to give the petitioning creditors access to the books and testimony of the bankrupt in making their own case in chief. Yet such provision would be wholly superfluous if the bankrupt may be obliged to submit to “general examination” before adjudication. If the bankrupt’s testimony is wanted in preparation for trial, it should be procured by deposition or by enforcement of the special provisions of the statute mentioned requiring his attendance at the trial. If wanted in aid of an application for injunction or receiver, it is also obtainable in the usual way. But it seems clear that the “general examination” into the “acts, conduct and property of the bankrupt” provided for in § 21 (a) should not be had before adjudication.

As a practical matter, not much inconvenience results from the inability to procure a “general” examination of the debtor prior to his adjudication, for there are numberless motions, applications and controversies that might be made in aid of enforcing the provisional remedies available during the pendency of the petition, upon which the bankrupt might be summoned as an ordinary witness; such, for instance, might be a motion for the appointment of a receiver, or for injunction, etc., upon which would certainly exist opportunity for somewhat extensive examination of the bankrupt in establishing the necessity for a receivership or an injunction.

§ 1544. **No Notice Requisite Where Bankrupt Witness upon Issues between Parties.**—No notice to creditors is necessary where the bankrupt

is called to testify as a mere witness upon some issue between parties in the case.

The statutory requirement that ten days' notice by mail must be given to creditors "of all examinations" of the bankrupt, is probably to protect the bankrupt from vexatious repetitions of examination by different creditors,³¹ and does not refer to cases where the bankrupt may be needed as a witness to testify for or against some particular issue between parties in the proceedings, but refers to what is termed the "general examination" of the bankrupt, where the bankrupt is put upon the stand and asked miscellaneous questions in a general inquiry concerning his affairs, where no issue is raised, where nothing is to be proved and where no judgment or order results. Of course, whenever a party needs the bankrupt's testimony to support or defend some claim or right, the party is entitled to the testimony of the bankrupt, precisely as much as to that of any other necessary witness; and no notice to creditors is required—a simple subpoena at most is all that is needed to bring the bankrupt.

§ 1545. Bankrupt Examined without Notice before First Meeting, in Relation to Pending Application.—In this way a bankrupt may be examined as a witness before he has filed his list of creditors, in aid of some application or motion of some party to the proceedings. Thus, it has been held allowable to examine him, without notice to creditors, for the purpose of gathering the information requisite to fill out the bankrupt's own schedules;³² and to direct the bankrupt to furnish information to aid the court and its officer, the receiver, in the preservation of the estate for creditors, without the giving of notice.³³

§ 1546. Also, Even before Adjudication.—And even before adjudication.³⁴

§ 1547. Broad Scope of General Examination—"Acts, Conduct and Property."—No rigid rules can be laid down as to the method and scope of the general examination of the bankrupt and witnesses.³⁵

In *re Foerst*, 1 A. B. R. 259, 93 Fed. 190 (D. C. N. Y.): "There is no precise rule governing the admissibility of such testimony, other than that it should be reasonably pertinent to the subject of inquiry. In general, a large latitude of inquiry should be allowed in the examination of persons closely connected with the bankrupt in business dealings, or otherwise, for the purpose of discovering assets and unearthing frauds, upon any reasonable surmise that they have assets of the debtor. The intent of the Bankrupt Law is that only the

31. In *re Price*, 1 A. B. R. 419, 91 Fed. 326 (D. C. N. Y.).

32. In *re Franklin Syndicate*, 4 A. B. R. 244, 101 Fed. 402 (D. C. N. Y.).

33. *Abrahamson v. Bretstein*, 1 A. B. R. 44 (Ref. N. Y.); In *re Fixen & Co.* 2 A. B. R. 822, 96 Fed. 748 (D. C. Calif.).

34. In *re Fixen & Co.*, 2 A. B. R. 822, 96 Fed. 748 (D. C. Calif.).

35. Bankr. Act, § 21 (a).

honest debtor shall be discharged; and that any proper assets of the estate, however concealed, shall be made available to creditors. The examination for this purpose is of necessity, to a considerable extent, a fishing examination. The extent to which it shall be permitted to go must be determined by the sound judgment of the officer before whom it is taken. Reasonable examination should not be allowed to be checked by constant objections that the materiality of the answer may not be immediately apparent, where no harm can arise to the witness from the disclosure, if the transaction is honest. If the result of such an examination may often be a considerable amount of immaterial testimony, this is a much less evil than to stifle examination by technical rules which would defeat the purpose of the act, and discredit the administration of the law in the interest of creditors. Unreasonable discursiveness in the examination will be in some measure checked by making it at the expense of the examining party; if plainly frivolous, or prolix, it should be stopped. Where questionable proceedings have been disclosed, greater latitude in the prosecution of inquiries should be allowed; and the precise form or order in which the questions are put can scarcely be deemed material.

"Upon the above general principles, and upon the matters already disclosed on this examination, I think the witness should answer as respects any moneys or property acquired by her during the year prior to the adjudication, or even farther back, should further testimony show such inquiries to be reasonably pertinent."

Compare, *In re Williams*, 10 A. B. R. 538, 123 Fed. 321 (D. C. Tenn.): "It is proper to remark here that the ordinary provisions of law for taking the testimony of absent witnesses contemplate their examination as witnesses to prove definite issues made by the pleadings in the case in which they are examined as witnesses. But in bankruptcy proceedings, while the scope of their examination is much broader, the purpose is none the less definite, although peculiar to bankruptcy proceedings. While they are witnesses in every sense of the word, they are examined inquisitorially for the purpose of discovering what general or specific knowledge they have of the bankrupt's affairs and property; or, to use the language of section 21 of the Act of 1898, they are examined at large "concerning the acts, conduct, or property of a bankrupt." There may be no action at law or bill in equity or libel in admiralty or other like proceedings in which they are examined as witnesses upon issues made by pleadings in the ordinary way but there is pending, in the bankruptcy court upon pleadings appropriate to that purpose, the administration of a bankrupt estate about which the trustee needs information from those who have knowledge of the bankrupt's affairs, and every bankruptcy system provides for an inquisitorial examination of all those wherever present who had such knowledge. It is this kind of examination which is provided for by the bankruptcy statute and procured by the ordinary practice for the taking of the testimony of witnesses when they reside beyond the jurisdiction of the court."

No issue is involved. No fact is asserted on one side and denied on the other. No fact is to be proved or disproved. The examination is simply a general inquiry into the "acts, conduct and property of the bankrupt," the cause of his failure, the whereabouts of his property, the contracts relating to his business, and in short an examination into all matters and things of reasonable interest to the creditors; and, as a consequence, a great latitude of enquiry is permitted.

U. S. v. Wechsler, 16 A. B. R. 5 (D. C. N. Y.): "In the case of a trial upon issues framed it must be material to those issues, but this section of the Bankrupt Act you will perceive, does not provide for any trial. There is no decision to be made necessarily as the result of the giving of this evidence. It is an investigation. He is to be examined concerning the acts, conduct or property of the bankrupt. It is a broad field of inquiry and intended to be so, and this section is the section under which the investigations usually take place about the property of the bankrupt, particularly in cases where there is any suspicion that there has been any attempt to take property and conceal it from creditors. * * * If there have been recent transfers of property or payments of money on the eve of bankruptcy, that is a suspicious fact, particularly if they have been transferred to relatives or connections. All such transfers become material subjects of inquiry; and in order to ascertain what the truth is about them the party examining the bankrupt is not confined to a mere inquiry in the first instance whether the property has been transferred, or a mere explanation of what it was transferred for, but counsel have a right to inquire into all the surrounding circumstances in the case in order to ascertain what the truth is in that respect."

In re Horgan & Slattery, 3 A. B. R. 253, 98 Fed. 414 (C. C. A. N. Y.): "The provisions of the Bankruptcy Act authorizing the examination of third persons as witnesses, and compelling the production of books and documents upon such examinations, are intended to enable creditors to discover transactions which may effect the right of the bankrupt to obtain a discharge, and to enable the trustee to ascertain whether any assets exist which should be collected and applied toward the payment of the bankrupt's debts. It is the duty of the Bankruptcy Court to see that such examinations are not permitted to transcend the limit of a legitimate investigation for these purposes; but of necessity this is a duty which involves the exercise of a wide discretion, and which should not be interfered with by an appellate court except when it has been manifestly abused."

Obiter, In re Carley, 5 A. B. R. 554, 106 Fed. 862 (D. C. Ky.): "Speaking generally, I think the provisions of § 21a of the Bankruptcy Act should be liberally construed, so as to enforce full and frank answers by witnesses who are being examined under its provisions as to the 'acts, conduct or property of the bankrupt,' the object being to secure information on those subjects for use in the administration of the bankrupt's estate. The statute was intended for beneficial purposes, and in order to affect them witnesses should fully disclose all their knowledge relative either to the acts, the conduct or the property of the bankrupt."

Obiter, In re Wilcox, 6 A. B. R. 362, 366, 109 Fed. 628 (C. C. A. N. Y.): "The right of the trustee extends to a discovery of whatever tends to bring to light the estate of the bankrupt so as to enable the trustee to pursue the estate and reduce it to possession and to enable creditors 'to discover transactions which may affect the right of the bankrupt to obtain a discharge.'"

Compare, obiter, In re Rauchenplat, 9 A. B. R. 763 (D. C. Porto Rico): "Great latitude should be allowed in evidence to find a bankrupt's assets, or unearth fraud, but the court, or if acting by its referee, has a discretion how far this should proceed, and the referee had a legal discretion as to the extent of the examination of the books of the witness."

Direct and leading questions are not forbidden and the examiner is not bound to state what he expects to prove by any of his questions. He is

not trying to prove anything. He is simply inquiring and informing himself about his debtor's affairs.³⁶

In *re Fixen & Co.*, 2 A. B. R. 832, 96 Fed. 748 (D. C. Calif.): "The examinations thus provided for are not intended as means of producing testimony pertinent to issues then on trial, but their object is to afford to the creditors, and the officer charged with administering the trust, full information touching the bankrupt's estate, in order that necessary steps may be taken for its possession and preservation."

The only limitation upon the inquiry is that it shall be pertinent to the acts, conduct or property of the bankrupt in some way.

In *re Howard*, 2 A. B. R. 582, 585, 95 Fed. 415 (D. C. Calif.): "Of course, when the person whose attendance is required appears before the referee, his examination must be relevant to matters concerning the acts, conduct, or property of the bankrupt, and it must be presumed that the referee will confine the examination within legal limits; that is, within limits pertinent to such general inquiry, and the witness will be justified in refusing to answer irrelevant or impertinent questions."

Of course, questions relating to his religion or to his domestic infelicities or to his politics are improper. Also questions whose answers could not in any way throw light on any present assets or on any act that would prevent discharge,³⁷ so also would it be improper repeatedly to cover the same ground.³⁸

The examination should be decorous and decent, and should not be unduly prolonged nor unnecessarily vexatious. This is about all that can be said as to the nature of the general examination of the bankrupt and witnesses. Of course, as before stated, when the bankrupt is called as a witness in support of some issue raised between parties to the proceedings, then the rules for his examination are the same as for any other witness and the fact that it is the bankrupt who is testifying will not alter the rules except, perhaps in so far as he may or may not be considered an interested party.

The subject of the examination is to be confined to the acts, conduct and property of the bankrupt and his dealings with his creditors, etc., preceding the adjudication; nevertheless, facts occurring subsequently thereto also may be inquired into if in their nature they are such as would likely throw light on the acts, conduct or property of the bankrupt *before* the adjudication, or on the amount, kind and whereabouts of the property.³⁹

The examination is not limited to transactions occurring within the four months preceding the bankruptcy. A full understanding of the acts, con-

36. [1867] In *re Earl*, Fed. Cases, No. 4,244; [1867] In *re Krueger*, Fed. Cases, No. 7,942; [1867] In *re Lathrop*, Fed. Cases, No. 8,106; [1867] In *re Stuyvesant*, Fed. Cases, No. 13,582; [1867] In *re Mendenhall*, Fed. Cases, No. 9,423.

37. In *re Hayden*, 1 A. B. R. 670, 96 Fed. 199 (D. C. N. Y.).

38. In *re Romine*, 14 A. B. R. 789, 138 Fed. 837 (D. C. W. Va.).

39. Impliedly, In *re Walton*, 1 N. B. N. 533. Compare, under law of 1867, In *re McCrien*, Fed. Cas. 8,666, 3 N. B. Reg. 90; (1867) In *re Rosenfield*, 1 N. B. Reg. 60, Fed. Cas. 12,059.

duct and property of the bankrupt may involve inquiry into facts occurring months and even years beforehand.⁴⁰

§ 1548. Production of Books, Papers and Documents Enforced.—The production of books, papers and documents may be enforced. As to the bankrupt's books, documents, etc., the Act itself vests their title in the trustee.⁴¹

Third parties, examined as witnesses, may be required to produce their books of account, where showing has been made that property likely or probably has been turned over to them in violation of the Bankruptcy Act; perhaps mere circumstances of suspicion may suffice to lay a predicate for the production.

§ 1549. Whether Federal Equity Rules Govern "General" Examinations.—General Order No. XXII provides that the "examination and cross-examination of the witnesses shall be had in conformity with the mode now adopted in courts of law of the United States;" that mode being prescribed by U. S. Rev. Stat., § 721, as follows:

"The laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

Yet it is doubtful whether this rule adopts the common-law federal rules, in toto, whereby the mode of examination and cross-examination of witnesses prevailing in the courts of the particular State is accepted in the federal court.⁴²

And, in the so-called "general examinations" of the bankrupt and of witnesses, it is doubtful whether the strict rules of *Dravo v. Fabel*, 132 U. S. 489, as to taking the opposite party's deposition, apply.

The relevancy or irrelevancy of questions is for the Court to determine.⁴³

§ 1550. Witness Not Excused because Testimony Would Reveal Private Affairs.—A witness will not be excused from answering an apparently relevant question because of his assertion that the answer would disclose the personal affairs of himself or others, not material to the subject of inquiry;⁴⁴ nor from producing books or documents, for the same reason.⁴⁵

40. In *re Brundage*, 4 A. B. R. 47, 100 Fed. 613 (D. C. Iowa); In *re Pursell*, 8 A. B. R. 96, 114 Fed. 371 (D. C. Conn.).

41. Bankr. Act, § 70 (a) (1). See ante, § 956. In *re Fixen & Co.*, 2 A. B. R. 822, 96 Fed. 748 (D. C. Calif.); compare, In *re Romine*, 14 A. B. R. 792, 138 Fed. 837 (D. C. W. Va.).

42. Compare, inferentially, In *re DeGottardi*, 7 A. B. R. 739, 740, 114 Fed. 328 (D. C. Calif.).

43. *People's Bank v. Brown*, 7 A. B. R. 475, 112 Fed. 652 (C. C. A. N. J.).

44. *People's Bank v. Brown*, 7 A. B. R. 475, 112 Fed. 652 (C. C. A. N. J.). Compare, In *re Howard*, 2 A. B. R. 532, 585, 95 Fed. 415 (D. C. Calif.).

45. In *re Fixen & Co.*, 2 A. B. R. 822, 96 Fed. 748 (D. C. Calif.).

§ 1551. But Examiner Must Develop Facts Showing Sufficient Connection with Bankrupt to Make Further Inquiry Relevant.—But, after the witness has positively negatived the idea that the matter inquired into has any relation to the acts, etc., of the bankrupt, it devolves upon the examiner to develop facts showing sufficient connection with the acts, conduct or property of the bankrupt to make further inquiry reasonably relevant.⁴⁶

In *re Carley*, 5 A. B. R. 556, 106 Fed. 862 (D. C. Ky.): "But the act does not demand such liberality of construction when it is sought to inquire into the acts, conduct or property of any persons other than the bankrupt himself. Indeed, the act does not authorize, in this mode of proceeding, any examination whatever into matters other than those specifically mentioned, which might, however, include cases where the acts, conduct or property of the witness are so connected or interwoven with those of the bankrupt as to make them virtually the same by reason of community of interest."

Compare, as to practice on opposition to discharge, In *re Romine*, 14 A. B. R. 785, 138 Fed. 837 (D. C. W. Va.): "It has been settled beyond peradventure for very many years that courts do not compel production of books simply to gratify curiosity, or permit 'fishing' excursions into them to see what can be found that may or may not be of advantage to the parties making the demand. A party cannot obtain a roving commission for the inspection or production of books or papers in order that he may ransack them for evidence to make out his case. He is entitled to production and inspection only when the same is material and necessary to establish his cause of action. The application will not be granted where the facts to be proved by the books can be otherwise established. It will therefore be denied when the party has in his possession or under his control the means of acquiring all the information he seeks to obtain, or when the books do not in themselves contain evidence, but merely information by which evidence can be obtained. It is not permitted to enable a party to ascertain whether he has cause of action or defense, or to ascertain the evidence on which his opponent's action or defense rests."

But proof in advance of the existence of any particular interest or right or relation between the witness and the bankrupt estate is not requisite so long as the circumstances developed might, with other circumstances to which the inquiries are directed, lay a foundation if true, for recovery of assets or for proof of such acts as might bar discharge or affect the claims of parties.

Inferentially, *People's Bk. v. Brown*, 7 A. B. R. 476, 112 Fed. 652 (C. C. A. N. J.): "It is true that when the appellee was interrogated respecting this real estate it had not been shown that the bankrupt had any interest in it; but his relationship to the parties, to several transactions concerning it, the history of those transactions, and the communications which ensued between the bankrupt and the witness when the latter was served with a subpoena, did appear, and disclosed a state of facts which justified the investigation. Its object was to determine whether the bankrupt did not have an interest in the property which should be applied to the payment of his debts, and the discovery sought would have been superfluous if, as a condition precedent to its

46. Compare, In *re Fixen & Co.*, 2 A. B. R. 822, 95 Fed. 748 (D. C. Calif.).

requirement, it had been necessary to independently establish the existence of such interest. Although it is the duty of the court to confine such examinations within the limits to which the purposes for which they are authorized restrict them, yet, where there are circumstances warranting the investigation, no obstruction of it should be permitted which is not justified by law. * * *

"The relevancy of any particular matter to the subject under judicial investigation is always for determination by the court, and no witness is entitled to decide for himself that the facts which he is asked to disclose would tend to prove the existence or nonexistence of the ultimate fact to which it is intended to relate them. * * * 'It is, in substance, but an expression of his understanding that the facts which he declines to reveal would, if revealed, appear to be immaterial, and to this opinion of his, though not even evidential, he asks that there shall be conceded determinative force.'"

§ 1552. General Examinations to Be in Writing.—The general examination of witnesses and bankrupts are to be taken down in writing, by or under the direction of the referee, in the form of a deposition, and may be in narrative form;⁴⁷ or by question and answer. Undoubtedly the requirement that it be taken in writing may be waived by counsel of both parties.⁴⁸ Other examinations, taken upon issues joined, are not subject to this requirement.

The deposition must be read over to the bankrupt or other witness, and signed by him in the referee's presence.⁴⁹

The bankrupt or other witness should always be permitted to make a correction in any statement theretofore made and the reason therefor may be taken into consideration by the court in passing upon the credibility of the witness.⁵⁰ Such correction, however, does not permit the bankrupt or other witness to expunge the corrected parts, if they accurately state the testimony actually given, but simply permits the addition of the statement that the former testimony was incorrect and should have been given differently, "as now stated."

§ 1553. Objections to Be Entered on Record.—Objections made must be entered on the record by the referee, together with his rulings thereon.⁵¹

§ 1554. Referee to Rule on Admissibility and to Exclude Incompetent Testimony.—But the referee is to pass upon the admissibility of evidence offered and to exclude that which is incompetent, irrelevant or otherwise inadmissible.⁵²

47. Gen. Ord. XXII; *In re Romine*, 14 A. B. R. 785, 138 Fed. 837 (D. C. W. Va.).

48. Compare, inferentially, *obiter*, *In re Wilcox*, 6 A. B. R. 366, 109 Fed. 628 (C. C. A. N. Y.).

49. Gen. Ord. XXII.

50. *In re Hark Bros.*, 14 A. B. R. 625 (D. C. Penn.).

51. Gen. Ord. No. XXII.

52. Compare, *In re DeGottardi*, 7 A. B. R. 742, 114 Fed. 328 (D. C. Calif.); apparently *contra*, *In re Romine*, 14 A. B. R. 785, 138 Fed. 837 (D. C. W. Va.). But this case does not seem to note the distinction between the referee acting in his ordinary functions and as special master on discharge.

In *re Wilde's Sons*, 11 A. B. R. 714, 131 Fed. 142 (D. C. N. Y.): "This motion involves the question whether a referee in bankruptcy has any power to exclude evidence. As I understand it, an officer appointed to simply take testimony for the use of the court, as, for instance, an examiner in an equity suit, has no jurisdiction to exclude or pass upon testimony. Unless the parties refer any question of the admission of testimony to the court, he is obliged to take all that is offered. But I think that whenever any officer is appointed whose duty it is to take evidence and also to exercise any judicial duty in regard to it, as to decide issues or to state the facts or law in an opinion or report, it is his right and duty to exclude inadmissible evidence upon objection. Why should he admit evidence which it would be his duty to disregard if admitted? Substantially all the cases in which evidence is taken by referees in bankruptcy, either in their character as referees or as special commissioners, are cases in which they either decide questions outright or draw conclusions from the evidence in the shape either of a report or an opinion; and I think that in all such cases the referee has the right to exclude evidence which he deems inadmissible. If error is committed by such exclusion, any party interested can take up the matter immediately on a certificate, or can urge the alleged error on final hearing. I am aware that there are authorities to the contrary for which I feel sincere respect, but none of them is necessarily controlling upon me, and I am not able to concur with them. The delay and expense of a bankruptcy system under which a referee has no power to exclude testimony, however irrelevant, is so great that such a method of procedure should not be permitted unless the principles of law absolutely require it. In my opinion they do not require it in proceedings before referees in bankruptcy."

Apparently *contra*, In *re Sturgeon*, 14 A. B. R. 682, 139 Fed. 608 (C. C. A. N. Y.): "Under General Order No. 22 (18 Sup. Ct. vii), the duty of the referee is to receive the evidence which is offered, to note objections and to record the evidence; and, if either party persists in offering incompetent or irrelevant matter in evidence, the other party has a remedy, because the rule provides that 'the court shall have power to deal with the costs of incompetent, immaterial or irrelevant depositions, or parts of them, as may be just.' The equity practice is to be followed by referees. The order directs him to proceed as referee. The referee must take all the evidence and note objections." But it is to be noted that this was an examination before a referee in another district than the one wherein the bankruptcy was pending and this might afford a distinction.

A rule compelling the referee on general examinations of bankrupts and witnesses, to take down answers, although the questions be incompetent and the answers improper, would lead to interminable confusion, and would practically give over such examinations into the absolute control of the examiner, leading to the possibility of intolerable abuse. The distinction noted in *In re Wilde's Sons*, *supra*, undoubtedly states the true principle.⁵³

53. But compare the practice on hearings in opposition to discharge before referees acting as special masters and where depositions are being taken in one district for use in a bankruptcy proceedings pending in another district, where the rule seems to be that if objection is made and sustained and exception taken the special master is bound nevertheless to take down the answer offered noting the objection thereto, the exception and his rulings.

In *re Romine*, 14 A. B. R. 785, 138 Fed. 837 (D. C. W. Va.): "It is clear to

§ 1555. **General Examination Competent as Admission in Subsequent Litigation against Same Party.**—The written deposition taken on general examination and also verbal testimony as to what was testified to on general examination, either of the bankrupt or of any witness, is admissible in evidence, as an admission, in any proceeding against the particular party so previously testifying.⁵⁴

In *re Alphin & Lake Cotton Co.*, 12 A. B. R. 653, 131 Fed. 824 (D. C. Ark., affirmed in 14 A. B. R.): "Their testimony taken under § 7 or § 21—they having the right under the Act to have the assistance of counsel, at the expense of the estate, if necessary, and an opportunity for cross-examination—was clearly admissible in any proceeding against them, other than criminal, as admissions against themselves."

In *re Wilcox*, 6 A. B. R. 366, 109 Fed. 628 (C. C. A. N. Y.): "The testimony of the bankrupt himself, which is ordinarily reduced to writing by or under the supervision of the referee, and given under the solemnity of an oath, amounts, when protection against criminative testimony has been waived, to his admission, which can be used elsewhere, but not in any criminal or penal proceeding, as an admission against himself (In *re Krueger*, 2 Lowell 182)."

But is not admissible as against any other party.⁵⁵

Breckons v. Snyder 15 A. B. R. 112, 211 Pa. St. 176: "The notes of the testimony of the bankrupt, taken at a preliminary proceeding before the referee, to ascertain his assets and liabilities, were properly rejected. The issue was not between the same parties, nor did it involve the same subject matter."

And is admissible even though not in writing nor signed if proved by the testimony of those who heard it.⁵⁶

me that in taking testimony the referee must have it taken down, preferably in narrative form, but, upon objection raised, it is his duty to require the matter to be presented by question, to which the objection and reason thereof is to be clearly but briefly noted; then to enter his ruling thereon as to whether proper or not, and, although he may rule it to be improper, yet allow it to be answered. I am persuaded, however, that he is not called upon to suffer and allow counsel, as in this case, to ask and permit witnesses to answer the same question over and over again, whereby time is unnecessarily consumed and costs incurred; but that upon his notice the fact that the question has been once answered, or the demand to answer has been once positively refused, the court will justify him in preventing vain repetition."

In *re Lipset*, 9 A. B. R. 32, 119 Fed. 379 (Ref. N. Y., affirmed by D. J.); In *re DeGottardi*, 7 A. B. R. 723, 114 Fed. 328 (D. C. Calif.); In *re Sturgeon*, 14 A. B. R. 681, 139 Fed. 608 (C. C. A. N. Y.). But compare, post, § 1571.

54. In *re Wiesen Bros.*, 14 A. B. R. 347, 135 Fed. 442 (D. C. Penn.); In *re Gaylord*, 7 A. B. R. 1, 112 Fed. 668 (C. C. A. N. Y., affirming 5 A. B. R. 410); In *re Mellen*, 3 A. B. R. 226, 97 Fed. 326 (D. C. N. Y.); In *re Dow*, 5 A. B. R. 400, 105 Fed. 889 (D. C. Iowa). See post, § 1839. Contra, but because considered to be privileged, In *re Marx*, 4 A. B. R. 521, 102 Fed. 676 (D. C. Ky.). Contra, but because considered to be privileged, In *re Logan*, 4 A. B. R. 525, 102 Fed. 876 (D. C. Ky.).

55. In *re Wilcox*, 6 A. B. R. 362, 109 Fed. 628 (C. C. A. N. Y.); In *re Alphin & Lake Cotton Co.*, 12 A. B. R. 653, 131 Fed. 824 (D. C. Ark., affirmed in 14 A. B. R.); In *re Wiesen*, 14 A. B. R. 347, 135 Fed. 442 (D. C. Penn.). Contra, In *re Cooke*, 5 A. B. R. 434, 109 Fed. 631 (D. C. N. Y., following In *re Wilcox* before rehearing of later case—distinguished in In *re Wiesen*, 14 A. B. R. 347, 135 Fed. 442, D. C. Penn.).

56. Obiter, In *re Bard*, 5 A. B. R. 810, 108 Fed. 208 (D. C. N. Y.); obiter, in *re Knaszak*, 18 A. B. R. 189, 151 Fed. 503 (D. C. N. Y.).

§ 1556. **Bankrupt's Testimony Not to Be Used in Criminal Proceedings against Him.**—No testimony given by the bankrupt shall be offered in evidence against him in any criminal proceedings.⁵⁷

But this immunity from the use of testimony given by the bankrupt does not prevent prosecution for acts testified to upon examination: the immunity is immunity from the use of evidence so given, not from prosecution.

Burrell v. State, 12 A. B. R. 132, 194 U. S. 572: "It does not say that he shall be exempt from prosecution, but only, in case of prosecution, his testimony cannot be used against him. The two things are different, and cannot be confounded."

In *re Walsh*, 4 A. B. R. 693, 696, 104 Fed. 518 (D. C. S. Dak.): "If the Congress of the United States desires to draw from the bankrupt testimony that may tend to criminate him, it must by legislation provide, under the ruling in the case of *Brown v. Walker*, nothing short of immunity from prosecution. Not that it shall never be used in any criminal proceeding against him, but that he cannot be prosecuted by reason of any information gained in this manner."

But it does create an effective obstacle to any conviction for perjury in swearing falsely before the referee.⁵⁸

But in one case it has been ably contended that the clause does not grant immunity from prosecution for falseness in the testimony itself thus protected: that the immunity extends simply to prosecution for any actual crime revealed by the testimony, and is based on such testimony being true.

Edelstein v. U. S., 17 A. B. R. 658 (C. C. A. Minn.): "The government contends that the immunity has sole reference to the use of evidence in a prosecution for some offense to which his evidence related; that Congress offered as an inducement to a full, frank, and truthful disclosure by a bankrupt for the benefit of his creditors of all matters and things concerning his property and estate that his evidence should not be used against him in any prosecution for any such offense, however much it might implicate him.

"Defendant's argument is that the language employed is comprehensive and unequivocal; 'that no testimony given by him shall be offered against him in any criminal proceeding;' that it, in terms, prohibits the use of the negative answer given by the bankrupt to the question propounded to him, although knowingly and intentionally false, as a basis for the criminal charge involved

⁵⁷. Bankr. Act, § 7 (9): "No testimony given by the bankrupt shall be offered in evidence against him in any criminal proceedings."

U. S. v. Marsh. Chambers, 13 A. B. R. 708 (D. C. N. Y.): This case extends the doctrine to an unreasonable extent, holding that in a proceeding before a grand jury on an indictment for concealing assets, under § 29, by failing to schedule them, it is unlawful to produce the schedules themselves, as evidence and that an indictment so procured will be dismissed. How can the crime be proved if the very fact itself—*corpus delicti*, so to speak—cannot be given in evidence. It is doubtful if the proviso of § 7 (9) or the constitutional guaranty would extend so far. The immunity from the use of testimony would hardly extend to the use of schedules.

U. S. v. Simon, 17 A. B. R. 41, 146 Fed. 89 (D. C. Wash.). See discussion in *State v. Strait* (Minn.), 102 N. W. 913. Also, in *Burrell v. State*, 12 A. B. R. 132, 194 U. S. 572.

⁵⁸. *U. S. v. Simon*, 17 A. B. R. 41, 146 Fed. 89 (D. C. Wash.).

in the indictment now under consideration. To this we cannot give our assent. There is no rule requiring a literal construction to be placed even upon unambiguous words of a particular clause of a statute without consideration of its context. The meaning of specific words in one part of a statute is often controlled by other provisions of the same act, and frequently by provisions of other acts which are in *pari materia*. * * *

"Moreover, it would, in effect, secure to the bankrupt the immunity in question for violating his part of the compact, namely, to testify—that is, to testify truthfully—by virtue of which he secured a right to the immunity. We are not willing to impute to Congress any such contradictory and absurd purpose. The words 'any criminal proceeding' cannot sensibly or reasonably be construed so literally and generally as to include the criminal proceeding provided by law for false swearing in giving his testimony."

§ 1557. Protection Applies Only to Federal Prosecution.—Neither the proviso of § 7 (9) of the Bankrupt Act, nor § 860 of the U. S. Rev. Stats., would protect the bankrupt from the use as evidence in a criminal prosecution in the State Courts of books, papers, and documents of the bankrupt passing to the trustee by operation of § 70 (a) (1).⁵⁹

In *re Hess*, 14 A. B. R. 562, 563, 134 Fed. 109 (D. C. Pa.): "There is nothing either in this section or any other in the Bankrupt Act which protects him from the use of evidence in a criminal prosecution, either in the Federal or State courts, that may be obtained from books and documents which the 70th section, clause 13 of the Act, passes to the trustee.

"Section 860 of the Revised Statutes only prohibits the use of evidence that may be obtained from the bankrupt's books in prosecutions in the Federal courts. There is nothing in this section which extends that immunity to the use of such evidence in the State courts, and there is nothing to prevent the trustee from making use of the bankrupt's books in a criminal prosecution against him instituted in the State courts.

"Obviously, therefore, if § 7, clause 9, of the Bankrupt Act, does not protect him against the use of the evidence, which he alleges is contained in his books of an incriminating nature, in either the State or Federal courts, and § 860 of the Revised Statutes extends the immunity only to Federal courts, and not to State courts, it is plain that whatever incriminating evidence the book may contain could be used without restriction in the State courts for the purpose of convicting him of any crime for which he might be indicted there, and, in consequence of this danger to him, the plea of his constitutional privilege must prevail."

In *re Nachman*, 8 A. B. R. 181, 182, 114 Fed. 995 (D. C. S. C.): "The proviso can have no other effect than to protect him against the use of his testimony in any prosecution in the courts of the United States. It would be no answer to a prosecution which might be instituted in the State courts, which are not created by acts of Congress, and which prescribe their own rules of proceedings independently of Congress."

Evidence taken in the bankrupt's examination may be used against him on the hearing of objections to his discharge: opposition to discharge not

59. *Contra*, *obiter*, U. S. v. Goldstein, 12 A. B. R. 757, 132 Fed. 789 (D. C. Va.).

being a criminal proceedings, even though a crime be charged.⁶⁰ Also it may be used on hearings upon petitions for orders upon bankrupts to surrender assets claimed to be in their possession.⁶¹

§ 1558. **Incriminating Questions—Constitutional Rights Preserved, Notwithstanding § 7 (9).**—The constitutional right of a witness to refuse to answer questions and produce documents or other evidence that in his estimation would tend to incriminate him, is preserved, both as to bankrupts and as to all other witnesses; and this is so notwithstanding that, as to the bankrupt, under § 7 (9), no testimony given by him may be offered in evidence against him in any criminal proceedings, this statutory protection of the bankrupt from the use of such testimony not being so broad as his constitutional privilege to refrain from giving it altogether.⁶²

Thus, as to the bankrupt, it is preserved.⁶³

In re Rosser, 2 A. B. R. 755 (D. C. Mo.): "To compel him to answer the question is a violation of rights guarantied to him by the fifth amendment to the constitution. * * *

"It was urged in argument that he could not avail himself of this provision of the constitution, because, under the seventh section of the Bankrupt Law, it is expressly provided, 'but no testimony given by him shall be offered in evidence against him in any criminal proceeding.' But this language is not half so strong nor half so broad as the language of the Act of February 25, 1868 (15 Stat. 37), which was considered, and the same argument made in the case of Counselman v. Hitchcock, 142 U. S. 560, in which case the court held that the witness could not be compelled to answer."

In re Walsh, 4 A. B. R. 693, 104 Fed. 518 (D. C. S. Dak.): "Now, while it

60. In re Woodford Gaylord, 7 A. B. R. 1, 112 Fed. 668 (C. C. A. N. Y., affirming 5 A. B. R. 410); In re Dow, 5 A. B. R. 400, 105 Fed. 889 (D. C. Iowa). Contra, In re Marx, 4 A. B. R. 521, 102 Fed. 676, disapproved in In re Gaylord, 7 A. B. R. 1, and also disapproved in In re Dow, 5 A. B. R. 400, 105 Fed. 889 (D. C. Iowa).

61. In re Alphin & Lake Cotton Co., 12 A. B. R. 653, 131 Fed. 824 (D. C. Ark.).

62. U. S. Const., Amend. V.

63. Compare, Counselman v. Hitchcock, 142 U. S. 547 (distinguished in Burrell v. State, 12 A. B. R. 132, 194 U. S. 572); compare, Brown v. Walker, 161 U. S. 591.

In re Glassner, Snyder & Co., 8 A. B. R. 184 (Ref. Md.): In this case the bankrupt made a general plea to a petition for an order requiring him to surrender certain assets and certain books and documents that he should not be required to answer thereto because such answer might tend to subject him to punishment.

In re Feldstein, 4 A. B. R. 321, 103 Fed. 269 (D. C. N. Y.); In re Kanter and Cohen, 9 A. B. R. 104 (D. C. N. Y.); In re Henschel, 7 A. B. R. 207 (Ref. N. Y.); In re Shera, 7 A. B. R. 552, 114 Fed. 207 (D. C. N. Y.); U. S. v. Goldstein, 12 A. B. R. 755, 132 Fed. 789 (D. C. Va.); In re Scott, 1 A. B. R. 49, 95 Fed. 815 (D. C. Penn.); obiter, U. S. v. Simon, 17 A. B. R. 46, 146 Fed. 89 (D. C. Wash.); obiter, In re Hess, 14 A. B. R. 562, 563, 134 Fed. 109 (D. C. Wash.); In re Hawthorn, 2 A. B. R. 298 (Ref. La.); contra, Mackel v. Rochester, 4 A. B. R. 1, 102 Fed. 314 (C. C. A. Mont.); contra, In re Franklin Syndicate, 4 A. B. R. 511, 114 Fed. 205 (D. C. N. Y., distinguished in In re Shera, 7 A. B. R. 552, 114 Fed. 207 (D. C. N. Y.)); obiter, Edelstein v. U. S., 17 A. B. R. 658 (C. C. A. Minn.).

is very desirable, as the Court of Appeals in the Ninth Circuit says, that the bankrupts should be compelled to answer these questions, so that the estate of the bankrupt should be properly administered and distributed, still the bankruptcy law, and the courts, and all of us are bound by the superior provisions and paramount authority of the Constitution of the United States, and all and everything must give way to its mandates. I can see that in some instances the fact that the bankrupt stands upon his constitutional guaranty would interfere with the proper administration of the bankruptcy law, but that is not a question which the court has the power to remedy."

In *re Nachman*, 8 A. B. R. 182, 183, 114 Fed. 995 (D. C. S. C.): "Testimony thus given under compulsion might be used to search out other testimony which could be used against him, a clue to which might not otherwise be obtained, and the immunity provided by the constitution would thus be frittered away. No act of Congress can deprive a citizen of the privilege afforded by the constitution unless it supplies a complete protection from all perils against which the constitution was intended to provide. Section 7 of the Bankrupt Act, cited above, does not provide such complete protection. * * * It may be well contended that the object designed to be accomplished by § 7 of the Bankrupt Act, which requires the bankrupt to submit to an examination concerning the conduct of his business, will be defeated, if the witness is thus permitted to refuse to testify concerning his dealings with his creditors and others, and such undoubtedly is the unfortunate result; but it is for the Congress to provide, if it can, against such contingencies. It might well provide that a witness who refused to answer questions concerning his business should be deprived of his right to a discharge. That would be within its right. The courts cannot deprive a citizen of the constitutional right invoked by him for his protection upon any consideration of inconvenience or for the purpose of administering what it may regard as a salutary and useful law.

"My conclusion, therefore, is that a witness, under examination before a referee in bankruptcy, cannot be compelled to answer a question the answer to which he claims will tend to criminate him."

Thus, as to other witnesses it is likewise preserved.⁶⁴

And the protection extends to the production of documents, as well as to testimony.⁶⁵

Boyd v. U. S., 116 U. S. 616: "The compulsory production of a man's private papers to be used in evidence against him is equivalent to compelling him to be a witness against himself in a prosecution for a crime, penalty or forfeiture, and is equally within the prohibition of the Fifth amendment."

⁶⁴. In *re Feldstein*, 4 A. B. R. 321, 103 Fed. 269 (D. C. N. Y.).

In *re Smith*, 7 A. B. R. 213, 112 Fed. 509 (D. C. N. Y.): In this case the court held, that a trustee in bankruptcy could not be compelled to give testimony which might tend to show he had misappropriated the funds of the bankrupt estate.

In *re Smelting Co.*, 15 A. B. R. 83, 138 Fed. 954 (D. C. Penn.), where an officer of a bankrupt corporation under indictment for embezzlement of its funds refused to testify whether he had taken any part of the bankrupt's property but was required to testify whether he had then any of its money or property in his possession.

⁶⁵. In *re Hess*, 14 A. B. R. 562, 563, 134 Fed. 109 (D. C. Wash.); In *re Kanter & Cohen*, 9 A. B. R. 104, 117 Fed. 356 (D. C. N. Y.); In *re Glassner, Snyder & Co.*, 8 A. B. R. 184 (Ref. Md.); impliedly, In *re Rosenblatt*, 16 A. B. R. 308, 143 Fed. 663 (D. C. Penn.); apparently, contra, *People v. Swarts*, 8 A. B. R. 490 (Criminal Court Cook Co. Ills.).

And even to the use in the State courts of documents, books, and papers of the bankrupt, title to which passes to the trustee by operation of § 70 (a) (1).⁶⁶

But the privilege may not be asserted so as to prevent the production and surrender to the trustee of those "documents," books, deeds and instruments in writing, relating to the bankrupt's business, the actual title to which passes to the trustee by operation of law, under § 70 (a) (1) as defined by § 1 (13).

And it is not essential that a prosecution be actually pending.

Impliedly, *In re Sapiro*, 1 A. B. R. 296, 92 Fed. 340 (D. C. Wis.): "But the privilege is asserted here in favor of the bankrupt to excuse him from producing the books of account kept in the business which he was conducting when his voluntary petition was filed to invoke the benefits and submit to the requirements of the Bankruptcy Law. He thereby elected to place all his property (aside from exemptions) including these books of account which contain apparently the only evidence of credits outstanding at the disposition of this court. If he were otherwise privileged to withhold the books his petition operates both as a waiver and as a transfer of the right of custody and the books cannot now be withheld or withdrawn upon the assertion that they may contain incriminating evidence or matter."

In re Hess, 14 A. B. R. 562, 134 Fed. 109 (D. C. Wash.): "The fact that no prosecution is now pending against the bankrupt is no answer to his right to claim this constitutional privilege. The meaning of the constitutional provision is not simply that he shall not be compelled to produce books and papers which may contain evidence tending to incriminate him in a pending prosecution for a criminal offense against him, but its object is to insure him against such compulsory production of his books and papers containing incriminating evidence in any proceeding or investigation, whether such compulsory disclosure is sought directly to establish his guilt, or indirectly and incidentally for the purpose of proving facts involved in an issue between other parties. If the disclosure thus made would be capable of being used against him as a confession of crime, or an admission of facts tending to prove the commission of an offense by himself, in any prosecution then pending, or that might be brought against him thereafter, such disclosure would be an accusation of himself, within the meaning of the constitutional provision."

§ 1559. Where Answer by No Reasonable Possibility Could Tend to Incriminate, No Privilege.—But where the answer to a question can-

⁶⁶ *In re Hess*, 14 A. B. R. 562, 563, 134 Fed. 109 (D. C. Wash.).

And the rule has been extended, though in a case of doubtful authority, even to cases where books of a bankrupt corporation seized by its receiver, in bankruptcy are sought to be used in a criminal prosecution against the president and one of the employees of the company, the court holding that although the secretary was the proper immediate custodian of corporate books, yet the president theoretically was also custodian. *People v. Swarts & Greenberg*, 8 A. B. R. 490 (Criminal Court Cook Co. Ills.); S. C., 24 Nat'l Corp. Rep. 282: "The court would hold that they were as much in his possession, so far as the right of production is concerned, and the power of production, as they were in the hands of the secretary. If that be true, then these books were taken from the possession of the president of this company and of the secretary, and I am obliged to hold that the contents of these books would be incompetent evidence."

not by any reasonable possibility tend to incriminate him; the bankrupt or witness, he must answer.⁶⁷

Brown v. Walker, 161 U. S. 599: "The object of the law is to afford to a party, called upon to give evidence in a proceeding *inter alios*, protection against being brought by means of his own evidence within the penalties of the law. But it would be to convert a salutary protection into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice."

In *re Levin*, 11 A. B. R. 382, 131 Fed. 388 (D. C. N. Y.): "As I understand the rule, if the question is of such a description that the answer may or may not criminate the witness, he can refuse to answer (Judge Marshal's opinion on Burr trial). But if the court is convinced that the answer to the question cannot by any possibility criminate him and especially if the witness does not swear that he believes it would, it is the duty of the court to compel him to answer. Otherwise every bankrupt can absolutely refuse to be examined at all." The syllabus in this case is: "A bankrupt under examination may be punished as for contempt for refusing to answer questions: (1) As to the accuracy of a creditor's proof of claim; (2) as to whether or not the signature to notes held by a creditor were his; (3) Whether or not he knew a particular creditor who had filed a claim, and whether or not he was a salesman in his employ; (4) as to the identity of his check book after testifying that he could tell whether or not a check has been paid by reference to each of his checks; as each of the questions could not, by any of the questions asked, tend to degrade or incriminate him."

Obiter, In *re Kantor & Cohen*, 9 A. B. R. 104, 117 Fed. 356 (D. C. N. Y.): "In a case where it clearly appears to the court that a party from whom evidence is sought contumaciously or mistakenly refuses to furnish that which cannot possibly injure him, he will not be permitted to shield himself behind the privilege, but generally the party best knows what he cannot furnish without accusing himself and where it is not perfectly evident and manifest that the evidence called for will not be incriminating, the privilege must be allowed."

In *re Hess*, 14 A. B. R. 826, 134 Fed. 109 (D. C. Pa.): "But who is to be the judge whether or not the books and papers do actually contain evidence of an incriminating nature, as alleged by the bankrupt? Can it be that upon the filing of an involuntary petition in bankruptcy, the bankrupt can refuse to deliver possession of the books and papers to the trustee, when called upon to do so, by answering that they contain incriminating evidence? He may desire to retain possession of his books for the purpose of concealing assets, or he may honestly be mistaken as to the effect of the evidence alleged to be incriminating; the transactions, which, in his judgment, are incriminating, may not be acts or transactions of an incriminating nature, and, if established, may not constitute an offense; the Statute of Limitations may bar a prosecution. All these matters must be considered in passing upon the question as to whether or not the books do contain evidence of an incriminating nature."

"When a witness is before the court in a proceeding, and a question is propounded, it must appear to the court, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from being compelled to answer, to entitle him to the privilege of silence, and where the

⁶⁷. In *re Franklin Syndicate*, 4 A. B. R. 511, 114 Fed. 205 (D. C. N. Y.). Compare. *inferentiallv*. In *re Hark Bros.*, 14 A. B. R. 625 (D. C. Penn.).

fact of the witness being in danger be once made apparent to the court, great latitude should be allowed to him in judging for himself of the effect of any particular question. * * *

"This being the practice when witnesses are called to testify and claim their privilege, it is equally important, under the Bankrupt Law, that the Court should pass upon the probability of danger to the bankrupt when he pleads his constitutional privilege, upon a demand made by a trustee in bankruptcy for him to deliver his books and papers, as required by that Act."

In re Rosenblatt, 16 A. B. R. 308, 143 Fed. 663 (D. C. Pa.): "It is contended that the bankrupts are the sole judges of that question, and they are not required to do more than to claim their constitutional privilege that they are the sole judges of the question as to whether or not the books do contain such evidence, and that they are not required in any manner, by the production of evidence, to satisfy the court that their claim has some foundation in fact. If this be the law, then, bankrupts in every case can retain their books, and creditors will be unable to secure evidence of what in most mercantile concerns is the most valuable asset, to-wit: The book accounts. It would be the greatest possible encouragement to dishonest debtors to practice frauds upon their creditors and then destroy the evidence of it. But this question has been settled by the courts. They have taken a more reasonable view, which requires that it shall appear to the court that the claim is made in good faith and that there is reasonable ground to apprehend danger from the production of the books, and when this fact does appear then great latitude should be allowed the claimant in judgment for himself as to the effect of any particular question or production of a book. 'But it would be to convert a salutary protection into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice.' *Brown v. Walker*, 161 U. S. 599. And it would be equally potential in converting a salutary protection into a means of abuse if a bankrupt were permitted to judge entirely for himself, regardless of the facts, whether or not the production of a book will tend to incriminate him."

Obiter, In re Walsh, 4 A. B. R. 693, 696, 104 Fed. 518 (D. C. S. Dak.): "And in questions where the referee is satisfied clearly that the bankrupt would not criminate himself by answering the same, he would not be entitled to the protection."

Inferentially and obiter, In re Nachman, 8 A. B. R. 183, 114 Fed. 905 (D. C. S. C.): "Under the provisions of section 7, the witness is compelled to give testimony concerning his business, and he cannot interpose objections which will shut out all light whatever from his creditors. The constitutional immunity can only be invoked to protect him from answering a question the answer to which might subject him to prosecution. In the further conduct of the examination the referee is directed, whenever a question is propounded, to notify the witness that he is not required to answer it if the answer would tend to criminate himself. It is only questions of that nature that he may refuse to answer. He is not to be permitted to interpose his constitutional immunity as a shield to every inquiry concerning his business, nor is his counsel to be permitted to delay or obstruct inquiry by making objections for him."

§ 1560. Privilege Does Not Authorize Refusal to Be Sworn Altogether nor to Produce Documents.—And the privilege does not extend to authorizing a bankrupt to refuse altogether to be sworn, nor to refuse

altogether to produce the documents or books, but simply to refuse to answer questions as they are put or to allow inspection of the particular document or pages of the book as they are called for; the bankrupt must be sworn and the books or documents must be produced.⁶⁸

In *re Hark Bros.*, 14 A. B. R. 624 (D. C. Pa.): "The order to produce them before him should have been complied with, and then the question as to whether this plea of the bankrupts is well founded could be determined by the referee."

In *re Hess*, 14 A. B. R. 563, 564, 134 Fed. 109 (D. C. Pa.): "Where, under these circumstances, a bankrupt pleads this privilege, he should be required to bring the books and papers, which he alleges contain the incriminating evidence, before either the court or referee in bankruptcy, and when it is made to appear that his plea is well founded, the court can make such order in the case as will fully protect him from discovery of such evidence, and, at the same time, if possible, enable the trustee to obtain such information from the books as is always necessary and indispensable in the settlement of bankrupt estates."

§ 1561. Privilege to Be Claimed at Time Question Asked or Production Demanded.—The time to claim the privilege is when the testimony is offered, and if not then claimed it is waived.⁶⁹

Burrell v. State, 12 A. B. R. 132, 194 U. S. 572: "The statute does not prohibit the use of testimony against the consent of him who gave it. It prescribes a rule of competency of evidence which may or may not be insisted upon. It does not declare a policy the protection of which cannot be waived. And the time to avail of it is when the testimony is offered. After the testimony is admitted, its probative force cannot be limited. This could not be contended even under the broader provision of the Constitution. A witness who voluntarily testifies cannot resist the effect of the testimony by claiming that he was not compellable to give it."

"In the case at bar, the court dealt with testimony which had been admitted without question or objection. * * *

"In the case at bar, as we have already said, plaintiff in error did not claim the protection afforded him by the Bankrupt Act. He made no objection to the use of the testimony which he gave before the referee, nor does he now urge its use as error. He broadly claimed, and now claims, exemption from prosecution. For the reasons we have given the claim is untenable."

And when the book or document is about to be inspected.⁷⁰

The privilege should be claimed by the witness himself.

In *re Nachman*, 8 A. B. R. 180, 184, 114 Fed. 995 (D. C. S. C.): "If he claims that the answer to any question propounded would tend to criminate

68. As to books, see decision of District Court embodied in opinion of C. C. A. in *Goodman v. Brenner*, 6 A. B. R. 470, 109 Fed. 48f (C. C. A. La.); In *re Rosenblatt*, 16 A. B. R. 308, 143 Fed. 663 (D. C. Penn.).

No appeal lies from such ruling, it being simply an interlocutory order and not a final order, *Goodman v. Brenner*, 6 A. B. R. 470, 109 Fed. 663 (D. C. Penn.).

The bankrupt is not permitted to qualify his oath: the constitutional guaranty protects him without express reservation, In *re Scott*, 1 A. B. R. 49, 95 Fed. 815 (D. C. Pa.).

69. In *re Mellen*, 3 A. B. R. 226, 97 Fed. 326 (D. C. N. Y.).

70. In *re Hark Bros.*, 14 A. B. R. 563, 564, 134 Fed. 109 (D. C. Penn.).

him, he cannot be compelled to answer. This claim, to be effective, should be made by the witness himself, but the referee should notify him that a statement that such answer would tend to criminate him would, if false, subject him to a prosecution for perjury, as would any other false oath."

§ 1562. Privilege Not Waived by Voluntary Bankruptcy.—The bankrupt does not waive the privilege by filing a voluntary petition.⁷¹

U. S. v. Goldstein, 12 A. B. R. 760, 132 Fed. 789 (D. C. Va.): "It is suggested that one who files a voluntary petition in bankruptcy, who in theory, at least, knows that he may be required to make full disclosures under § 7, cl. 9, of the Bankruptcy Act is in the position of a defendant in a criminal case who voluntarily takes the witness stand in his own behalf, and that, having waived his constitutional privilege in respect to self-crimination, he cannot refuse to answer any question. For the sake of argument it may be conceded—though I have not referred to, and have not found, any Virginia decision so holding—that, when a defendant in a criminal cause voluntarily goes on the stand and testifies in his own behalf, he cannot, on cross-examination, claim his privilege and refuse to answer; and while there is some likeness between the two cases, the analogy is not perfect. It seems to me that the position of the bankrupt is rather more like that of a defendant in a criminal case, who has proposed to testify in his own behalf, and who before so doing concludes to claim his constitutional privilege."

§ 1563. Pendency of Litigation with Witness, No Excuse for Refusing to Testify.—The fact that a controversy, or even a law suit, is already pending in the state court with the witness, involving the same matter, and that the examination will oblige him to uncover his defense, will not excuse the witness from testifying. That is precisely what the examination is for—to ascertain the real facts pertaining to the bankrupt's acts, conduct and property;⁷² nor is it a sufficient excuse that his answers will give evidence which the trustee may use in a subsequent civil action against him.⁷³

71. In re Hawthorn, 2 A. B. R. 298 (Ref. La.). Contra, In re Sapiro, 1 A. B. R. 296, 92 Fed. 340 (D. C. Wis.): This case was rightly decided but was placed on the ground that the privilege was waived by voluntary bankruptcy rather than that the title of the documents itself had passed to the trustee by operation of law under § 70 (a) (1).

Also, compare, modification of contra rule, obiter, In re Walsh, 4 A. B. R. 693, 104 Fed. 518 (D. C. S. Dak.): "I will say, however, that it is not every question that the bankrupt may refuse to answer. He would not be protected in case a question was clearly cross-examination of what he had volunteered himself, either in his petition and schedules, or any testimony he had already given before the referee."

Compare, obiter, quære, In re Hess, 14 A. B. R. 562, 563, 134 Fed. 109 (D. C. Wash.).

Quære, if witness volunteers testimony tending to incriminate him does he not waive the privilege on cross-examination as to same matters? U. S. v. Goldstein, 12 A. B. R. 760, 132 Fed. 789 (D. C. Va.); In re Walsh, 4 A. B. R. 693, 104 Fed. 518 (D. C. S. Dak.).

72. In re Cliffe, 3 A. B. R. 257, 97 Fed. 540 (D. C. Penn.).

73. In re Howard, 2 A. B. R. 584, 95 Fed. 415 (D. C. Calif., citing In re Fay, 3 N. B. Reg. 660; In re Pioneer Paper Co., 7 N. B. Reg. 250; Garrison v. Markley, 7 N. B. Reg. 246).

§ 1564. **Conversely, Pendency of Litigation Not Requisite.**—Conversely, an examination of a third person may be demanded although no action is pending and no issue joined.⁷⁴

[1867] In re Krueger, 2 Low. 182: "These examinations thus stand in effect on the footing of summary bills of discovery. The discovery cannot be limited by reference to an action pending, for there is no such limitation in the law, but it is to be confined to the subject matter, the trade, dealings and estate of the bankrupt."

§ 1565. **Bankrupt's Wife Examined Touching "Business Relations."**—The bankrupt's wife may be required to submit to examination, notwithstanding the general rule privileging transactions between husband and wife.⁷⁵

This modification of the common law and statutory provision relative to privileged communication was a valuable amendment to the law, for before it was incorporated into the law it was possible to cover up the most frequently recurring kinds of frauds, namely, fraudulent transfers between husband and wife, both spouses hiding behind the privilege of the marital relation. To be sure, the amendment to § 21 (a) contains the proviso:

"Provided that the wife may be examined only touching business transacted by her or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt."

But this proviso, on analysis, will be seen not to interfere greatly with a full and free investigation into all the business dealings between husband and wife.

Nevertheless the scope of the examination of the bankrupt's wife since the Amendment of 1903, is still not unlimited.

In re Worrell, 10 A. B. R. 744, 125 Fed. 159 (D. C. Pa.): "But, even in such an inquiry, she cannot be examined generally, the proviso to the clause specially confines the examination to 'business transacted by her, or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt.' Her own separate business is, of course, not the subject of inquiry at all, but it is at this point precisely that questions are most likely to arise. Is the particular business her own, or is it her husband's? Obviously, she cannot be allowed to determine that question for herself, and the result is, that a certain degree of latitude in her examination must of necessity be permitted, in order that the court may be sure that she has not been, and is not now, transacting business as a mere cover for the bankrupt, or in aid of a scheme to injure his creditors. If the course of inquiry should reveal matters that, in the end, turn out to concern herself alone, such a result is to be regretted; but this cannot always be obviated, and it is certainly better than to allow her to decide conclusively that the business is hers by making a bare assertion to that effect."

74. In re Fixen & Co., 2 A. B. R. 822, 96 Fed. 748 (D. C. Calif.); In re Wilcox 6 A. B. R. 366, 109 Fed. 628 (C. C. A. N. Y.).

75. Bankr. Act, § 21 (a) as amended. Compare, as to rule before the Amendment of 1903, In re Mayer, 3 A. B. R. 222, 96 Fed. 826 (D. C. Wis.); In re Cohn, 5 A. B. R. 16, 104 Fed. 328 (D. C. Mo.); In re Jefferson, 3 A. B. R. 174, 96 Fed. 826 (D. C. Wash.); In re Fowler, 1 A. B. R. 555, 93 Fed. 417 (D. C. Wis.).

§ 1566. **Privileged Communications Respected.**—Of course privileged communications are to be respected as much in bankruptcy as elsewhere. Thus, confidential communications between attorney and client are to be respected.

People's Bk. v. Brown, 7 A. B. R. 478 (C. C. A. N. J.): "This court has neither authority nor inclination to repudiate the rule which protects from exposure, unless with the client's consent, all communications between him and his counsel, made during the subsistence of that relation, in reference to any matter respecting which the latter has been, and properly could be, professionally consulted. This rule was applied, apparently for the first time, in the case of *Berd v Lovelace*, Cary, 88, and for three centuries, at least, it has been steadily upheld by the courts upon the ground that for the proper administration of the law the confidence which it encourages the client to repose in the attorney to whom he resorts for legal advice and assistance should upon all occasions be inviolable. But it has been forcibly and vehemently assailed."

Thus, by statute, in Michigan the taxpayer's return to the assessors is privileged and may not be used for discovery of assets.⁷⁶

But witnesses claiming the communication to be privileged may be subjected to preliminary examination to enable the court to determine for itself whether the communication sought for be, in the circumstances, a privileged one.

People's Bk. v. Brown, 7 A. B. R. 475 (C. C. A. N. J.): "Therefore, it is requisite that in every instance it shall be judicially determined whether the particular communication in question be really privileged, and, in order that such primary determination may be advisedly made, it is indispensable that the court shall be apprised, through preliminary inquiry, of the characterizing circumstances. There is no presumption of privilege, and though its allowance may, in a clear case, be founded upon the voluntary statement of the attorney that his knowledge of the fact to which he is asked to testify was acquired in professional confidence, yet wherever, as in this case, the circumstances suggest that the sufficiency of the grounds of that statement should be considered, it is the right of the opposing party to demand that the proponent of the privilege shall be submitted to such interrogation as may be necessary to test its validity."

§ 1567. **Competency of Witnesses Governed by Federal Law.**—The competency of witnesses in bankruptcy is governed by the Federal law, Rev. Stat., U. S., § 858, together with such modification as the amendment of 1903, § 21 (a) introduces, by making a wife competent touching business transactions with her husband.⁷⁷

Smith v. Township, 17 A. B. R. 748, 150 Fed. 257 (C. C. A. Mich.): "It was objected to the testimony of Chamberlain above recited that he was an

⁷⁶. In re Reid, 17 A. B. R. 477 (D. C. Mich.).

⁷⁷. Bankr. Act, § 21 (a): "A court of bankruptcy may, * * * require any designated person, including the bankrupt and his wife, to appear * * * to be examined concerning the acts, conduct or property of a bankrupt whose estate is in process of administration under this Act: Provided, That the wife may be examined only touching business transacted by her or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt."

incompetent witness in regard to the transactions between himself as agent of the bonding company and the bankrupt, because of a statute of Michigan excluding the testimony of one who has acted as an agent for one party to a transaction, where the other party has since deceased, relative to any matter equally within the knowledge of such other party. This objection is renewed here. But this proceeding was in a federal court, and as the statute of the United States relating to the competency of witnesses, as affected by their interests, covers the subject and is paramount, the State statute is not the test, as the District Judge rightly held."

By the Amendment of 1903, not only was the proviso with regard to the testimony of wives added, but the qualification "competent by the laws of the State" was dropped. Before the Amendment then the State law governed.

In *re Josephson*, 9 A. B. R. 349 (D. C. Ga.): "It seems therefore that the test of competency of witnesses before a court of bankruptcy is the test afforded by the law of the State in which the case is pending."

§ 1568. **Contempt for "Willfully Evasive" or "Flagrantly False" Testimony.**—The bankruptcy court has power to punish a witness for contempt for willfully evasive or flagrantly false swearing on general examination.⁷⁸ And such false swearing is punishable as a contempt although also punishable as a crime.

In *re Fellerman*, 17 A. B. R. 785, 149 Fed. 244 (D. C. N. Y.): "Perjury in the presence of the court is a contempt as old as the courts themselves. It is undoubtedly a great contempt." *Stockham v. French*, 1 Bing. 365."

"It is a 'gross piece of contempt.' *Chicago Directory Co. v. U. S. Directory Co.*, 123 Fed. 194."

§ 1569. **Attendance of Witnesses Residing Out of State or Further than Hundred Miles, Not Enforceable.**—A witness cannot be compelled to appear for examination before a referee at a place more than one hundred miles distant from his residence, even if it be within the state. If his testimony is sought, it can be required only under the rule of the succeeding sections.⁷⁹

A witness may not be compelled, in bankruptcy proceedings, to appear for examination before a referee at a place outside the State of the witness' own residence.⁸⁰

§ 1570. **General Examination of Nonresident Bankrupt or Witness before Another Referee, or State Judge.**—The bankrupt or any other witness may be ordered by the bankruptcy court having in charge

⁷⁸. In *re Fellerman*, 17 A. B. R. 785, 149 Fed. 244 (D. C. N. Y.).

⁷⁹. In *re Hemstreet*, 8 A. B. R. 760, 117 Fed. 568 (D. C. Iowa).

⁸⁰. In *re Cole*, 13 A. B. R. 300, 133 Fed. 414 (D. C. Me.); (1867) *Paine v. Caldwell*, Fed. Cas. 10,674; In *re Hemstreet*, 8 A. B. R. 760, 117 Fed. 568 (D. C. Iowa).

the particular bankruptcy case involved, to appear before another referee, or the judge of any State Court, even in another State, and submit to examination there.⁸¹

§ 1571. Method Where before Judge of State Court or Another Referee.—But where the witness thus appears for examination at a place other than that where the proceedings themselves are pending, the referee, or judge, acting in the examination, perhaps should take down all the testimony, merely noting the objections and not ruling upon them, such examination to be thereupon filed with the referee in charge of the proceedings proper, who may himself then pass upon the admissibility of the testimony.⁸²

§ 1572. Order for General Examination of Nonresident Witness to Be Made Only by Court before Whom Bankruptcy Case Pending.—But a bankruptcy court in a district other than in which the bankruptcy proceedings are pending has no jurisdiction to enter an order for the examination: such order may only be made by the court of bankruptcy in charge of the administration of the estate.⁸³

In re Williams, 10 A. B. R. 541, 123 Fed. 321 (D. C. Tenn.): "The application that has been made for an order to be entered here for the examination of the parties above mentioned and the accompanying subpoena to enforce the same must be refused.

"The order that is desired for an examination of the parties, as above mentioned, should, in my judgment, be made by the court of bankruptcy in Colorado having charge of the administration of this bankruptcy estate."

§ 1573. Witness, as Such, Not Entitled to Attorney.—A witness is not entitled as such to have an attorney, and his attorney need not be allowed to participate in the proceedings.⁸⁴

In re Abbey Press, 13 A. B. R. 11, 134 Fed. 51 (C. C. A. N. Y.): "Finally, it is contended that the petitioner was entitled to be represented by counsel.

"No authority is cited in support of this proposition. Such a course would be contrary to the rulings in other courts, and, as we understand it, contrary to the practice and decisions in the bankruptcy courts. In any event, no such representation should be allowed except in the discretion of the court, that is, of the referee."

81. Bankr. Act, § 21 (a). In re Williams, 10 A. B. R. 538, 123 Fed. 321 (D. C. Tenn.); impliedly, In re Sturgeon, 14 A. B. R. 681, 138 Fed. 608 (C. C. A. N. Y.); compare, In re Geo. Watkinson Co., 12 A. B. R. 370, 130 Fed. 218 (D. C. Penn.).

82. In re Sturgeon, 14 A. B. R. 681, 138 Fed. 608 (C. C. A. N. Y.). But compare, ante, § 1554. The distinction made by the able judge in In re Wilde's Sons, 11 A. B. R. 714, 131 Fed. 142 (D. C. N. Y.), cited supra, however, ought to be noted, as laying down the better rule.

83. Contra, In re Sutter Bros., 11 A. B. R. 632, 131 Fed. 654 (D. C. N. Y.).

84. See In re Howard, 2 A. B. R. 582, 95 Fed. 415 (D. C. Calif.), citing In re Comstock, 13 N. B. Reg. 193, Fed. Cases, No. 3,080, and In re Fredenburg, 1 N. B. Reg. 268, Fed. Cases, No. 5,075, and In re Stuyvesants' Bk., 6 Ben. 33, Fed. Cases, No. 13,582. In re Cobb, 7 A. B. R. 104 (Ref. Mass., affirmed by D. C. without report). But see In re Fixen, 2 A. B. R. 822, 96 Fed. 748 (D. C. Calif.),

§ 1574. **But Is Entitled if Witness Be Creditor or Bankrupt.**—But if the witness is also a creditor who has proved his claim in the proceedings, or if he is the bankrupt himself, it would seem he may, as being a party to the proceedings, be entitled to an attorney and to have his attorney heard on the propriety of questions and to participate in the examination precisely as could any creditor who is not a witness. A contrary rule would allow creditors who were not witnesses to have attorneys participate in the examination, but would debar creditors who were witnesses from the exercise of the same right. So, also, by the same contrary rule, a bankrupt, who in fact is precisely as much of a party to the proceedings as any creditor, would not be entitled to have his attorney participate in the examination when the bankrupt himself were a witness, but would be entitled to participate in the proceedings when he was not a witness. The contrary rule thus would lead to absurdity.

So, while it still remains true that as a mere witness neither a bankrupt nor any creditor is entitled to counsel, yet, as parties to the bankruptcy proceedings they are so entitled, and both the bankrupt's attorney, and also any creditor's attorney, is entitled to cross-examine witnesses, where the examination is a "general" examination.⁸⁵

In *re Hark Bros.*, 14 A. B. R. 624, 136 Fed. 986 (D. C. Pa.): "It is to be assumed that the referee will allow a bankrupt representation by counsel at any hearings that may take place."

§ 1575. **Witness' Fees and Mileage.**—Witnesses, except the bankrupt, are entitled to \$1.50 for each day's attendance, and 5 cents per mile for each mile going and 5 cents for each mile returning.⁸⁶ The fees and mileage must be tendered to the witness at the time of service,⁸⁷ else contempt for disobedience of the subpoena will not lie.

§ 1576. **Contempt for Disobedience of Subpoena.**—Witnesses may be punished for contempt for failure to respond to a subpoena to attend before a referee. But where the witness is required to attend more than 100 miles from his residence, he should not be attached for contempt for failure to respond unless he has been tendered his fee and mileage.⁸⁸

85. Contra, In *re Cobb*, 7 A. B. R. 104 (Ref. Mass., affirmed by D. C.).

86. Sec. 848, U. S. Rev. Stat.

Claimant re-examined upon reconsideration of his claim has been held entitled to reimbursement for his reasonable traveling expenses and hotel bills but not counsel fees, where an agreement to that effect has been made, In *re Geo. Watkinson Co.*, 12 A. B. R. 370, 130 Fed. 218 (D. C. Penn.). Otherwise such reimbursement would be clearly improper.

87. In *re Boeshore*, 10 A. B. R. 802 (D. C. Penn.); In *re Kerber*, 10 A. B. R. 747, 125 Fed. 653 (D. C. Penn.).

88. In *re Kerber*, 10 A. B. R. 747, 125 Fed. 653 (D. C. Penn.); In *re Boeshore*, 10 A. B. R. 802 (D. C. Penn.).

Mere Order, While Witness on Stand, to Bring Document Held, under Facts of Case, Not Sufficient, in Absence of Notice or of Subpoena Duces Tecum and Failure to Bring Not Contempt.—A mere order on a witness while he is on the stand, to bring in a document at a later hearing, has been held under the circumstances not sufficient, over his protest and in the absence of notice or of a subpoena duces tecum, and failure to produce it has been held not contempt. In *re Johnson & Knox Lumber Co.*, 18 A. B. R. 51, 151 Fed. 207 (C. C. A. Ills.).

§ 1577. **No Witness Fees to Bankrupt, but Expenses, Where Examined Away from His Town.**—A bankrupt is not entitled to any fees or compensation for attending the court for examination, except that “he shall be paid his actual expenses from the estate when examined or required to attend at any place other than the city, town or village of his residence;”⁸⁹ although this provision for reimbursement would not extend to his attendance upon the hearings upon his application for discharge.⁹⁰

§ 1578. **Bankrupt Voluntarily Removing Residence after Adjudication Not Entitled to Reimbursement.**—If the bankrupt voluntarily remove his residence, after he has been adjudicated bankrupt, he would not be entitled to such reimbursement and could not saddle the extra expenses upon his creditors.

In re Groves, 6 A. B. R. 732 (Ref. Ohio affirmed by D. C.): “The bankrupt is not entitled to reimbursement for his expenses in returning for examination, where he has voluntarily removed his residence from the district after bankruptcy.”

§ 1579. **Employment of Stenographer.**—Upon the application of the trustee an order may be made by the referee authorizing him to employ a stenographer at the expense of the estate to take down the general examination of the bankrupt and witnesses and for other examinations, but the statute itself prescribes that the estate shall not be liable for the expenses of such employment beyond the rate of ten cents per folio, that is to say, per 100 words, for both taking down and transcribing the testimony.⁹¹

The trustee must make the application.⁹²

This, of course, does not mean the stenographer is limited to such a rate of compensation, but that only such part of the compensation as will be at the rate of ten cents per folio shall be charged against and paid from the estate. Creditors may personally make up any deficiency if the stenographer is unwilling to take the compensation which may be charged against the estate.

And if the testimony be not transcribed, the provisions of § 38 (5) would not forbid the allowance of a per diem to the stenographer, for taking down the testimony in shorthand.

⁸⁹. Bankr. Act, § 7 (9).

⁹⁰. Obiter and inferentially, In re Shanker, 15 A. B. R. 109, 138 Fed. 862 (D. C. Penn.).

⁹¹. Bankr. Act, § 38 (5): “Referees may ‘upon application of the trustee during the examination of the bankrupt or other proceedings authorize the employment of stenographers at the expense of the estate at a compensation not to exceed 10 cents per folio for reporting and transcribing the proceedings.’” Also, see In re Todd, 6 A. B. R. 88, 109 Fed. 265 (D. C. N. Y.).

⁹². In re Todd, 6 A. B. R. 88, 109 Fed. 265 (D. C. N. Y.).

CHAPTER XXXII.

JURISDICTION OF THE BANKRUPTCY COURT WHERE ANOTHER COURT ALREADY HAS CUSTODY: CONFLICT OF JURISDICTION.

Synopsis of Chapter.

- § 1580. Jurisdiction and Conflict of Jurisdiction in Collecting and Protecting Assets.
- § 1581. Courts Cautious in Dealing with Conflict of Jurisdiction.
- § 1582. If State Court First Obtains Possession, It Retains Jurisdiction, except in Three Instances.
- § 1583. Simply because Bankruptcy Court Preferable or Trustee Interested, Not Sufficient to Confer Jurisdiction.
- § 1584. But State Courts May Be Permitted to Retain Jurisdiction Where Better Suited to Adjust Rights, Even Where Bankruptcy Court Might Have Jurisdiction.
- § 1585. Replevin and Other Suits Asserting Ownership, Where Seizure Made First by State Court, Not Abated.
- § 1586. Foreclosure and Other Suits Not Themselves, Creating Liens Nullified by Bankruptcy, but Simply Enforcing Liens, etc., Not Abated, Where Started before Bankruptcy Seizure.
- § 1587. Custody of State Court Preserved in Part, and in Part Superseded.
- § 1588. Attachments Obtained Prior to Four Months, Not Abated
- § 1589. Landlord's Levy.
- § 1590. Partnership Dissolution Suits.
- § 1591. Fraudulent Conveyance Suits Instituted before Four Months.
- § 1592. Fraudulent Conveyance Suit within Four Months in Aid of Levy Made before Four Months, Not Abated.
- § 1593. Creditors' Bills Instituted before Four Months.
- § 1594. Assignments and Receiverships Created before Four Months.
- § 1595. Administrators, etc., Where Bankrupt Owns Interest in Estate, Not Disturbed.
- § 1596. Trustee's Intervention in State Court Proceedings Does Not Oust State Court.
- § 1597. State Courts Administer Bankrupt Law and Trustee, Intervening, Not Confined to Rights Accorded by State Law.
- § 1598. Bankruptcy Court May Enjoin, to Permit Intervening of Trustee.

DIVISION 1.

- § 1599. First Exception to Rule That State Court Retains Jurisdiction if First Obtaining Possession.
- § 1600. Same Subject Discussed, Ante, "Liens by Legal Proceedings Nullified by Bankruptcy."
- § 1601. When Lien Nullified Property Recoverable by Summary Order.

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- § 1602. Second Exception to Rule That State Court Retains Jurisdiction if First Obtaining Custody.
- § 1603. Basis of Superseding Custody of Assignee and Receiver.
- § 1604. Possession under General Assignments Superseded.
- § 1605. Likewise, under State Court Receiverships.

- § 1606. General Assignment Not Per Se Illegal nor Void but Voidable Merely.
- § 1607. Unless Petition Filed within Four Months, Followed by Adjudication, State Court's Custody Not Superseded.
- § 1608. But if Filed within Four Months and Adjudication Occurs, Assignment Void.
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- § 1610. Assignee or Receiver May Be Enjoined.
- § 1611. May Be Ordered Summarily to Surrender Assets.
- § 1612. No Summary Order as to Sums Already Disbursed.
- § 1613. Sales by Assignee under Void Assignment.
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- § 1615. Assignment Must Be "General" and "Bona Fide," Not "Partial" nor "Fraudulent."
- § 1616. Receivers Likewise Entitled to Lien Where Receiverships Nullified by Bankruptcy.
- § 1617. Likewise, Mortgagees in Possession under Mortgage Executed for Benefit of All Creditors Assenting.
- § 1618. Also, Attaching Creditors Where Attachment Lien Preserved for Benefit of Estate.
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- § 1620. Whether Extent of Lien May Be Fixed by State Court before Surrender.
- § 1621. Only Expenses and Compensation for Services Beneficial to Estate and Reasonable, Allowed.
- § 1622. Others' Rights to Be Worked Out Through Assignee or Receiver.
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- § 1624. No Liability on Assignee's Bond on Superseding of State Court's Custody, to Those Creditors Who Participate in Defeating Assignment.

DIVISION 3.

- § 1625. Third Exception to Rule That State Court Retains Jurisdiction if First to Obtain Custody.
- § 1626. Basis of Supersedence, Paramount Authority Conferred by Constitution, and Necessary Implication from § 70.
- § 1627. State Bankruptcy and Insolvency Laws Not Prohibited.
- § 1628. But Suspended during Existence of Federal Bankruptcy Law, as to All Classes Subjected to Latter.
- § 1629. State Insolvency and Bankruptcy Laws Ipso Facto Suspended.
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- § 1631. State Bankruptcy and Insolvency Laws Simply Held in Abeyance.
- § 1632. Bankruptcy, Insolvency Laws, and General Assignment Laws, Distinguished.
- § 1633. Various Holdings as to What Amount to "Insolvency" Proceedings.
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DIVISION 4.

§ 1638. Voluntary Surrender by State Court.

SUBDIVISION "A."

§ 1639. Pending Suits against Bankrupts—Subrogation of Trustee to Creditor's Lien Where Lien Preserved.

§ 1640. Pending Suits by Bankrupts—Substitution of Trustee.

§ 1641. Preliminary Order of Approval Proper.

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§ 1645. Ordering Trustee to Apply for Leave to Defend.

§ 1646. Intervening Not Usually Proper except Where Property Involved.

§ 1647. Intervening or Suits in Personam.

§ 1648. State Court Governed by State Law and Judicial Policy in Granting or Refusing Application.

§ 1649. Manner of Intervention.

§ 1650. Trustee Bound as Any Other Litigant, on Intervention.

§ 1651. Stay of Pending Suits.

§ 1580. Jurisdiction and Conflict of Jurisdiction in Collecting and Protecting Assets.—In the orderly development of subjects, the subject is now reached of the forum for the assertion of rights in collecting assets belonging to the estate and in defending possession of them when custody is once acquired.

The sections of the Bankruptcy Act involved are §§ 2 (7), 23, 38, 60 (b), 67 (e) and 70 (e).

§ 1581. Courts Cautious in Dealing with Conflict of Jurisdiction.—Courts must be cautious in dealing with a conflict of jurisdiction.¹

But at the proper time the federal courts may by force emphasize the supremacy of the constitution:

Hooks v. Aldridge, 16 A. B. R. 665 (C. C. A. Tex.): "While it is unquestionable that the federal courts are the final arbiters to settle questions arising under the bankruptcy laws, there are questions relating to comity and procedure, in the event of conflict of opinion between the State courts and the bankruptcy courts as to the possession of the bankrupt's assets, which remain unsettled by decision of the Supreme Court. Whether the bankruptcy courts should make such orders as will preserve the estate, and await the final result of the litigation in the State court, or should act on its own opinion of the want of jurisdiction of the State court, and enforce its order to secure the possession of the property, is one of the questions left unsettled, so far as we are advised, by a decision of the Supreme Court. At a proper time the federal courts, of course, may decree the enforcement of the supremacy of the Constitution and laws of the United States, for it is an "incontrovertible principle that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it."

1. *Metcalf v. Barker*, 9 A. B. R. 46, 187 U. S. 175; *Pickens v. Dent*, 5 A. B. R. 644 (C. C. A. W. Va., affirmed in 187 U. S. 175, but this point not adverted to); *Hooks v. Aldridge*, 16 A. B. R. 664 (C. C. A. Tex.).

§ 1582. **If State Court First Obtains Possession, It Retains Jurisdiction, except Three Instances.**—Where property afterwards claimed by the bankruptcy trustee is taken into the custody of the state court (or any other court than the bankruptcy court) before the bankruptcy petition was filed, the state court, or such other court continues to retain jurisdiction over the entire matter except in three instances, later to be explained, and the only thing for the trustee to do is to get himself admitted as a party into the case in the state court and to litigate his rights there. For the rule of law that the Court first obtaining jurisdiction over the “res” retains it to the end, prevails in bankruptcy as well as in every other jurisprudence.²

Eyster v. Gaff, 91 U. S. 521: “The opinion seems to have been quite prevalent in many quarters at one time, the moment a man is declared a bankrupt the District Court, which has adjudged, draws to itself, by that act, not only all control of the bankrupt’s property and credits, but that no one can litigate with the assignee or contest rights in another court, except in so far as the Circuit Court took concurrent jurisdiction, and all other courts can proceed no further in suits of which they had, at that time, full cognizance, and it was a prevalent practice to bring any person who contracted with the assignee any matter growing out of disputed rights of property or of contracts into the bankrupt courts by the service of a rule to show cause, and to dispose of their rights in a summary way. This court has steadily set its face against this view. The debtor of a bankrupt, or the man who contests the right to real and personal property with him, loses none of these rights by the bankruptcy

2. *Pickens v. Dent*, 9 A. B. R. 47, 187 U. S. 177 (affirming 5 A. B. R. 644); *In re Kavanaugh*, 3 A. B. R. 832, 99 Fed. 928 (D. C. Ky.); *Marble Co. v. Grant*, 14 A. B. R. 288, 135 Fed. 322 (C. C. A. Penn.); *Nat’l Bk. of The Republic v. Hobbs*, 9 A. B. R. 190, 118 Fed. 626 (U. S. C. C. Ga.); compare, to same effect, under old law of 1867, *In re Biddle*, 9 B. Reg. 144; *Nat’l Bk. v. Moses*, 11 A. B. R. 772 (Sup. Ct. N. Y.); *In re Shoemaker*, 7 A. B. R. 437, 112 Fed. 648 (D. C. Va.): Even as to property levied on by execution within the four months. Instance, *In re Heckman*, 15 A. B. R. 500 (C. C. A. Wash.).

See analogously, the following cases cited and quoted under the proposition that “Where the Bankruptcy Court has once assumed jurisdiction over the property it has jurisdiction to determine all rights therein,” etc., § 1795, et seq., affirming jurisdiction in the bankruptcy court, to be sure, but affirming it on precisely the same principle of the retention of jurisdiction by the court first obtaining possession of the res: *In re McCallum*, 7 A. B. R. 596, 113 Fed. 393 (D. C. Conn.); *In re Whitener*, 5 A. B. R. 198, 105 Fed. 180 (C. C. A. Tex.); *Turrentine v. Blackwood*, 4 A. B. R. 338, 28 So. Rep. 95 (Sup. Ct. Ala.); *In re Drayton*, 13 A. B. R. 602, 135 Fed. 883 (D. C. Wis.); *Chauncey v. Dyke Bros.*, 9 A. B. R. 447, 119 Fed. 3 (C. C. A. Ark.); *Carter v. Hobbs*, 1 A. B. R. 215, 92 Fed. 594 (D. C. Ind.); *In re Noel*, 14 A. B. R. 720, 137 Fed. 694 (D. C. Md.); *In re Huddleston*, 1 A. B. R. 572 (Ref. Ala.); *Keegan v. King*, 3 A. B. R. 79, 96 Fed. 758 (D. C. Ind.); impliedly, *White v. Schloerb*, 4 A. B. R. 178, 178 U. S. 542; impliedly, *In re Kellogg*, 10 A. B. R. 8, 121 Fed. 333 (C. C. A. N. Y.); *In re Rochford*, 10 A. B. R. 615, 124 Fed. 182 (C. C. A. S. Dak.); *In re Moody*, 12 A. B. R. 724, 134 Fed. 628 (D. C. Iowa); *In re Antigo Screen Door Co.*, 10 A. B. R. 359, 123 Fed. 249 (C. C. A. Wis.); *In re J. C. Winship*, 9 A. B. R. 641, 120 Fed. 93 (C. C. A. Ills.); *In re Russell & Birkett*, 3 A. B. R. 660, 101 Fed. 248 (C. C. A. N. Y.); *In re Lemmon & Gale Co.*, 7 A. B. R. 291, 112 Fed. 296 (C. C. A. Tenn.); *Crosby v. Spear*, 11 A. B. R. 613, 98 Me. 542; *In re Mertens*, 12 A. B. R. 698, 131 Fed. 507 (D. C. N. Y.); *In re Chambers, Calder & Co.*, 3 A. B. R. 537, 98 Fed. 865 (D. C. R. I.); *In re Sentenne & Green Co.*, 9 A. B. R. 649, 120 Fed. 436 (D. C. N. Y.); *Leidigh Carriage Co. v. Stengel*, 2 A. B. R. 396, 95 Fed. 637 (C. C. A. Ohio).

of his adversary. The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions. If it has, for certain classes of actions, concurrent jurisdiction for the benefit of the assignee in the circuit and district courts of the United States, it is concurrent with and does not divest that of the State courts."

Peck v. Jenness, 7 How. (U. S.) 625: "These rules have their foundation, not merely in comity but on necessity. For if one court may enjoin, the other may retort by injunction; and thus the parties be without remedy; being liable to a process for contempt in one, if they dare proceed in the other. Neither can one take property from the custody of the other by replevin, or any other process, for this would produce a conflict extremely embarrassing to the administration of justice."

Metcalf v. Barker, 9 A. B. R. 36, 187 U. S. 175 (reversing *In re Lesser*, 5 A. B. R. and 3 A. B. R.): "The State court had jurisdiction over the parties and the subject matter and possession of the property; and it is well settled that where property is in the actual possession of the court this draws to it the right to decide upon conflicting claims to its ultimate possession and control. * * * A judgment or decree in enforcement of an otherwise valid pre-existing lien is not the judgment denounced by the statute, which is plainly confined to judgments creating liens. If this were not so the date of the acquisition of a lien by attachment or creditor's bill would be entirely immaterial."

Pickens v. Dent, 5 A. B. R. 644 (C. C. A. W. Va., affirmed in 9 A. B. R. 47, 187 U. S. 177): "Briefly stated, the rule is this: Considering the peculiar character of our government, and keeping in view the forbearance which courts of co-ordinate jurisdiction exercise towards each other, it follows that the court which first obtains rightful jurisdiction over the subject matter of a controversy must by all other courts be permitted to proceed therein to final judgment. The Federal courts will not interfere with the administration of affairs lawfully in the custody and jurisdiction of a State court, nor will they permit the courts of the States to interfere concerning litigation rightfully submitted to the decision of the courts of the United States. The Bankrupt Act of 1898 does not in the least modify this rule, but with unusual carefulness guards it in all of its detail, provided the suit pending in the State court was instituted more than four months before the District Court of the United States had adjudicated the bankruptcy."

Impliedly, *Carling v. Seymour Lumber Co.*, 8 A. B. R. 29, 113 Fed. 483 (C. C. A. Ga.): "A receiver or trustee, when appointed in the bankruptcy proceedings, while not entitled to the mortgaged property, will be entitled to any excess arising from the foreclosure sale, when made by order of the State court after the payment of the mortgages and costs of foreclosure. He will also be entitled, when appointed, to the possession of the choses in action and the other property in the hands of the State court's receiver which is not covered by the mortgages. The bankrupt law is equally binding on the State and the Federal court, and we cannot doubt that the former will, on proper application, give full effect to it. Where assets are in the hands of the receiver of one court which legally and equitably belong to the trustee or receiver appointed by another court, comity requires, as a general rule, that application should be made for a proper order to the former court, whose officer has possession of the property. This rule is reciprocal between the Federal and State courts, each respecting the possession of the other."

In re English, 11 A. B. R. 677, 127 Fed. 940 (C. C. A. N. Y., reversing 10 A. B. R. 133): "The situation, as we view it is this: Two parties claimed certain

personal property as tenants in common, and sought the aid of the State court to determine their rights and to distribute the property or its proceeds. The state court, by its receiver, took possession of the corpus of the property, and converted it into money, which the receiver held to be distributed between the respective claimants when their rights should be determined. All this took place more than a year before petition in bankruptcy was filed. Indisputably, the state court had full jurisdiction of the parties, or the controversy, of the subject matter, and had reduced the property to its possession. We know of no provision of the Bankrupt Act, and our attention is called to no authority, which will sustain the proposition that, when a year afterwards one of the parties to the action is adjudicated a bankrupt, the state court is shorn of its jurisdiction to determine the controversy, and must turn over the property to the bankruptcy court."

In *re Seebold*, 5 A. B. R. 364, 105 Fed. 910 (C. C. A. La.): "There is no provision in the present bankrupt law which authorizes or permits the courts of bankruptcy, by the use of either summary or plenary process, to stop the proceedings of the State court in a suit in which it had already, before the institution of the proceedings in bankruptcy, obtained possession of the subject matter and jurisdiction of the parties."

Compare, where the subject of the custody is real estate; *Frazier v. Southern Loan & Trust Co.*, 3 A. B. R. 710, 99 Fed. 707 (C. C. A. N. Car.): "The District Court seems to have been of the opinion, and it is the contention of counsel for the respondent in this court, that the receiver must be in the actual possession of the property in order to place it in the custody of the court. This position is erroneous. 'A court of equity, by its order appointing a receiver, takes the subject matter of the litigation out of the control of the parties and into its own hands, and ultimately disposes of all questions, legal or equitable, growing out of the proceeding.' High, Rec., § 4. As stated by the Supreme Court of Appeals of Virginia in *Beverly v. Brooks*, 4 Gratt. 187: 'A decree appointing receivers levies upon the property an equitable execution.' The possession of the receiver is that of the court, of which he is the ministerial officer. Thus it is that, inasmuch as the receiver is merely an officer of the court appointing him, property in his possession is said to be in the custody of the law. * * * And it is said to be immaterial in this respect that the receiver appointed declines to act, the property being, notwithstanding, in the custody of the law.' Beach, Rec., § 221. Nor is it necessary for a court of equity to take possession of the property in litigation, or to attempt to do so by the appointment of a receiver, where the object of the suit is to set aside a fraudulent conveyance and enforce judgment liens against the land of the debtor."

In *re Price & Co.*, 1 A. B. R. 606, 92 Fed. 987 (D. C. N. Y.): "This court, however, can make no order requiring the receiver in a State court to transfer the assets in his custody to the trustee in bankruptcy. The receiver is an officer of the State Court, the court had full jurisdiction of the action to dissolve the partnership, and under its authority the receiver became vested with the title for the purpose of that action, which included a distribution of the property among creditors. The Bankruptcy Act does, indeed, vest in the trustee the title to all the bankrupt's property and rights of action whether legal or equitable (30 Stat. 565, § 70) but this does not authorize an interference by one court with the property lawfully in possession of another court of competent jurisdiction." *Linstroth Wagon Co. v. Ballew*, 18 A. B. R. 28, 149 Fed. 960 (C. C. A. Tex.): "The features of this case call to mind the opinion which seems to have been quite prevalent in many quarters at one time, while the Bankruptcy Act of 1867

was in force, that the moment a man is declared bankrupt, the District Court, which has so adjudged draws to itself, by that act, not only all control of the bankrupt's property and credits, but that no one can litigate with the trustee contested rights in any other court except in so far as the Circuit Courts had concurrent jurisdiction, and that other courts could proceed no further in suits of which they had, at that time, full cognizance; as the result of which opinion the practice became prevalent to bring any person who contested with the trustee any matter growing out of disputed rights of property or contracts, into the Bankruptcy Court by service of the rule to show cause, and dispose of their rights in a summary way. Against this view of the matter and practice which for a time sweepingly prevailed, the Supreme Court steadily set its face. *Eyster v. Gaff*, 91 U. S. 525, 23 L. Ed. 403. On the going into effect of the present Act, some of the referees in bankruptcy and of the judges of those courts, unmindful of the teaching of the Supreme Court under the Act of 1867, or disregarding its lesson, began to follow the practice which had prevailed under that Act, against which the Supreme Court had steadily set its face. With the usual tendency toward the growing weight of precedents, that practice had extended and become widely prevalent before the case of *Bardes v. Hawarden Bank*, 178 U. S. 524, 4 Am. B. R. 163. * * * These amendments do not touch the case of the appellant. It does not claim the property here in controversy under any transfer from the bankrupt; it expressly disclaims being a creditor of the bankrupt at the time of the institution of this suit. The suit is not founded upon a claim from which a discharge in bankruptcy would be a release, and therefore is not subject to the provisions of § 11a. Before the filing of the involuntary petition, which imparted life to the jurisdiction of the Court of Bankruptcy as to Morgan and his estate, the appellant asserted its title to the specific personal property, clearly marked, branded, and distinctly pointed out, which it sought to recover against the bankrupt, then in possession of it, and obtained appropriate preliminary process for placing the property in safe custody pending the trial of appellant's title thereto. It did not seek to acquire or fix a lien by the levy of its writs of sequestration, or by the recovery of a judgment, but to establish its rights to the specific property and recover, lawfully, the possession of it. The appellant could not have sued in the Circuit Court, because the value of the property was less than \$2,000; it could not sue in the United States District Court, because that court had no jurisdiction in civil cases, apart from its jurisdiction as a Court of Bankruptcy, and its jurisdiction as a Court of Bankruptcy had then not yet been vitalized by the filing of the involuntary petition. Therefore, it could invoke the jurisdiction of the proper State court only, which it did, and by its petition and the suing out of the writs for which it prayed, that court obtained jurisdiction of the cause and the jurisdiction was not lost, or in any way affected by the subsequent filing of the involuntary petition against Morgan, or by the subsequent adjudication that he was a bankrupt. The trustee might have obtained leave of the Court of Bankruptcy to appear and defend the suit, and have so appeared by leave of the State court; but he was not a necessary party, and whether he did so appear or not the suit could proceed to final judgment which would be binding on the trustee equally with any other party acquiring an interest pendente lite. Therefore, so far as the property itself or the admitted proceeds of that property are concerned, it is immaterial whether we consider that the trustee became or not, legally, a party to the litigation in the State Court."

In *re Tune*, 8 A. B. R. 286, 115 Fed. 906 (D. C. Ala.): "When the only right of possession by a State court of attached property is based on an attachment

lien, which is annulled by the adjudication in bankruptcy, the State court loses all jurisdiction of the rem, which is transferred into the exclusive jurisdiction of the court of bankruptcy. There is no longer any right of possession in the officer of the State court, who then holds as bailee for the person rightfully entitled to possession, and becomes a trespasser if he fails to deliver on proper demand.

"In cases of concurrent jurisdiction the court first obtaining possession of the property administers it, but where that court loses jurisdiction, and it is transferred by operation of valid laws to a court of the United States, which has exclusive jurisdiction of the subject matter, the question becomes one of the obedience to the paramount authority of the constitution, and comity can have no influence in determining the right."

In *re Gerdes*, 4 A. B. R. 346, 102 Fed. 318 (D. C. Ohio): "The State Court had jurisdiction of the subject matter and of the parties, and the control of the property for the purposes of sale, and it is clear under the authorities that it had power to proceed with the sale and the distribution of the proceeds thereof notwithstanding the commencement, pending the sale, of the proceedings in bankruptcy against Gerdes. Its jurisdiction was not ousted by the commencement of the proceedings in bankruptcy, and it has exclusive jurisdiction to determine and enforce the right of Pruden in the property or its proceeds."

In *re Wells*, 8 A. B. R. 76, 114 Fed. 222 (D. C. Mo.): "All agree that the Court, State or Federal, which first take possession of the property, retains the possession and the jurisdiction. This is elementary, and cases need not be cited to emphasize the proposition."

Furth v. Stahl, 10 A. B. R. 442 (Sup. Ct. Penna.): "But independently of his acts or agreement the jurisdiction is clear. The court was distributing a fund in its own hands raised by it on its own process. Its authority to do so did not depend on any one's consent."

Inferentially, *Turrentine v. Blackwood*, 4 A. B. R. 339, 28 So. Rep. 95 (Ala.): "Conceding that the State and Federal Courts have concurrent jurisdiction in certain instances over the bankrupt's property, another principle is universally acknowledged, 'that when two courts have concurrent jurisdiction, that which first takes cognizance of the case, has the right to retain it, to the exclusion of the other; that if a trust estate is being administered by a court of competent jurisdiction, or when property is in gremio legis of a court of rightful jurisdiction, no other court can interfere and wrest from it the possession and jurisdiction first obtained.'"

Savings Bk. v. Jewelry Co., 12 A. B. R. 781, 123 Iowa 432: "At the time of the adjudication in bankruptcy, the foreclosure proceedings were pending in the State court, and the mortgaged property was in the hands of a receiver appointed by the State court awaiting a determination of such proceedings. The adjudication in bankruptcy and the appointment of a trustee did not have the effect to abate the suit thus pending, or take away the right of the State court to decree and enforce a specific lien upon the property. That the enactment of the general bankruptcy law so far supersedes and suspends the operation of State insolvency laws as that a receiver or assignee in insolvency proceedings instituted under State statutes may be properly required to surrender possession to a trustee in bankruptcy, may be conceded. And such are the cases cited by counsel for appellant. But such doctrine cannot be extended to an action for the enforcement of a specific lien. Jurisdiction of such actions in the State court is not sought to be taken away by the Federal statute, and such could not well be. The action is not one to administer upon the estate of the bank-

rupt, or any portion of such estate. The purpose thereof is to ascertain if the plaintiff have a right to resort, by virtue of a specific lien claim, to the particular property in controversy, as against all other creditors or claimants, for the payment of his debt or the satisfaction of his demand. His right would be the same whether presented to the State or the Federal court in an action to foreclose, or by way of a claim made in the bankruptcy proceedings. Hence it is that the court which first takes jurisdiction and assumes control of the property retains it for all the purposes of a final order or decree. True, the trustee in bankruptcy may intervene in such action pending in the State court, as did this intervenor, and be heard to contest the existence or the validity of the specific lien claimed, and he may well be awarded the property in the event the existence of the lien claimed is denied by the decree. But that a trustee may work an ouster of jurisdiction in the State court in such cases by pointing out the pendency of the bankruptcy proceedings has no support in reason or well-considered authority."

In *re Greater Amer. Expo.*, 4 A. B. R. 486, 102 Fed. 986 (C. C. A. Tenn.): "We are of the opinion that the bankrupt court had no right to stay the suit to enforce the lien as against the res in the possession of a third party, to wit, the wrecking company, although the trustee of the bankrupt was incidentally interested in the amount of the lien which might be established, by virtue of the contract which the bankrupt had entered into with the vendee."

Taylor v. Taylor, 4 A. B. R. 217, 59 N. J. Eq. 84 (N. J. Ch.): "The policy of the Federal Supreme Court seems to have been to permit any such suit, which was pending in a State court at the time when bankruptcy proceedings were begun, to proceed to final settlement."

It has been held, but erroneously, that the bankruptcy court will have exclusive jurisdiction as to any suit where property is sequestered by a State court begun within the four months.³

In *re Kaplan*, 16 A. B. R. 268, 144 Fed. 159 (D. C. Ga.): "Of course, the mortgage lien of Mrs. Herndon, if valid, and I do not understand that to be questioned, is in no way affected by the property going into the hands of the trustee in bankruptcy. * * * Counsel rely on the case of *Metcalf v. Barker*.

3. In *re Knight*, 11 A. B. R. 1, 125 Fed. 35 (D. C. Ky.): But in this case the receivership operated to do more than simply to keep custody of property covered by the pre-existing valid lien and so the case was rightly decided though on grounds too broadly stated.

Possession under Writ of General Execution Different.—It has been held that the possession of a sheriff, marshal or constable under writ of general execution does not give jurisdiction to the court over the rem, at least not in the sense in which such officer holds possession where the sale is a judicial sale as distinguished, from an execution sale and such officer therefore may be required to surrender custody, even though the lien of the levy is not nullified by the bankruptcy, the lien following the property.

In *re Vastbinder*, 13 A. B. R. 148, 132 Fed. 718 (D. C. Penn.): "While the lien of the levy, if it has been properly kept up, is not divested by the present proceedings, antedating as it does over four months, it is not necessary to its preservation or enforcement, that the goods should be actually disposed of by the sheriff on the vend. ex. The trustee took subject to the levy and the execution creditor will be entitled to be paid out of the proceeds realized from the goods without regard to who may happen to sell them. But bankruptcy having intervened, jurisdiction over the property of the bankrupt has been drawn to this court under the direction of which the estate is to be now administered, and to this forum parties, who have claims thereon by way of lien or otherwise, are remitted for the ascertainment and establishment of their rights. There is no valid reason why in disregard of this the trustee should be compelled to

* * * The effect of this decision of the Supreme Court is discussed by Judge Evans in the recent case of *In re Knight*. * * * It is his conclusion that neither that case nor the case of *Pickens v. Roy* [*Pickens v. Dent*] affects the present question; and this is in accordance with my own views on the subject. * * * Reference to that case is sufficient. It may be proper to call attention particularly to the fourth headnote in the *Knight* case, especially pertinent here, which is as follows: 'In general, an adjudication of bankruptcy vests the bankruptcy court with exclusive jurisdiction to administer the property of the bankrupt, as against any State court which may have obtained possession of such property through proceedings instituted within four months prior to the adjudication, and it is immaterial that the proceedings in the State court were for the enforcement of liens not affected by the Bankruptcy Act.'

The rule is laid down in some cases even more strictly against the bankruptcy court than in the main proposition, to the following effect: Where property afterwards claimed by the trustee is taken into the custody of the State Court even after the filing of the petition, but before adjudication and before any bankruptcy officer actually takes possession or any restraining

follow the fund arising from the goods, elsewhere, and it would reverse the natural order and complicate matters to require him to do so. The case of *Metcalf v. Barker*, 187 U. S. 165, 9 Am. B. R. 36, on which reliance is placed, was different. That was a creditor's bill by which not only did the complainant secure a specific lien, but the court in which it was filed obtained direct jurisdiction over the property against which the equity was asserted; and it was with reference to that situation that the bankruptcy proceedings were held to have no effect. But in the present instance the goods are not under the dominion of another court. They have simply been taken by the sheriff upon process as an officer of the law, the same as they might be by a constable on an execution from a magistrate or a bailiff under landlord's warrant on a claim for rent. Surely in the latter, the trustee should not be subjected to the uncertainties of a justice's court or the irresponsible action of a landlord, and if not why should he any more give way to an execution in the hands of the sheriff?

"The petition is therefore sustained and the writ of vend. ex. in the hands of the sheriff stayed."

In *re Baughman*, 15 A. B. R. 23, 138 Fed. 742 (D. C. Penn.): "In the present instance, while the execution creditor by virtue of its judgment has a lien upon the real estate proposed to be sold, which, antedating the bankruptcy proceedings by over four months as it does, may not be affected thereby, yet, bankruptcy having intervened, the sale and distribution of the property as well as the establishment of the correct amount due to the judgment creditor which seems to be in dispute, belongs to this court, unless it seems best to let it go on elsewhere, as might be the case if the liens were more than enough to exhaust the property leaving nothing for general creditors, although this is not always controlling and is entirely optional. In *re Keet*, 11 A. B. R. 117. A stay of execution does not interfere with the lien, as argued; it merely controls its enforcement, in the interest of general creditors where that is deemed advisable. Neither is there any difference in this respect between real and personal property."

See also, *In re Booth*, 2 A. B. R. 770, 96 Fed. 943 (D. C. Ga.). See post, "Summary Orders on Court Officers Holding under Nullified Legal Liens," § 1827, note.

The State Court will be deemed to have custody of the rem, at any rate where it is real estate, if a receiver has been appointed by it although such receiver has failed to reduce the property to actual possession, or has for a long time neglected to take any steps in relation thereto, *Frazier v. Southern Loan & Trust Co.*, 3 A. B. R. 710, 99 Fed. 707 (C. C. A. N. Car., reversing *Southern Loan & Trust Co. v. Benbow*, 3 A. B. R. 9).

Adverse Claimant Himself Becoming Bankrupt.—Where the adverse claimant himself becomes bankrupt the bankruptcy court, of course, obtains jurisdiction, *In re Rosenberg*, 8 A. B. R. 624, 116 Fed. 402 (D. C. Penn.).

order is applied for the State Court continues to retain jurisdiction over the res except in the three instances named, and the only recourse of the trustee is to get admitted as a party into the case in the State Court, if permitted, and to litigate his rights there.

In *re Wells*, 8 A. B. R. 75, 114 Fed. 222 (D. C. Mo.): "All agree that the court, State or Federal, which first takes possession of the property, retains the possession and the jurisdiction. This is elementary, and cases need not be cited to emphasize the proposition. But the trustee, by counsel, argues that the 'possession' does not mean physical possession. This court, by any of its officers, never has had physical possession of the property. And the decision of this question requires a construction of the bankrupt statute of 1898. Counsel for the trustee insists that the mere filing of the petition in involuntary bankruptcy is notice to the world, and no other court must interfere with any property then in the possession of the bankrupt, and that any subsequent interference by a State court is avoided and nullified by the subsequent adjudication of bankruptcy of the debtor. I decline to so hold, and for reasons which seem to me conclusive. Conflicts between courts over the same property should at all times be avoided, if possible, because at times such conflicts are unseemly. The mistake is constantly being repeated, and sometimes by lawyers, by asserting that the United States courts are greater and more commanding than the State courts. I cannot agree to this. The State courts are courts of general jurisdiction, while a Federal court is one of limited jurisdiction. Of course when a Federal court once acquires jurisdiction, then such jurisdiction becomes complete. And it is true that on some questions the Federal courts have exclusive jurisdiction—such as in admiralty and other cases. Under some of the old bankruptcy statutes such has been the case. But it is not so under the act of 1898."

And this rule, in still other cases, is held even to apply—at the discretion, however, of the bankruptcy court—where the suit is started in the State Court, after adjudication.⁴

And this rule in still other cases is even held to apply where the trustee claims the liens involved are nullified by the peculiar provisions of the Bankruptcy Act itself against preferences, both where the cases are started before the bankruptcy;⁵

Savings Bk. v. Jewelry Co., 12 A. B. R. 781, 123 Iowa 432: "His rights would be the same whether presented to the State or Federal court in an action to foreclose, or by way of a claim made in the bankruptcy proceedings."

And also where started after the bankruptcy.

Heath v. Shaffer, 2 A. B. R. 98, 93 Fed. 147 (D. C. Iowa): "He should appear in the State Court, and, by pleading the adjudication in bankruptcy and his

4. In *re Porter*, 6 A. B. R. 259, 111 Fed. 892 (D. C. Ky.); In *re San Gabriel Sanatorium Co.*, 7 A. B. R. 206, 109 Fed. 111 (C. C. A. Calif.); *Heath v. Shaffer*, 2 A. B. R. 98, 93 Fed. 647 (D. C. Iowa).

5. Impliedly, *Furth v. Stahl*, 10 A. B. R. 442 (Pa. Sup. Ct.). Perhaps, also, *Marble Co. v. Grant*, 14 A. B. R. 288, 135 Fed. 322 (C. C. A. Penn.): wherein the court held that where prior to the filing of a petition against an involuntary bankrupt a creditor had brought an attachment suit in a State court, to enforce an asserted right in rem, under the State law the bankruptcy court was without jurisdiction of the res. But in this case it does not appear whether the attachment suit was begun within the four months or not.

appointment as trustee, lay the foundation for the protection of his rights. If he questions the jurisdiction of the State court, he can plead thereto in proper form. If the case be one that is removable under the provisions of the Judiciary Act, he can make the requisite showing. If he does not dispute the validity of any lien asserted by the plaintiff, he can set up his title and rights as trustee, subject to the admitted lien, and the State court will protect his rights in the premises. If he wishes to contest the validity or extent of the adverse claim asserted by the plaintiff in the State court, he can do so by answer or cross bill. If, upon the hearing, the State court holds and adjudges the plaintiff's claim or lien to be invalid and void either at the common law or under the provisions of the Bankrupt Act, that court would, undoubtedly order the property to be delivered to the possession of the trustee. If the State court holds and adjudges the lien of the plaintiff to be valid, it would, upon the proper showing, also recognize the title and rights of the trustee, subject to the lien of the plaintiff, and would enforce the same according to the true intent and meaning of the Bankrupt Act. In some of the discussions had upon this general subject, it seems to be assumed that the State courts cannot aid in carrying out the general provisions of the Bankrupt Act, and that the trustee can only appeal to the courts of bankruptcy when seeking to secure a disposition of a bankrupt's estate under that act; but this is a mistaken view of the law. The State courts, in all proceedings pending before them, have the right to apply and enforce the provisions of the Bankrupt Act in the determination of the questions at issue before them, and can give full protection to the rights of the trustee. The Bankrupt Act is the law of the land, and the State courts have full right to enforce its mandate in all proceedings properly before them. Of course, it is not meant by this that a State court can adjudge a person to be bankrupt, or grant him a discharge, or control the distribution of the bankrupt's estate; but what is meant is that in all suits pending before them, wherein may be involved a contest between the trustee and a third party, which depends, in whole or in part, upon the provisions of the Bankrupt Act, the State courts must, of necessity have full right and jurisdiction to apply and enforce the provisions of the Bankrupt Act, not only in deciding the question of right at issue, but in securing to the parties the proper protection accorded to them under the act. Thus, in the proceedings pending in the State court, even though the court should adjudge the lien of the mortgage to be valid, it would undoubtedly recognize and properly protect the right of the trustee in the mortgaged property, and in ordering a sale of the property would have due regard to the rights and equities of the mortgagees and the trustee alike. Taking into consideration the entire provisions of the act, it clearly appears that it was the intent of Congress to utilize the State as well as the Federal courts in administering the law, at least in cases wherein an adversary claim may exist between the trustee and third parties."

And, in still other cases, the rule is broadly stated to be that neither plenary nor summary process from the courts of bankruptcy will lie to stay proceedings in a State Court nor to order the surrender of property thereby, even though possession has been acquired by the State Court within four months of the bankruptcy.⁶

§ 1583. Simply because Bankruptcy Court Preferable or Trustee Interested, Not Sufficient to Confer Jurisdiction.—Simply because

6. In re Seebold, 5 A. B. R. 358 (C. C. A. La.); *Marble Co. v. Grant*, 14 A. B. R. 288, 135 Fed. 322 (C. C. A. Penn.).

the bankruptcy Court can better settle and adjust the rights of the parties, is not sufficient to confer jurisdiction on it under the present law;⁷ nor because the trustee is interested.

In *re Greater Amer. Exp.*, 4 A. B. R. 486, 102 Fed. 986 (C. C. A. Neb.): "The fact that a trustee in bankruptcy may be interested in the result of a litigation which is pending between third parties in a State court does not entitle him to have the proceedings in such action stayed, as between such third parties, and to have the controversy transferred for adjudication to the bankrupt court."

§ 1584. But State Courts May Be Permitted to Retain Jurisdiction Where Better Suited to Adjust Rights, Even Where Bankruptcy Court Might Have Jurisdiction.—But it is true the State Courts may be permitted to retain jurisdiction in cases where the Bankruptcy Courts might assume jurisdiction, but do not do so because the rights of the parties can be better settled in the State Courts.⁸

Compare, *Hooks v. Aldridge*, 16 A. B. R. 665, 145 Fed. 865 (C. C. A. Tex.): "While it is unquestionable that the federal courts are the final arbiters to settle questions arising under the bankruptcy laws, there are questions relating to comity and procedure, in the event of conflict of opinion between the State courts and the bankruptcy courts as to the possession of the bankrupt's assets, which remain unsettled by decision of the Supreme Court. Whether the bankruptcy courts should make such orders as will preserve the estate, and await the final result of the litigation in the State court, or should act on its own opinion of the want of jurisdiction of the State court, and enforce its order to secure the possession of the property, is one of the questions left unsettled, so far as we are advised, by a decision of the Supreme Court."

§ 1585. Replevin and Other Suits Asserting Ownership, Where Seizure Made First by State Court, Not Abated.—A replevin suit or other action brought under claim of ownership of the property involved, in which property is seized before the marshal, receiver or trustee in bankruptcy takes possession, or any restraining order is issued, is not abated; and the State Court retains jurisdiction.⁹

In *re Wells*, 8 A. B. R. 75, 114 Fed. 222 (D. C. Mo.): "The question therefore is, does the filing in this court of a petition in involuntary bankruptcy, of itself, and before any order is made by this court, give this court jurisdiction of all the property then in the possession of the bankrupt, whether by him owned or not? And if the bankrupt then has possession of the property, but not owned by him, or the question of ownership is disputed, must the claimant have the question of ownership adjudicated by this court, and to the exclusion of the State court, which has taken possession of the property for adjudication?"

"All agree that the court, State or Federal, which first takes possession of

7. But compare decisions under the law of 1867, cited in editor's note to *Keegan v. King*, 3 A. B. R. 79 (D. C. Ind.).

8. See post, § 1794, et seq., subject of Bankruptcy Courts assuming jurisdiction. Also, see note to *Keegan v. King*, 3 A. B. R. 79 (D. C. Ind.), for decisions under law of 1867.

9. *Linstroth Wagon Co. v. Ballew*, 18 A. B. R. 28, 149 Fed. 960; *Pub. Co. v. Hutchinson Co.*, 17 A. B. R. 425 (Sup. Ct. Mich.); compare, inferentially, *In re Neely*, 7 A. B. R. 312, 112 Fed. 210 (C. C. A. N. Y.).

the property, retains the possession and the jurisdiction. This is elementary, and cases need not be cited to emphasize the proposition. But the trustee, by counsel, argues that the 'possession' does not mean physical possession. This court, by any of its officers, never has had physical possession of the property. And the decision of this question requires a construction of the bankrupt statute of 1898. Counsel for the trustee insists that the mere filing of the petition in involuntary bankruptcy is notice to the world, and no other court must interfere with any property then in the possession of the bankrupt, and that any subsequent interference by a state court is avoided and nullified by the subsequent adjudication of bankruptcy of the debtor. I decline to so hold, and for reasons which seem to me conclusive. Conflicts between courts over the same property should at all times be avoided, if possible, because at times such conflicts are unseemly. The mistake is constantly being repeated, and, sometimes by lawyers, of asserting that the United States courts are greater and more commanding than the State Courts. I cannot agree to this."

Contra, *In re Weinger, Bergman & Co.*, 11 A. B. R. 424, 126 Fed. 875 (D. C. N. Y.): "Moreover, in this case, in my opinion, no question can arise which is based on the theory that the State court first obtained jurisdiction. The petition in bankruptcy was filed in this court and notice of it was given to the marshal about the time that the marshal arrived at the bankrupts' store, and before the goods were actually seized and taken away. Under the present Bankrupt Act, as under the Act of 1867, the filing of a petition in bankruptcy is a caveat to all the world, and in effect an attachment and injunction (*Mueller v. Nugent*, 184 U. S. 1, 7 Am. B. R. 224); and I think that when a petition is filed before a State court acts, the State court cannot, by any subsequent action, claim to have first taken possession of the res. The fact that the bankruptcy court may not have yet made an adjudication, and that no receiver or trustee has yet been appointed, in my opinion, is immaterial. The bankrupts' property is within the jurisdiction of the bankruptcy court as soon as the petition is filed, so far as to prevent a State court which subsequently seizes the property from being held to have first obtained exclusive jurisdiction."

Also, contra, *In re Hymes Buggy & Implement Co.*, 12 A. B. R. 477, 130 Fed. 977 (D. C. Mo.): "True it is that the term 'all levies' would ordinarily in practice apply to a seizure under execution for the collection of money on a judgment. But looking at the connection and the whole statute, it is difficult to escape the conclusion that Congress employed the term 'all levies' in its most comprehensive sense, covering any and all seizures of property of the bankrupt within the four months period, under legal process, looking to the enforcement of claims against the bankrupt which would be released by his final discharge. Why nullify judgments, attachments, or other liens 'against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him,' and yet leave the claimant free to seize the property of the insolvent under replevin process?" But this case was wrongly reasoned. The assertion of ownership is not the assertion of a lien on the bankrupt's property but a denial that the property is the bankrupt's property; and it does not come within the mischiefs against which the Bankrupt Act was directed. In this particular case it appears the replevin suit was simply a cover and not the assertion of a bona fide claim of ownership. It was really an attempt to make replevin take the place of attachment.

§ 1586. Foreclosure and Other Suits Not Themselves Creating Liens Nullified by Bankruptcy, but Simply Enforcing Liens, etc., Not Abated, Where Started before Bankruptcy Seizure.—A suit in

equity, such as a foreclosure suit or other legal proceedings to enforce a lien which is itself not claimed to be in contravention of the peculiar provisions of the bankruptcy act nullifying liens obtained by legal proceedings, where such suit or other proceedings is instituted before the trustee, receiver or marshal takes actual possession or any restraining order is issued, is not abated and the State Court retains jurisdiction. It is not to be transferred to the bankruptcy court simply because the bankruptcy of the mortgagor or debtor occurs within four months of the commencement of the foreclosure suit;¹⁰

But compare, that such suits are stayed ipso facto, *Carpenter Bros. v. O'Connor*, 1 A. B. R. 381, 16 C. C. Ohio 526: "It is not a case in which there is conflict of jurisdiction as between courts of co-ordinate powers where you are called upon to determine which shall have possession of the property. The Court in Bankruptcy has exclusive jurisdiction to take and administer the assets of the bankrupt, pay his debts in so far as the assets will pay them, and discharge him if he is entitled to a discharge from further payment.

"The State court cannot do this. It cannot determine, at the outset, whether or not the defendant is a bankrupt, nor can it discharge him from the further payment of his debts after his property has been exhausted. So that it is a mistaken idea to say that the State court and the Court in Bankruptcy are co-ordinate courts, each having jurisdiction over the subject matter. The State court has nothing to do with the proceedings in bankruptcy.

"The order of procedure in this case should be under the statute as follows: When the petition in bankruptcy was filed by the defendant, all proceedings in the State court should stop. In other words, in the language of the Bankrupt Act as contained in § 11, 'The proceedings shall be stayed.' This is mandatory. The State court has no right to proceed further in an action there pending until the petition in bankruptcy has been adjudicated. When that has been done, the case may be further stayed in the State court at its discretion."

10. *Eyster v. Gaff*, 91 U. S. 521, quoted *supra*. In *re Greater American Exposition*, 4 A. B. R. 486, 102 Fed. 986 (C. C. A. Tenn.); quoted *supra*. See note to *Keegan v. King*, 3 A. B. R. 79, 96 Fed. 758, for cases under law of 1867. *Contra*, In *re Sabine*, 1 A. B. R. 315 (Ref. N. Y.).

Contra, In *re Knight*, 11 A. B. R. 1, 125 Fed. 35 (D. C. Ky.). But in this case the receivership operated more broadly than merely to take custody over the property under the mortgage sought to be foreclosed; it operated also to sequester other property for the benefit of the mortgagee, and to such extent was voidable under § 67 "f."

Contra, see note to *Taylor v. Taylor*, 4 A. B. R. 211 (N. J. Ch.). In *re Holloway*, 1 A. B. R. 659, 93 Fed. 638 (D. C. Ky.). But in this case the court seems to consider it a matter of discretion.

Reed v. Equitable Trust Co., 8 A. B. R. 242 (Sup. Ct. Ga.): "Unless the lienholder prove his claim as a creditor in the bankruptcy proceedings."

Obiter, *Leidigh Carriage Co. v. Stengel*, 2 A. B. R. 383, 95 Fed. 637 (C. C. A. Ohio). *Carling v. Seymour Lumber Co.*, 8 A. B. R. 29 (C. C. A. Ga.): In this case a receiver had been appointed in the State court to take charge of the mortgaged property and also of all other property of the debtor, the petition being framed so that it stated a case not only for throwing the debtor into insolvency under the State Insolvency Laws (as was its manifest object), but also for merely foreclosing the mortgage. The court held that the mortgaged property should remain in the hands of the receiver and the trustee be required to intervene and to apply first to the State Court. To same effect, analogously, In *re Chapman*, 3 A. B. R. 607, 99 Fed. 395 (D. C. Ga.).

Heller v. LeRoy, 12 A. B. R. 733, 179 N. Y. 369. This was an equitable action instituted to enforce a judgment lien acquired more than four months prior to bankruptcy wherein also fraudulent conveyances interfering with the lien were sought to be set aside. Also, see *ante*, § 1444.

Nor even where the foreclosure suit is not instituted until *after adjudication* of the mortgagor as bankrupt;¹¹ nor even where not instituted until after discharge.¹²

Foreclosure by sale, under power of sale, is equally protected with that by suit.¹³

And the State Court's jurisdiction will not be divested even though the lien or transfer therein involved (but not the lien of the suit itself) is claimed by the trustee to be in violation of the bankruptcy provisions relative to voidable preferences.¹⁴

And if the suit is a foreclosure suit with incidental prayer appropriate to insolvency proceedings, the state court is not divested of jurisdiction, the prayer for general insolvency relief being disregarded.

Carling v. Seymour Lumber Co., 8 A. B. R. 30, 113 Fed. 483 (C. C. A. Ga.): "The Insolvent Traders' Act, before it was superseded, must have been put in operation at the suit of "unsecured" creditors. Code Ga. 1895, § 2716; *Cracker Co. v. Brooke*, 91 Ga. 243, 18 S. E. 136. The appointment of a receiver is a jurisdiction often exercised by equity courts in foreclosure suits. The Insolvent Traders' Law provides for a proceeding against insolvents only, and the petition alleges that the defendant therein is insolvent; but that allegation is proper, if not necessary, to obtain a receiver in a foreclosure suit. So of all the averments as to the business embarrassments of the defendant in the petition. They are usual in bills seeking the appointment of a receiver. It is true that the petition contains other averments that are unnecessary and unusual in a foreclosure suit, such as demand and refusal to pay, that the petition is for the benefit of the petitioner and other creditors, etc. These and other averments show that the pleader had in view the Insolvent Traders' Law."

Obiter, *Merry v. Jones*, 11 A. B. R. 625 (Ga. Sup. Ct.): "Where the main purpose of the suit is to foreclose a mortgage, and there is also an incidental prayer for relief appropriate to insolvency proceedings, a receiver's possession thereunder will not be affected by a subsequent adjudication in bankruptcy."

But if the proceedings are in reality insolvency proceedings with merely incidental prayer for foreclosure, the jurisdiction is divested.

Merry v. Jones, 11 A. B. R. 625 (Sup. Ct. Ga.): "But where the main purpose of the petition is to obtain relief appropriate only in insolvency proceedings, the fact that a mortgage may be foreclosed as an incident therein will not save the case from the nullifying effect of bankruptcy on pending State insolvency proceedings."

And a suit in equity to enforce any other valid right than a lien will not be interfered with.¹⁵

11. *In re San Gabriel Sanitorium Co.*, 7 A. B. R. 206, 111 Fed. 892 (C. C. A. Calif., reversing, on rehearing, its own decision, 4 A. B. R. 197); *In re Porter*, 6 A. B. R. 259, 109 Fed. 111 (D. C. Ky.); *Heath v. Shaffer*, 2 A. B. R. 93, 93 Fed. 647 (D. C. Iowa).

12. *Evans v. Rounsaville*, 8 A. B. R. 236, 115 Ga. 684.

13. *Harvey v. Smith*, 7 A. B. R. 497 (Sup. Jud. Ct. Mass.).

14. *Furth v. Stahl*, 10 A. B. R. 442, 205 Penn. 439 (Sup. Ct. Penn.); *Savings Bk. v. Jewelry Co.*, 12 A. B. R. 781, 123 Iowa 432.

15. Compare, analogously, *In re English*, 11 A. B. R. 674, 127 Fed. 940 (C. C. A. N. Y.).

§ 1587. Custody of State Court Preserved in Part, and in Part Superseded.—If the suit is a foreclosure suit, or other suit in equity, not creating the lien, but simply enforcing it; but the receiver appointed therein does more than simply conserve the assets subject to the lien, and seizes other assets, although doing so by authority of the State law, the possession of the State Court will be protected as to the assets covered by the lien but will be superseded as to the remainder.¹⁶

Carling v. Seymour Lumber Co., 8 A. B. R. 30, 113 Fed. 483 (C. C. A. Ga.): "A receiver or trustee, when appointed in the bankruptcy proceedings, while not entitled to the mortgaged property, will be entitled to any excess arising from the foreclosure sale, when made by order of the State court after the payment of the mortgages and costs of foreclosure. He will also be entitled, when appointed, to the possession of the choses in action and the other property in the hands of the State court's receiver which is not covered by the mortgages. The bankrupt law is equally binding on the State and the Federal court, and we cannot doubt that the former will, on proper application give full effect to it. Where assets are in the hands of the receiver of one court which legally and equitably belong to the trustee or receiver appointed by another court, comity requires, as a general rule, that application should be made for a proper order to the former court, whose officer has possession of the property. This rule is reciprocal between the Federal and State courts, each respecting the possession of the other."

Likewise, if the attachment suit operates to do more than enforce a lien obtained before the four months' period, the state court's custody will be superseded as to the remainder.

§ 1588. Attachments Obtained Prior to Four Months, Not Abated.—Where an attachment lien is obtained more than four months prior to bankruptcy, the attaching creditor should be allowed to prosecute his action to judgment and sale, after the bankruptcy.¹⁷

§ 1589. Landlord's Levy.—Seizure, under state statute, by levy of execution by a landlord, upon goods found on the premises, will not be sufficient ground for ordering surrender of the property levied on: the state court will not be superseded.¹⁸

16. *Obiter*, inferentially, *In re Kavanaugh*, 3 A. B. R. 832, 99 Fed. 928 (D. C. Ky.); *contra*, impliedly, and that it is superseded altogether, see, *In re Knight*, 11 A. B. R. 1, 125 Fed. 35 (D. C. Ky.).

If the lienholder proves his demand in the bankruptcy proceedings, it would perhaps amount to a waiver of his rights to insist on continuing the foreclosure suit in the State Court. *Reed v. Equitable Trust Co.*, 8 A. B. R. 242, 115 Ga. 780.

But if no seizure nor sequestration of property in the suit in the State Court is made until after the bankruptcy court has assumed jurisdiction the property must be turned over to the bankruptcy court. *Carpenter Bros. v. O'Connor*, 1 A. B. R. 381 (Ohio C. C.). See post, § 1600.

17. *In re Snell*, 11 A. B. R. 35, 125 Fed. 154 (D. C. Calif.); *In re Beaver Coal Co.*, 7 A. B. R. 542, 113 Fed. 889 (C. C. A. O-re.). See ante, "Liens by Legal Proceedings within Four Months, Nullified by Bankruptcy," § 1439, et seq.

18. *In re Seebold*, 5 A. B. R. 358, 105 Fed. 910 (C. C. A. La.).

§ 1590. **Partnership Dissolution Suits.**—Suits for dissolution of partnership instituted more than four months before bankruptcy will not be disturbed;¹⁹ even where the court decrees therein that a previous transfer by the firm of one-half of the firm assets to pay a debt, is valid and free from the claims of the remaining partnership creditors.²⁰

But the state court must not go further and attempt to distribute the surplus among the particular creditors interested in the suit, but must turn it over to the trustee in bankruptcy of the partnership, if the order of distribution is asked for within four months of the bankruptcy.²¹

And if they operate to create liens or priority claims different from those prescribed by the Bankruptcy Act itself, and such liens or priorities are created within the four months, then the jurisdiction of the State court may be divested.²²

§ 1591. **Fraudulent Conveyance Suits Instituted before Four Months.**—Suits to set aside fraudulent conveyances instituted more than four months preceding the bankruptcy may not be enjoined, nor may the property be ordered turned over to the trustee in bankruptcy.²³

§ 1592. **Fraudulent Conveyance Suit within Four Months in Aid of Levy Made before Four Months, Not Abated.**—And a suit in equity instituted within the four months' period to enforce a judgment lien created before the four months' period will not be superseded because of the creditor's seeking therein to set aside a fraudulent conveyance that interferes with the enforcement of his judgment lien, the lien itself being acquired before the four months and the fraudulent conveyance suit being simply an incident to the enforcement of the lien.²⁴

§ 1593. **Creditors' Bills Instituted before Four Months.**—Creditors' bills instituted more than four months preceding the debtor's bankruptcy are not abated.²⁵

19. In re Price, 1 A. B. R. 606, 92 Fed. 987 (D. C. N. Y.); In re English, 11 A. B. R. 674, 127 Fed. 940 (C. C. A. N. Y.). But compare, contra, if within the four months, *Wilson v. Parr*, 8 A. B. R. 234, 115 Ga. 629.

20. In re English, 11 A. B. R. 674, 127 Fed. 940 (C. C. A., reversing, on other grounds, 10 A. B. R. 133).

21. In re English, 11 A. B. R. 674, 127 Fed. 940 (C. C. A. N. Y., reversing 10 A. B. R. 133).

22. *Mather v. Coe*, 1 A. B. R. 504, 92 Fed. 333 (D. C. Ohio).

23. *Pickens v. Dent*, 9 A. B. R. 47, 187 U. S. 177; Nat'l Bk. of Republic v. Hobbs, 9 A. B. R. 190, 118 Fed. 626 (U. S. C. C. Ga.); In re Meyers & Co., 1 A. B. R. 347 (Ref. N. Y.); In re Kavanaugh, 3 A. B. R. 832, 99 Fed. 928 (D. C. Ky.).

24. *Hiller v. LeRoy*, 12 A. B. R. 733, 179 N. Y. 369.

25. *Metcalf v. Barker*, 9 A. B. R. 36, 187 U. S. 165: The Supreme Court held in this case that the plaintiff in a judgment creditor's action commenced more than four months prior to the filing of the judgment creditor's petition in bankruptcy acquires a lien upon the equitable assets of the bankrupt which is superior to the title of his trustee in bankruptcy thereto.

In re Meyers & Co., 1 A. B. R. 347 (Ref. N. Y.). *Frazier v. Southern Loan &*

§ 1594. Assignments and Receiverships Created before Four Months.—Assignments and Receiverships instituted more than four months preceding bankruptcy are not affected.²⁶

In *re Carver & Co.*, 7 A. B. R. 539, 113 Fed. 128 (D. C. N. Car.): "The Act of Congress was not invoked by the filing of a petition in bankruptcy until more than four months after such assignment was made and the estate partly distributed in pursuance thereof. The assignment thus becomes valid and whatever was done under its provisions is also valid."

§ 1595. Administrators, etc., Where Bankrupt Owns Interest in Estate, Not Disturbed.—Administrators and executors under orders of court in possession of property at the time of bankruptcy, in which the bankrupt has an interest, may not be disturbed.²⁷

§ 1596. Trustee's Intervention in State Court Proceedings Does Not Oust State Court.—The trustee in bankruptcy, by intervening in an action to enforce a specific lien upon an insolvent's assets, in a State Court, does not thereby oust the State Court of jurisdiction.²⁸

§ 1597. State Courts Administer Bankrupt Law and Trustee, Intervening, Not Confined to Rights Accorded by State Law.—The Bankrupt Act is equally binding on State and Federal Courts, and where the trustee has intervened in a State Court proceeding, he is not confined to the rights accorded by State law in the absence of bankruptcy but may urge rights and defenses given by the Bankrupt Act; it being simply as to the forum and not as to the rights that he is relegated to the State court.²⁹

Carling v. Seymour Lbr. Co., 8 A. B. R. 41, 113 Fed. 483 (C. C. A. Ga.): "The laws of the United States being equally binding on all the courts, we cannot assume that the State court would refuse to administer them. We are not now called on to decide what course should be taken in the event of a disregard of the Bankrupt Law by the State court."

§ 1598. Bankruptcy Court May Enjoin to Permit Intervening of Trustee.—But the bankruptcy court may restrain the state court long

Trust Co., 3 A. B. R. 710, 99 Fed. 707 (C. C. A. N. Car., reversing *In re Benbow* (Southern Loan & Trust Co. *v.* Benbow), 3 A. B. R. 9, 96 Fed. 514), quoted *supra*. *Nat'l Bk. v. Moses*, 11 A. B. R. 772 (Sup. Ct. N. Y.); *In re Kavanaugh*, 3 A. B. R. 832, 99 Fed. 928 (D. C. Ky.); *Taylor v. Taylor*, 4 A. B. R. 211, 45 Atl. 440 (N. J. Ch.); *In re Heckman*, 15 A. B. R. 500, 140 Fed. 859 (C. C. A. Wash.); inferentially, *Nat'l Bk. of the Republic v. Hobbs*, 9 A. B. R. 190, 118 Fed. 626 (U. S. C. C. Ga.).

26. *In re Price & Co.*, 1 A. B. R. 606, 92 Fed. 987 (D. C. N. Y.), which was a receivership to wind up a partnership. *In re Kavanaugh*, 3 A. B. R. 832, 99 Fed. 928 (D. C. Ky.). See post, § 1607.

27. *In re Pierce*, 4 A. B. R. 489, 102 Fed. 977 (D. C. Wash.); compare, *White v. Thompson*, 9 A. B. R. 653, 119 Fed. 868 (C. C. A. Ala.).

28. *DesMoines Bk. v. Morgan Jewelry Co.*, 12 A. B. R. 781, 123 Iowa 432.

29. *Heath v. Schaffer*, 2 A. B. R. 102, 93 Fed. 647 (D. C. Iowa). See post, § 1687. *DesMoines Bk. v. Morgan Jewelry Co.*, 12 A. B. R. 781, 123 Iowa 432, quoted *supra*, § 1582.

enough to enable a trustee to be elected, and for him to intervene to protect the creditors' rights.³⁰

DIVISION 1.

FIRST EXCEPTION TO RULE THAT STATE COURT RETAINS JURISDICTION IF FIRST TO OBTAIN IT: NULLIFIED LEGAL LIENS.

§ 1599. **First Exception to Rule That State Court Retains Jurisdiction if First Obtaining Possession.**—To the rule that the State Court will retain jurisdiction if it is the first to obtain custody of the property, there are three exceptions: First, where the possession of the State Court has itself created a lien by legal proceedings within four months of the bankruptcy, whilst the debtor was insolvent; second, where a receiver, assignee or trustee appointed by the State Court within four months of the bankruptcy, is in possession; third, where the possession is under State Insolvency proceedings that are superseded by the Bankrupt Act.

First exception: Where the possession of the state court has created a lien by legal proceedings within four months of the bankruptcy and while the debtor is insolvent, the State court does not retain jurisdiction; but the property affected must be surrendered to the bankruptcy court.

This is so for the reason that the *lien* thus created is itself null and void, and being created by the legal proceedings the legal proceedings themselves are null and void and fall to the ground. This exception, then, does no real violence to the principle that the court first obtaining jurisdiction of the res retains jurisdiction.

§ 1600. **Same Subject Discussed, Ante, "Liens by Legal Proceedings Nullified by Bankruptcy."**—The nature of § 67 "f" nullifying such liens, and the elements that must be in attendance in order that the lien be nullified, and the limitations of the rule, are fully expounded ante, under the subject of "Liens by Legal Proceedings Nullified by Bankruptcy;" as are also the general rules as to procedure in obtaining surrender of such property to the trustee.³¹

Thus, if a creditor has attached property of an insolvent debtor and, within four months thereafter, a bankruptcy petition is filed by or against the debtor and the debtor adjudged bankrupt, the attachment proceedings, as already noted, are nullified, and the sheriff or constable may be required to surrender possession of the property; although, of course, nothing prevents the suit from continuing to its finish to a judgment in personam against the debtor, if the debtor himself does not stay it. But as to the

30. In re Klein, 3 A. B. R. 174, 97 Fed. 31 (D. C. Ills.). Obiter, Carling v. Seymour Lumber Co., 8 A. B. R. 41, 113 Fed. 438 (C. C. A. Ga.).

31. See also, subject of "Summary Orders on Custodians and Court Officers in Possession." § 1830.

property, the bankruptcy court seizes possession of it, and wholly supersedes the State Court in its administration.³²

It is to be borne in mind, also, that the bankruptcy must have occurred within four months of the levying of the attachment or other creation of the legal lien, else the legal proceedings are not made null nor void;³³ and the only thing the trustee can do in case it comes later than four months thereafter, is to get admitted to the proceedings of the State Court, as a party, and to litigate his rights there, being content with whatever the State Court may say is his rightful share of the proceeds.

Thus, also, where the suit is in part a mere foreclosure suit or other suit to realize upon a valid pre-existing lien and in part creates a lien by legal proceedings upon other assets of the insolvent during the four months' period, the jurisdiction of the State Court will be protected as to the first part and be superseded as to the latter part.³⁴

Thus, also, until the adjudication in bankruptcy takes place the legal proceedings are not superseded and a court officer in possession of assets may not be proceeded against summarily. It may occur that the legal lien may never be rendered void.³⁵

But when the adjudication does take place, the nullity and invalidity relate back to the date of the levy or seizure by legal proceedings, and the State Court is superseded.³⁶

§ 1601. When Lien Nullified Property Recoverable by Summary Order.—When the lien is nullified, the property affected by it is recoverable by summary order.³⁷

DIVISION 2.

SECOND EXCEPTION GENERAL ASSIGNMENTS, RECEIVERSHIPS, ETC., NULLIFIED BY BANKRUPTCY.

§ 1602. Second Exception to Rule That State Court Retains Jurisdiction if First Obtaining Custody.—The second exception to the rule

32. See ante, §§ 1448, 1449.

33. See ante, § 1439.

34. See ante, § 1587.

For a case where the court refused to enjoin execution sale, where levy was made within four months on judgment obtained several years beforehand, relegating the parties to the State Court for action on the ground of comity, see *In re Shoemaker*, 7 A. B. R. 437, 112 Fed. 648 (D. C. Va.).

For a case where the Circuit Court of Appeals reversed the District Court and refused to stay an attachment case and relegated the parties to the State court on the ground of prior possession of the res, see *Marble Co. v. Grant*, 14 A. B. R. 288, 135 Fed. 322 (C. C. A. Penn.).

But attachment suits in Pennsylvania, it is understood, may be used to assert title or ownership in the res; in such cases such ruling would not be contrary to the main proposition.

35. See post, § 1609; "Summary Orders on Court Officers," § 1828.

36. See ante, § 1467.

37. Apparently, *In re McCartney*, 6 A. B. R. 368, 109 Fed. 629 (D. C. Wis.).

See ante, § 1471, et seq.; post, "Summary Orders on Custodians and Court Officers," § 1830, et seq.

that the State Court retains jurisdiction if it first obtains the custody of the property involved is **where the property at the time of the Bankruptcy is in the possession of an assignee for the benefit of creditors or of a receiver or trustee appointed outside of bankruptcy, where the assignment, receivership or trusteeship is created within the four months preceding the filing of the bankruptcy petition, in which event, upon the adjudication in bankruptcy occurring, the Bankruptcy Court supersedes the insolvency court and the court appointing the assignee, receiver or trustee and takes over the property involved for administration in Bankruptcy.**³⁸

Randolph v. Scruggs, 10 A. B. R. 1, 190 U. S. 533: "It is admitted that a general assignment for the benefit of creditors made within four months from the filing of a petition in bankruptcy, is void as against a trustee in bankruptcy, so far as it interferes with his administering the property assigned. This could not be denied."

§ 1603. Basis of Superseding Custody of Assignee and Receiver.

—The rule that the bankruptcy court supersedes the custody of the State

38. Compare, "General Assignments, Receiverships and Trusteeships as Acts of Bankruptcy," ante, § 144, et seq. Compare "General Assignments and Receiverships held to amount to State Insolvency Laws," post, § 1634, division 3, this chapter.

The following cases were receivership and assignment cases, to be sure, but were held in many instances to amount to State Bankruptcy or State Insolvency proceedings, hence in many of these cases the superseding of the State Court's custody is to be based on entirely different principles, the principles discussed in division 3 of chapter XXXII:

In re Storck Lumber Co., 8 A. B. R. 86, 114 Fed. 860 (D. C. Md.); In re Lengert Wagon Co., 6 A. B. R. 536, 110 Fed. 927 (D. C. N. Y.); obiter, In re Kersten, 6 A. B. R. 516, 110 Fed. 929 (D. C. Wis.); *Mauran v. Carpet Lining Co.*, 6 A. B. R. 734 (Sup. Ct. R. I.).

Compare, as being act of Bankruptcy, In re Milbury Co., 11 A. B. R. 523 (D. C. N. Y.). Compare, apparently to same effect, In re Watts, 10 A. B. R. 113, 190 U. S. In re Smith & Dodson, 2 A. B. R. 9 (D. C. Ind.); apparent instance, In re Etheridge Furn. Co., 1 A. B. R. 115, 92 Fed. 329 (D. C. Ky.); apparent instance, In re McKee, 1 A. B. R. 311 (Jefferson County Ct. Ky.); In re Curtis, 1 A. B. R. 440, 91 Fed. 737 (D. C. Ills.), which was an assignment case. In re Gutwillig, 1 A. B. R. 388, 92 Fed. 337 (C. C. A. N. Y., affirming 1 A. B. R. 78, reasoning approved in *Lea v. West*, 174 U. S. 590, 2 A. B. R. 463); *David v. Bohle*, 1 A. B. R. 412, 92 Fed. 325 (C. C. A. Mo., affirming In re Sievers, 1 A. B. R. 117); In re Sievers, 1 A. B. R. 117, 91 Fed. 366 (D. C. N. Y., affirmed sub nom. *Davis v. Bohle*, 1 A. B. R. 412, 92 Fed. 325 (C. C. A. Mo.); In re Gray, 3 A. B. R. 647 (N. Y. Sup. Ct.); impliedly, In re Thompson, 11 A. B. R. 720, 128 Fed. 575 (C. C. A. N. Y.); In re Knight, 11 A. B. R. 1, 135 Fed. 25 (D. C. Ky.); In re Watts, 10 A. B. R. 113, 190 U. S. 1.

In re Brown, 1 A. B. R. 110, 91 Fed. 358 (D. C. Ore.): "Nor can the fact that the property is in the hands of a receiver, in a suit to set aside an alleged fraudulent conveyance, affect the question. The immunity which the prior conveyance has, under the Bankrupt Act, does not extend to the legal custody taken in a suit to cancel the conveyance, the property having in the meantime been voluntarily restored by the fraudulent grantee to the bankrupt."

Obiter, In re Hirose, 12 A. B. R. 154 (D. C. Hawaii); inferentially and obiter, In re Romanow, 1 A. B. R. 461, 92 Fed. 510 (D. C. Mass.); In re Fellerath, 2 A. B. R. 40, 95 Fed. 121 (D. C. Ohio); obiter, *Leidigh Carriage Co. v. Stengel*, 2 A. B. R. 383, 95 Fed. 637 (C. C. A. Ohio); In re Etheridge Furn. Co., 1 A. B. R. 115, 92 Fed. 329 (D. C. Ky.).

Court in cases of assignments, receiverships, etc., created within the four months period, is said to have for its basis the necessary implication arising from such assignments and receiverships being specifically declared to be acts of bankruptcy. Since they operate—if allowed to stand—to take away the very fruits of the adjudication itself and to render the adjudication purposeless, the necessary implication arises, it is said, that the assignments and receiverships themselves become void.

Obiter, Randolph v. Scruggs, 10 A. B. R. 3, 190 U. S. 533: "It is admitted that a general assignment for the benefit of creditors, made within four months from the filing of a petition in bankruptcy, is void as against a trustee in bankruptcy, so far as it interferes with his administering the property assigned. This could not be denied. *West Co. v. Lea Bros.*, 174 U. S. 590, 595, 2 Am. B. R. 463, 43 L. Ed. 1098, 1099, *Boese v. King*, 108 U. S. 379, 385, 27 L. Ed. 760, 762; *Bryan v. Bernheimer*, 181 U. S. 188, 5 Am. B. R. 623, 45 L. Ed. 814. It hardly is necessary to discuss whether such an assignment should be held to be embraced in the express avoidance of conveyances made with intent to hinder, delay, or defraud creditors in § 67e of the Bankruptcy Law. * * * It is possible to say that constructively a general assignment falls under that description. * * * One ground for such a construction would be that making the assignment is declared an act of bankruptcy by § 3. As it could not have been intended that the very conveyance which warranted putting the grantor into bankruptcy should withdraw all his property from distribution there, it seems sufficient to rely upon the necessarily implied effect of § 3. * * * If by declaring the assignment an act of bankruptcy, the statute means that the conveyance shall not be effectual against the bankruptcy proceedings, as is agreed, the natural and simple construction is that it means that the deed shall be avoided as a whole when the trustee takes the goods."

In *re Knight*, 11 A. B. R. 6, 125 Fed. 35 (D. C. Ky.): "* * * it is the established doctrine in bankruptcy that an assignee, under a deed of general assignment, and the execution of which deed is the act of bankruptcy upon which the adjudication is made, although he has qualified in the County Court and is acting under its orders, does not hold the estate of the bankrupt adversely to the trustee in bankruptcy. It thence logically and necessarily follows that the assignee holds the property subject to the right of the requisite number of creditors having debts amounting in the aggregate to the sum of \$500 to avail themselves of the act of bankruptcy and secure an adjudication, and that when this is done the rights of the creditors relate back to the act of bankruptcy, and override all intermediate or intervening attempts by the assignee to overreach or defeat the results of the act of bankruptcy, or the rights of creditors arising out of it. The general principle which underlies the subject, and which cannot be ignored, must be this: When a general assignment for the benefit of creditors is made by a debtor, eo instanti there is generated by the statute a right in his creditors to have his affairs wound up and his estate administered in the bankruptcy court pursuant to the Bankrupt Law, which has suspended the operation of all State insolvency laws; and, if the enforcement of this right is demanded by a proper proceeding within four months after its inception, no action in any court in any suit brought after the commission of the act of bankruptcy can defeat it without the consent of the bankrupt court. Quoad hoc, the jurisdiction of the bankruptcy court is necessarily exclusive and supreme. * * * In other words, the rights of creditors, inchoate from the making of the assignment, ripen into maturity when

the adjudication is made. If it were otherwise the Bankruptcy Law could be evaded with the utmost facility."

Davis v. Bohle, 1 A. B. R. 412, 92 Fed. 325 (C. C. A. Mo.): "This (§ 3, making assignments acts of bankruptcy) was but another form of saying that if a person, subject to the provisions of the act, should make a general assignment, it should entitle his creditors to have him adjudged a bankrupt within four months after the commission of the act, and to have his estate administered by a trustee or trustees of their own selection, pursuant to the provisions of the act, rather than by the assignee who had been chosen by the insolvent debtor for that purpose. Inasmuch as an assignee under a voluntary deed of assignment is not a purchaser for value of the assigned property, but is merely an agent or trustee of the assignor and his creditors, and holds the assigned property solely for their benefit, Congress, when it provided that a general assignment should be regarded as an act of bankruptcy, did not deem it necessary to say further, and in so many words, that the assigned property might be taken from the custody of the assignee at the instance of creditors, if the assignor was subsequently adjudged a bankrupt. It was assumed, no doubt, that by declaring a general assignment to be an act of bankruptcy, with all which that declaration implied, the assignee named in such a deed would take a defeasible title to the assigned property, which would instantly fail when the assignor was adjudged a bankrupt, and that he would thenceforth be accountable to the trustee appointed in bankruptcy proceedings for the assigned property or its proceeds. Such, we think, is the necessary effect of the clause making a general assignment an act of bankruptcy, when that clause is read in the light of decisions both in this country and England construing prior bankrupt laws, which decisions must be presumed to have been well known to the lawmaker. Thus, under an English bankrupt act (6 Geo. IV. ch. 16, § 3), which made it an act of bankruptcy if a person executed any fraudulent conveyance or transfer with intent to defeat or delay his creditors, it was repeatedly held that a voluntary assignment by a debtor of his whole estate for the equal benefit of all his creditors was an act of bankruptcy, within the meaning of the aforesaid statute, not because such a conveyance was fraudulent in fact, but because it was constructively fraudulent, and in violation of the Bankrupt Act, in that it provided for a different mode of administration upon the effects of the insolvent debtor than that contemplated by the act."

Hooks v. Aldridge, 16 A. B. R. 664, 145 Fed. 865 (C. C. A. Tex.): "We have before us a record showing that a State court, because of insolvency, appointed a receiver for a corporation and placed him in possession of its property, and that thereupon, and on that ground, among others, the court of bankruptcy adjudged the corporation a bankrupt, pursuant to the amendment we have quoted. In enacting these additional grounds of involuntary bankruptcy, it could not have been the intention of Congress that the receiver of the State court, appointed 'because of the insolvency' of the corporation, should continue to hold possession of the property and to administer and settle the estate. The Supreme Court observed in a recent case that 'the operation of the bankruptcy laws of the United States cannot be defeated by insolvent corporations applying to be wound up under State statutes' (In re Watts & Sachs, 190 U. S. 1, 27, 10 Am. B. R. 113, 23 Sup. Ct. 718, 47 L. Ed. 933): nor can they be defeated by the appointment of receivers, because of insolvency, at the suits of their officers, stockholders, or creditors."

The obvious weakness of such reasoning would seem to be that the right to supersede the State court's custody would logically apply only

where such general assignment or receivership is the very ground of the adjudication in bankruptcy itself, thus leaving assets to continue in the control of the State Court receiver or assignee where the adjudication is based on other grounds or is on voluntary petition. One court, in evident anticipation of such argument, in a case where a general assignment was first made and afterwards a receiver was appointed in a mortgage foreclosure suit to collect the rents of the mortgaged property in behalf of the mortgagee, held, that although the assignment was the act of bankruptcy upon which the adjudication was obtained, nevertheless not only was the assignment itself nullified but also all subsequent dispositions of the property.

In *re Knight*, 11 A. B. R. 1, 125 Fed. 35 (D. C. Ky.): “* * * can the rights of the creditors to have the bankrupt’s estate administered in the bankruptcy court, and under the Bankruptcy Law be defeated by the expedient of thereafter hurriedly bringing suit in the State court, in which, upon an allegation of insolvency, a receiver is appointed and put in charge of the debtor’s property—things which, of themselves, under the amendment of 1903, * * * constituted a further act of bankruptcy, upon which alone an adjudication could have been secured? And just at this point we may well inquire whether, if an adjudication in bankruptcy had been made upon a creditor’s petition alleging, in the language of the amendment of February 5, 1903, that because of insolvency a receiver had been put in charge of Knight’s property by the State court, that court, under the doctrine and rule of comity, and the supposed teachings of the case of *Peck v. Jenness*, would be still entitled to administer the assets, notwithstanding the Bankruptcy Law. This inquiry would seem to reach the kernel of the matter, for if a State Court could thus do the very thing which constitutes an act of bankruptcy, and at the same time defeat it on the doctrine of comity and priority of jurisdiction, the new ground of bankruptcy is a manifest delusion. These suggestions seem to me to show that the expedient resorted to in this case, under the facts and circumstances surrounding it, cannot defeat the rights of the general creditors, which related back to the doing of the thing upon which the adjudication in bankruptcy was made.”

But this counter argument only partly avoids the weakness adverted to. What would become of the prior assignment had not it, but rather the subsequent receivership, been the ground of the adjudication, both being within the four months period?

More naturally, one would expect to find the basis of the superseding of the State Courts in some express provision of the statute concerned, in *pari materia*, with the subject of the right of the trustee to recover assets from third parties, such as are §§ 67, 70, etc., rather than in § 3, relating merely to the determination of the status of the debtor as a bankrupt. Moreover, § 3, relating solely to what acts warrant adjudication of bankruptcy, equally as well makes a preferential transfer an act of bankruptcy, yet Congress did not leave the avoidance of preferences to mere “necessary implication” from that section of the statute, but provided specifically therefor in § 60. The question naturally arises then why Congress should have left the superseding of the custody of the State Court in the important cases of assignments, receiverships, etc., to mere impli-

cation from the provisions of another section of the act and yet deem it necessary elsewhere to make specific provisions as to the recovery of preferences, although preferences are likewise referred to in that same section as acts of bankruptcy.

It has also been held that the basis is that such assignments and receiverships are transfers made to hinder, delay and defraud creditors under § 67 (e).³⁹

In *re Knight*, 11 A. B. R. 1, 135 Fed. 25 (D. C. Ky.): "Besides, it is important to remember that, whether so in fact or not, a deed of general assignment is constructively fraudulent, and, in legal contemplation, its purpose is to hinder and delay creditors, within the meaning of § 67e of the Statute of 1898 (30 Stat. 564), and consequently that under that section the assigned property, if the deed was made within four months before the filing of the petition in bankruptcy, belongs to the trustee, and by the express terms of the section it is made his duty to recover and reclaim it."

West Co. v. Lea, 2 A. B. R. 467, 174 U. S. 590: "Such consequence was held to arise, from a deed of that description, as a legal result of the clause, in the Act of 1867, forbidding assignments with 'intent to delay, defraud, or hinder' creditors, and from the provision avoiding certain acts done to delay, defeat, or hinder the execution of the act."

It would seem to be improper, however, to classify such resorting to the duly constituted courts of the State among the fraudulent transfers reprobated by § 67 (e), unless an actual fraudulent intent existed.

Ketcham v. McNamara, 6 A. B. R. 162, 72 Conn. 709: "The present bankruptcy law differs from that of 1867 in its mode of treating assignments for the benefit of creditors made without preferences prior to the institution of bankruptcy proceedings. The Act of 1898 declares every assignment of that kind an act of bankruptcy. * * * Under that of 1867 (§§ 26, 86, as amended in 1868 [15 Stat. at L. 228]), it was such only if made in fraud of creditors, and the assignee in bankruptcy could not recover the property without proof that the person receiving it 'had reasonable cause to believe that a fraud on this act was intended.' While the law stood thus, we therefore held that an honest conveyance by an insolvent debtor under our insolvent laws, without actual fraud, and with no actual intent to defeat the operation of the Act of Congress, could not be treated as absolutely void. *Hawkin's Appeal*, 34 Conn. 548, 551. The claim that it was such was set up in that case by one of the general creditors, but apparently only because, if sustained, it would prevent the assignment from operating as a dissolution of an attachment which he had previously made, and thus work a preference in his favor. Such a result the court was indisposed to promote by a construction of the bankruptcy law which would frustrate its main purpose. *Reed v. McIntyre*, 98 U. S. 507, 513.

"The Supreme Court of the United States, in another case, where the equities were of a similar character, held that if the Act of 1867 *ipso facto* suspended

39. In *re Gray*, 3 A. B. R. 647 (N. Y. Sup. Ct.); inferentially, *Randolph v. Scruggs*, 10 A. B. R. 3, 190 U. S. 533; obiter, *Chem. Nat'l Bk. v. Meyer & Dickinson*, 1 A. B. R. 570 (D. C. N. Y.); In *re Slomka*, 9 A. B. R. 637, 122 Fed. 630 (C. C. A. N. Y.). Compare, analogously (Act of Bankruptcy), *Rumsey v. Machine Co.*, 3 A. B. R. 704, 99 Fed. 699 (D. C. Mo.). Compare, analogously (Act of Bankruptcy), *Salmon v. Salmon*, 16 A. B. R. 122, 143 Fed. 395 (D. C. Mo.).

the operation of the insolvent laws of the States, general assignments under those laws, not followed by bankruptcy proceedings, when made with no actual intent to defraud, were not so absolutely void that a judgment creditor of an assignor could hold the assignee to account for the proceeds of the property. *Boese v. King*, 108 U. S. 379, 385, affirming 78 N. Y. 471."

'And in still other cases it has apparently been held that the basis is to be found in the principle that the Bankruptcy Law is paramount in the administration of insolvent estates, and that the custody of another court is inconsistent therewith and hence superseded.⁴⁰

In *re Watts*, 10 A. B. R. 113, 190 U. S. 1: "And the operation of the bankruptcy laws of the United States cannot be defeated by insolvent commercial corporations applying to be wound up under State statutes. The Bankruptcy Law is paramount, and the jurisdiction of the Federal courts in bankruptcy, when properly invoked, in the administration of the affairs of insolvent persons and corporations, is essentially exclusive. Necessarily when like proceedings in the State courts are determined by the commencement of proceedings in bankruptcy, care has to be taken to avoid collision in respect of property in possession of the State courts. Such cases are not cases of adverse possession or of possession in enforcement of pre-existing liens, or in aid of the bankruptcy proceedings. The general rule as between courts of concurrent jurisdiction is that property already in possession of the receiver of one court cannot rightfully be taken from him without the court's consent, by the receiver of another court appointed in a subsequent suit, but that rule can have only a qualified application where winding up proceedings are superseded by those in bankruptcy as to which the jurisdiction is not concurrent. Still it obtains as a rule of comity, and accordingly the receiver of the District Court brought his appointment to the knowledge of the Floyd Circuit Court and requested the delivery of the assets."

In *re Curtis*, 1 A. B. R. 444, 91 Fed. 737 (D. C. Ill.): "The object of enumerating in the National Bankrupt Act what shall constitute an act of bankruptcy is for the very purpose of specifying with certainty what estates shall be administered in the Bankrupt Court. And, in declaring that whosoever should attempt to distribute his estate by a general assignment should be adjudged a bankrupt, it is also the plain intent of the law that such person should not be permitted, after the first day of July, 1898, to do so, but, instead, such estate must be administered in the precise manner pointed out by the National Bankrupt Act.

"From this it is obvious that not only the main object of the State and Federal laws are identical, but also that they both expressly provide a manner of administering the estate of whosoever shall make a general assignment. This being the case, one must yield to the other. One must be operative, and the other inoperative. Both cannot be in full force and effect at the same time. Which remains paramount and operative cannot be in doubt. That the State law shall be suspended is now well settled, and it is therefore the opinion of this court that the proceedings under the general assignment made by the Bank of Waverly, and in the Morgan County Court, are wholly unauthorized and void."

40. *Obiter*, *Scheuer v. Book Co.*, 7 A. B. R. 390, 112 Fed. 407 (C. C. A. Ala.); *obiter*, *Leidigh Carriage Co. v. Stengel*, 2 A. B. R. 383, 95 Fed. 637 (C. C. A. Ohio); In *re Etheridge Furn. Co.*, 1 A. B. R. 115, 92 Fed. 329 (D. C. Ky.); In *re McKee*, 1 A. B. R. 311 (Jefferson County Ct. Ky.); In *re Fellerath*, 2 A. B. R. 40, 95 Fed. 121 (D. C. Ohio).

But the reasoning of such rule would apply equally to all cases of insolvency regardless of the four months' limitation. In reality, such reasoning can only be applicable to cases where the legal proceedings amount to State bankruptcy or State insolvency proceedings, which themselves are superseded in toto, and would come rather under the next division, which discusses the third exception to the main rule. It would hardly apply to mere general assignments and receiverships, except perhaps when they amount, in effect, to State bankruptcy or State insolvency proceedings.

Perhaps, on ultimate analysis, this basis is more properly reducible to the fact that such assignments and receiverships operate to create liens by legal proceedings in behalf of creditors and thus are made null and void by § 67 (c) and (f), if created within the four months period. Although such liens redound to the benefit of all creditors and not simply to a part, they are nevertheless liens by legal proceedings, quite as much as those created by creditors' bills or suits, brought in behalf of all creditors to set aside fraudulent conveyances, which are held to be clearly within § 67.⁴¹

Mauran v. Carpet Lining Co., 6 A. B. R. 739, 50 Atl. 331, 387 (Sup. Ct. R. I.): "The United States Bankruptcy Act, § 67, clause 'f,' contains this provision [quoting § 67 'f']:

"It seems to us that the word 'judgment,' as used above, is sufficiently broad to apply to the judgment of this court in appointing the receiver of the Crown Carpet Lining Co., and that the adjudication of bankruptcy against said corporation nullified and avoided the judgment of this court, and that the property held by the receiver must be turned over for administration under the bankruptcy proceedings."

Inferentially, *In re Gutwillig*, 1 A. B. R. 388, 92 Fed. 337 (C. C. A. N. Y., affirming 1 A. B. R. 78): "These provisions (§§ 67 'c' and 67 'f') manifest unmistakably the intention of Congress, not only not to permit preferences to be acquired upon the bankruptcy of a debtor when he is about to become a bankrupt, but also to annul all dispositions of his property, except to innocent purchasers, which will defeat the rights of creditors to a distribution by the instrumentalities and according to the schemes of the Bankrupt Act."

And possibly the nullification would come about rather from the provisions of § 67 "c," than from those of § 67 "f;" for proof of insolvency is essential under § 67 "f," but is not essential under § 67 "c," where the lien by legal proceedings within the four months period was "sought and permitted in fraud of the provisions of the act."⁴²

Compare reasoning *West Co. v. Lea*, 2 A. B. R. 466, 174 U. S. 590: "Under the English bankruptcy statutes (as well that of 1869 as those upon which our earlier acts were modeled), and our own bankruptcy statutes down to and including the Act of 1867, the making of a deed of general assignment was

41. *Wilson v. Parr*, 8 A. B. R. 234 (D. C. Ga.). Likewise see same underlying principle adverted to, although not distinctly announced, in *Davis v. Bohle*, 1 A. B. R. 412, 92 Fed. 325 (C. C. A. Mo., affirming *In re Sievers*, 1 A. B. R. 117). See interesting though sarcastic discussion, obiter, in *Singer v. Nat'l Bedstead Co.*, 11 A. B. R. 287 (Ct. Chancery N. J.).

42. Compare reasoning in *In re Gutwillig*, 1 A. B. R. 388, 92 Fed. 337 (C. C. A. N. Y., affirming 1 A. B. R. 78); obiter, *In re Congdon*, 11 A. B. R. 219 (D. C. Minn.). Compare *Davis v. Bohle*, 1 A. B. R. 412, 92 Fed. 325 (C. C. A. Mo.), quoted *supra*.

deemed to be repugnant to the policy of the bankruptcy laws, and, as a necessary consequence, constituted an act of bankruptcy per se. This is shown by an examination of the decisions bearing upon the point, both English and American. In *Globe Insurance Co. v. Cleveland Insurance Co.*, 14 Nat. Bankr. Reg. 311; 10 Fed. Cas., 488, the subject was ably reviewed and the authorities are there copiously collected. The decision in that case was expressly relied upon in *Re Beisenthal*, 14 Blatchf. 146, where it was held that a voluntary assignment, without preferences, valid under the laws of the State of New York, was void as against an assignee in bankruptcy, and this latter case was approvingly referred to in *Reed v. McIntyre*, 98 U. S. 513. So, also, in *Boese v. King*, 108 U. S. 379, 385, it was held, citing *Reed v. McIntyre*, that whatever might be the effect of a deed of general assignment for the benefit of creditors, when considered apart from the Bankruptcy Act, such a deed was repugnant to the object of a bankruptcy statute, and therefore was in and of itself alone an act of bankruptcy. The foregoing decisions related to deeds of general assignment made during the operation of the Bankruptcy Act of 1867, or the amendments thereto of 1874 and 1876. Neither, however, the Act of 1867, nor the amendments to it, contained an express provision that a deed of general assignment should be a conclusive act of bankruptcy. Such consequence was held to arise, from a deed of that description, as a legal result of the clause, in the Act of 1867, forbidding assignments with 'intent to delay, defraud, or hinder' creditors, and from the provision avoiding certain acts done to delay, defeat, or hinder the execution of the act."

There is no fatal weakness in the fact that all other parts of § 67 are taken up with attempts of single creditors, or creditors less than all, to get advantage over their fellows, whilst assignments and receiverships are presumably created for the equal benefit of all. Neither the principle of "*noscitur a sociis*" is violated nor that of "*in pari materia*," for § 67 is taken up with the broad subject of recovery of assets held by other courts, rather than with the narrower subject of the recovery of assets held by courts in behalf of some creditor seeking a selfish advantage.

Furthermore, the very wording of § 67 "c" avoiding liens created by legal proceedings within the four months' period where the same is "sought and permitted in fraud of the provisions of this Act," strikes precisely at such custody of the State Courts as would take away from the bankruptcy courts the entire administration of the insolvent's estate. Indeed, frequently, when the basis of the superseding of the State Court's custody under receivers and assignees has been discussed, it has been placed upon such custody being a "fraud upon the Bankruptcy Act."⁴³

Instance, *In re Congdon*, 11 A. B. R. 219, 129 Fed. 478 (D. C. Minn.): "Assignments have generally been considered frauds on the Bankruptcy Law."

Instance, *In re Slomka*, 9 A. B. R. 637, 122 Fed. 630 (C. C. A. N. Y.): "Moreover, by the Bankrupt Law, the assignment was void having been executed within four months prior to the filing of the bankruptcy petition. Such a transfer by an insolvent debtor is made with intent to hinder, delay and defraud creditors because its necessary effect is to defeat the operation of the Bankrupt

⁴³. *Obiter*, *Wilbur v. Watson*, 7 A. B. R. 55 (D. C. R. I.). Compare rulings under the act of 1867: *Ketcham v. McNamara*, 6 A. B. R. 162, 72 Conn. 709. *Boese v. King*, 108 U. S. 379. *Reed v. McIntyre*, 98 U. S. 509.

Act and the rights of creditors to such an administration of the assets of the debtor as that Act is intended to secure."

Obiter, *Singer v. Nat'l Bedstead Mfg. Co.*, 11 A. B. R. 285 (N. J. Ch.): "The debtor, other than a corporation, who undertakes to make a general assignment of his estate so that the same may be administered under a State law, is deliberately avoiding and evading the provisions of the Bankrupt Act, and is proceeding in defiance of its policy. He plainly is perpetrating a fraud on the act."

§ 1604. **Possession under General Assignments Superseded.**—Thus, the possession of the State Court under an assignment for the benefit of creditors within the four months, is superseded.⁴⁴

§ 1605. **Likewise, under State Court Receiverships.**—Likewise the possession of the State Court under receiverships within the four months period, is superseded.⁴⁵

Thus, a suit for the dissolution of a partnership instituted within the four months may be superseded.

Wilson v. Parr, 8 A. B. R. 230 (Sup. Ct. Ga.): "In such a case it is not erroneous for a superior court, which had within four months prior to the adjudication in bankruptcy appointed a receiver to take charge of and administer the assets of such partnership, to grant an application that the receiver deliver those assets to the trustee in bankruptcy."

44. *In re Gutwillig*, 1 A. B. R. 388, 92 Fed. 337 (C. C. A. N. Y.); *Davis v. Bohle*, 1 A. B. R. 412, 92 Fed. 325 (C. C. A. Mo.); *In re Sievers*, 1 A. B. R. 117, 91 Fed. 366 (D. C. N. Y.); *In re Gray*, 3 A. B. R. 647 (N. Y. Sup. Ct.); *In re Knight*, 11 A. B. R. 6, 125 Fed. 35 (D. C. Ky.); obiter, *Leidigh Carriage Co. v. Stengel*, 2 A. B. R. 383, 95 Fed. 645 (C. C. A. Ohio); *In re Fellerath*, 2 A. B. R. 40, 95 Fed. 121 (D. C. Ohio); *In re Etheridge Furn. Co.*, 1 A. B. R. 115, 92 Fed. 329 (D. C. Ky.); obiter, *In re Hirose*, 12 A. B. R. 154 (D. C. Hawaii); obiter, *In re Romanow*, 1 A. B. R. 461, 92 Fed. 510 (D. C. Mass.); impliedly, *In re Thompson*, 11 A. B. R. 720, 128 Fed. 575 (C. C. A. N. Y.).

45. *In re Knight*, 11 A. B. R. 6, 125 Fed. 35 (D. C. Ky.), where the receivership was not the basis of the adjudication but a prior assignment was the basis. *In re Watts*, 10 A. B. R. 113, 190 U. S. 1, in which case it seems to appear that perhaps the same rule would apply where the receivership or trusteeship was not the basis of the bankruptcy proceedings.

In re Brown, 1 A. B. R. 110, 91 Fed. 358 (D. C. Ore.).

Receiverships Amounting to State Bankruptcy and State Insolvency Proceedings.—For cases involving receiverships but where the receiverships amounted, in effect, to State Bankruptcy or State Insolvency proceedings, and therefore come rather under the next division, division 3 of chapter XXXII relative to the superseding of State Bankruptcy and State Insolvency proceedings; see footnote to the main proposition of this division, ante, § 1602.

Dissolution of Corporations.—For cases of receiverships in proceedings for the dissolution of corporations, see post, division 3, § 1634, and ante, §§ 150 to 159, inclusive.

Receiverships incidental to foreclosure and other equity proceedings, see ante, § 1586.

Mauran v. Carpet Lining Co., 6 A. B. R. 734, 50 Atl. 331 (R. I. Sup. Ct.): The decision in this case was based on both grounds, § 67 (f), and on the fact that the receivership amounted to State Bankruptcy or State Insolvency proceedings.

Impliedly, *In re Tyler*, 5 A. B. R. 152, 104 Fed. 778 (D. C. N. Y.); compare, obiter, *Scheuer v. Book Co.*, 7 A. B. R. 384, 112 Fed. 384 (C. C. A. Ala.). But compare, *Strohl v. Sup. Ct.*, 2 A. B. R. 92 (Sup. Ct. Wash.).

But it will not be superseded where it was instituted before the four months.⁴⁶

§ 1606. General Assignment Not Per Se Illegal nor Void but Voidable Merely.—General assignments for the benefit of creditors are valid until bankruptcy intervenes; they are not per se illegal; they are voidable, not void.⁴⁷

Randolph v. Scruggs, 10 A. B. R. 3, 190 U. S. 533: "The assignment was not illegal. It was permitted by the law of the State, and cannot be taken to have been prohibited by the Bankruptcy law absolutely and in any event. It had no general fraudulent intent. It was voidable only in case bankruptcy proceedings should be begun."

Summers v. Abbott, 10 A. B. R. 258, 122 Fed. 36 (C. C. A. Mo.): "The deed of assignment covered all the property of the bankrupts. It was honestly made for the laudable purpose of applying all the property of the debtors to the payment, ratably, of all their debts. This is conceded. No claim is made that there was a secret trust reserved for the grantor's benefit, or that there was otherwise any fraud in fact in the execution and delivery of the deed. It was not made to hinder, delay, or defraud creditors, but to pay creditors. Fraud cannot be predicated of such a deed. It constituted an act of bankruptcy, which entitled the debtors' creditors, if they saw proper to do so, to have the administration of the trust transferred from the assignee to the bankrupt court, but this is no impeachment of the honesty of the transaction; and the debtors, when adjudged bankrupts, would be entitled to their discharge, precisely as though they had made no such assignment. It is also admitted that the appellant, who was named in the deed as assignee, accepted the trust in good faith, and for the purpose of executing it according to law and the terms of the deed; and that he did execute it intelligently, successfully, and honestly, is conceded. Neither fraud in fact nor in law can be imputed to such an assignee.

"The contention of the trustee in bankruptcy is that all assignments for the benefit of creditors since the passage of the Bankrupt Act are fraudulent, and that every assignee under such a deed is a fraudulent vendee or assignee, and hence entitled to no compensation for his services. This contention is probably grounded on the assumption that it is the legal duty of an insolvent debtor who wants to apply his property to the payment of his debts to apply to the bankrupt court to be adjudged a bankrupt, and then turn his property over to the trustee of his estate in bankruptcy. But neither in the present nor any previous Bankrupt Law this country has ever had will there be found any provision making it obligatory upon a debtor to go into court and have himself adjudged a bankrupt. The Bankrupt Act declares the making of 'a general assignment for the benefit of his creditors' shall constitute an act of bankruptcy, but it nowhere declares that when the debtor has committed an act of bankruptcy he shall go into the bankrupt court and have himself adjudged a bankrupt. Many debtors who commit acts of bankruptcy struggle on and finally pay all the debts they owe, which is much more than would have been done had they gone into the bankrupt court and had themselves adjudged bank-

46. *In re Price*, 1 A. B. R. 609, 92 Fed. 987 (D. C. N. Y.).

47. *Grunsfeld Bros. v. Brownell*, 11 A. B. R. 602 (New Mex. Sup. Ct.); *In re Carver & Co.*, 7 A. B. R. 541 (D. C. N. Car.).

Contra, and that their necessary effect, is to hinder, delay and defraud creditors, see *In re Salmon & Salmon*, 16 A. B. R. 122, 143 Fed. 395 (D. C. Mo.). Also, contra, *Rumsey v. Machine Co.*, 3 A. B. R. 704, 99 Fed. 699 (D. C. Mo.).

rupts. It is open to the creditors of one who has committed an act of bankruptcy to proceed to have him adjudged a bankrupt, but it is optional and not obligatory upon his creditors to do this. As a matter of fact, thousands of debtors commit acts of bankruptcy who are never adjudged bankrupts; their creditors preferring to let their debtor administer his own estate, rather than turn it over to a bankrupt court."

In *re Chase*, 10 A. B. R. 677, 124 Fed. 753 (C. C. A. R. I.): "That there was nothing unlawful in such an assignment, but that it was merely voidable by proceedings in bankruptcy, and meritorious unless avoided, has been clearly affirmed by the Supreme Court under the prior statutes. * * *

"Nothing in these expressions of the Supreme Court declares that general assignments, honestly made, are contrary, to the policy of the bankruptcy statutes; and, on the other hand, they are declared to be in harmony therewith."

In *re Sievers*, 1 A. B. R. 117, 91 Fed. 366 (D. C. Mo., affirmed, sub nom. *Davis v. Bohle*, 1 A. B. R. 412: "It results from these views that while proceedings under the insolvency laws, as such, are now void, whether proceedings in bankruptcy follow or not, proceedings under the general assignment laws of States like Missouri, or under the common-law deed of assignment, are not void or voidable, unless proceedings in bankruptcy are subsequently instituted, and whether such is the case when an adjudication in bankruptcy follows, is now to be considered."

Obiter (being case of act of bankruptcy) In *re Hirose*, 12 A. B. R. 154 (D. C. Hawaii): "There being no insolvent laws in the Territory of Hawaii, assignments for the benefit of creditors are good, under the common law, for all purposes except against proceedings in bankruptcy instituted under the Bankrupt Act within four months of their execution.

"If under such proceedings, the respondent is declared bankrupt, the assignment becomes void and the bankrupt's property is thereby transferred to the jurisdiction of the court of bankruptcy."

Obiter (being case of act of bankruptcy) In *re Romanow*, 1 A. B. R. 461, 92 Fed. 510 (C. C. A. Mo.): "Though the assignment is an act of bankruptcy, and is avoided by the adjudication, yet it is not a void instrument, but only a voidable one and until adjudication it is valid."

But where the general assignment statute is, in effect, an insolvency statute, then the rules as to the suspension of state insolvency or bankruptcy laws will prevail.⁴⁸

In *re Curtis*, 1 A. B. R. 440, 91 Fed. 737 (D. C. Ills.): "And proceedings under it are void and not merely voidable."

§ 1607. Unless Petition Filed within Four Months, Followed by Adjudication, State Court's Custody Not Superseded.—Unless bankruptcy proceedings are instituted within the prescribed four months after an assignment or receivership and adjudication of bankruptcy follows, the bankruptcy will not operate to supersede the control of the state court over the assignment or receivership proceedings, and the state court will retain jurisdiction over the property until its administration is completed.⁴⁹

⁴⁸. In *re Smith & Dodson*, 2 A. B. R. 9 (D. C. Ind.). Compare, post, division 3, this chapter, § 1627, et seq.

⁴⁹. See cases cited under main proposition of this chapter, under the section relating to "Assignments and Receiverships Created before the Four Months," § 1594.

§ 1608. **But if Filed within Four Months and Adjudication Occurs, Assignment Void.**—But when bankruptcy intervenes within four months after a general assignment, the general assignment is void.⁵⁰

§ 1609. **Until Adjudication, Custody Not Superseded.**—Until adjudication, however, the custody of the state court cannot be superseded. The mere filing of the petition will not give jurisdiction to the bankruptcy court to supersede the state court.⁵¹

§ 1610. **Assignee or Receiver May Be Enjoined.**—The assignee or receiver may be enjoined.⁵²

Obiter, *Carling v. Seymour Lbr. Co.*, 8 A. B. R. 41, 113 Fed. 483 (C. C. A. Ga.): "While it is a general rule that a Federal court may not enjoin proceedings in a State court, an exception is made in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy. Rev. Stat., U. S., § 720. When the State court is in possession, through its receiver, of assets that it is without jurisdiction or authority to hold against a receiver or trustee appointed in bankruptcy proceedings, instead of making a peremptory order on the receiver of the State court to surrender the funds an injunction, if necessary, might be granted by the bankruptcy court to prevent the unlawful distribution of the assets, until application could be made to the State court for an order to its receiver to surrender the assets to the proper custodian. The laws of the United States being equally binding on all the courts, we cannot assume that the State court would refuse to administer them. We are not now called on to decide what course should be taken in the event of a disregard of the Bankrupt Law by the State court."

§ 1611. **May Be Ordered Summarily to Surrender Assets.**—And the assignee or receiver may, after the adjudication of bankruptcy, be required by the bankruptcy court to surrender the assets to the trustee in bankruptcy; and the assignee may be so required by summary order from the bankruptcy court.⁵³

50. See cases under main proposition, ante, § 1602.

51. Compare, inferentially, *In re Kersten*, 6 A. B. R. 517, 110 Fed. 929 (D. C. Wis.). Also, see ante, § 1600. *State ex rel. Strohl v. Sup. Ct.*, 2 A. B. R. 97 (Sup. Ct. Wash.).

52. *In re Gutwillig*, 1 A. B. R. 388, 92 Fed. 337 (C. C. A. N. Y.); *Leidigh Carriage Co. v. Stengel*, 2 A. B. R. 383, 95 Fed. 637 (C. C. A. Ohio); *West Co. v. Lea*, 2 A. B. R. 467, 174 U. S. 590; *Davis v. Bohle*, 1 A. B. R. 412, 92 Fed. 325 (C. C. A. Mo.).

Compare, analogous ruling as to custodians and Court officers in possession under nullified legal liens, ante, § 1473. Also, custodians and Court officers in possession under nullified legal liens not adverse parties, post, § 1827.

53. See post, § 1830. *In re Smith & Dodson*, 2 A. B. R. 9 (D. C. Ind.); *In re Fellerath*, 2 A. B. R. 40, 95 Fed. 121 (D. C. Ohio); *In re Thompson*, 11 A. B. R. 719, 128 Fed. 575 (C. C. A. N. Y., affirming 10 A. B. R. 242); compare, *In re Carver & Co.*, 7 A. B. R. 539, 113 Fed. 138 (D. C. N. Car.); *In re Stokes*, 6 A. B. R. 262, 106 Fed. 312 (D. C. Penn.).

Apparently contra, as to summary jurisdiction, *In re Manning*, 10 A. B. R. 497, 123 Fed. 180 (D. C. S. D.). But the facts in this case show the funds had already been disbursed as to which the summary order was sought.

Compare similar rules as to custodians and Court officers in possession under

§ 1612. **No Summary Order as to Sums Already Disbursed.**—In no event, however, may the assignee be required by summary order of the bankruptcy court, to account for (in the sense of paying⁵⁴ over the equivalent of) disbursements already made before the filing of the petition in bankruptcy.⁵⁴

In *re Klein & Co.*, 8 A. B. R. 559, 116 Fed. 523 (D. C. N. Y.): "There can be no doubt that the court acquired full jurisdiction of such of the bankrupt estate as was in the possession of or under control of the assignee when the petition was filed, but if the funds had been disbursed before that time and had passed beyond the control of the assignee, it does not seem that they formed a part of the bankrupt's estate which fell under the jurisdiction of this court, even though the assignee submitted himself to the jurisdiction with respect to his accounts."

Nor for commissions retained and spent by him before then.⁵⁵

Louisville Trust Co. v. Comingor, 7 A. B. R. 421, 184 U. S. 18, the syllabus of which reads: "An assignee for the benefit of creditors has the right to have his claims for the amount paid to counsel or retained by him on account of commissions as assignee before the bankruptcy of the assignor adjudicated in the State Court in the customary mode of proceeding, and the bankruptcy court has no jurisdiction to finally adjudicate the merits of his claims unless by his consent and then only by plenary suit."

Nor may he be required to account for disbursements made by him before the four months.⁵⁶

But probably he may be required to account for commissions retained by him after the bankruptcy.⁵⁷ And the rule is not altered because of the assignee's voluntary offer to account.⁵⁸

nullified legal liens, ante, § 1474, and under "Agents Not Adverse Parties," § 1822.

The Supreme Court in the case of *Louisville Trust Co. v. Comingor*, 184 U. S. 18, 7 A. B. R. 421, affirming *Sinsheimer v. Simonson*, 5 A. B. R. 537, is not contra, for there the assignee was claiming, as an individual, right to retain his commissions, etc.

But the assignee of a partnership will not be required to surrender the partnership property in his hands to the trustee in bankruptcy of the individual members, In *re Mercur*, 10 A. B. R. 505, 122 Fed. 384 (C. C. A. Penn., affirming 8 A. B. R. 275).

Compare, *Ludowici Tile Roofing Co. v. Penn. Inst.*, 8 A. B. R. 739 (D. C. Penn.): "A trustee of individual partners has no right to interfere with firm assets."

But the assignee of an individual partner will be required to surrender the individual assets, by summary order, to the trustee in bankruptcy of the partnership itself, on the partnership's subsequently becoming bankrupt, In *re Stokes*, 6 A. B. R. 262, 106 Fed. 312 (D. C. Penn.).

54. In *re Manning*, 10 A. B. R. 497, 123 Fed. 180 (D. C. S. Car.). See post, § 1829.

55. In *re Klein & Co.*, 8 A. B. R. 559, 116 Fed. 523 (D. C. N. Y.), in which case the court extends the rule of disbursements made even up to the time of the filing of the petition against the assignee to call him to an accounting. *Sinsheimer v. Simonson*, 5 A. B. R. 537, 107 Fed. 898 (C. C. A. Ky., affirmed sub nom. *Louisville Trust Co. v. Comingor*, 7 A. B. R. 421, 184 U. S. 18); In *re Scholtz*, 5 A. B. R. 782, 106 Fed. 834 (D. C. Iowa).

56. In *re Carver & Co.*, 7 A. B. R. 539, 113 Fed. 138 (D. C. N. Car.).

57. Inferentially, In *re Thompson*, 11 A. B. R. 720, 128 Fed. 575 (C. C. A. N. Y.).

58. In *re Klein & Co.*, 8 A. B. R. 559, 116 Fed. 523 (D. C. N. Y.).

§ 1613. **Sales by Assignee under Void Assignment.**—Sales made by the assignee under the void assignment may be set aside by the bankruptcy court for sufficient cause; probably, however, only where the state court in charge of the assignment would have had jurisdiction to set them aside.⁵⁹ Thus, the title to property sold by the assignee but not paid for, passes to the trustee.⁶⁰

But the property may not be recovered, except by plenary action.

In *re Findlay Bros.*, 4 A. B. R. 745, 104 Fed. 675 (D. C. N. Y.): "Assuming, as contended by the creditors, that the money used by the bankrupts' wives to purchase the stock, was the money paid to them by the bankrupts before the institution of bankruptcy proceedings, still under the decision of the Supreme Court in the case of *Bardes v. Bank* (178 U. S. 524, 4 Am. B. R. 163), the payment of those moneys by the wives for the stock could not be disregarded, nor could the money be retained by the trustee upon setting aside the sale, but it would have to be returned. * * * For any relief, supposing I were to grant an order setting aside the sale, a bill in equity must be filed in the State court for an accounting as respects the goods or their proceeds, to which all persons concerned in the disposition of the goods subsequent to the sale and against whom relief was sought, would be necessary parties. After this lapse of time and the various changes that have occurred, I think the prosecution of such a suit would be attended with much labor and expense, and looking at all the circumstances, I have so much doubt as respects any beneficial final result, that I think I ought not to set aside the sale except upon security given by the creditors to indemnify the trustee against any loss or expense occasioned thereby, or by the subsequent proceedings to recover assets."

§ 1614. **Assignee Has Lien upon Surrendered Assets for Expenses and Compensation.**—When the bankruptcy court takes over the assets from the state court which has been administering the assignment, the assets come over subject to a lien for the reasonable expenses and compensation of the assignee, incurred or earned while performing services beneficial to the estate and necessary to its preservation, where the assignment was bona fide.⁶¹

Randolph v. Scruggs, 190 U. S. 533; S. C., 10 A. B. R. 1: "The assignment was not illegal. It was permitted by the law of the State, and cannot be taken to have been prohibited by the bankruptcy law absolutely in every event, whether proceedings were instituted or not. * * * It seems to us that it

59. Compare, impliedly, *In re Finlay Bros.*, 4 A. B. R. 745, 104 Fed. 675 (D. C. N. Y.); impliedly, *In re Knight*, 11 A. B. R. 1, 125 Fed. 35 (D. C. Ky.).

60. *In re Knight*, 11 A. B. R. 1, 125 Fed. 35 (D. C. Ky.).

61. *Summers v. Abbott*, 10 A. B. R. 254, 122 Fed. 36 (C. C. A. Mo.); impliedly, *In re Levitt*, 11 A. B. R. 411 (D. C. Wis.). Compare, to same general effect, *In re Bussey*, 6 A. B. R. 603 (Ref. Mo.); *In re Scholtz*, 5 A. B. R. 782, 106 Fed. 834 (D. C. Iowa); *In re Pauly*, 2 A. B. R. 333 (Ref. N. Y.).

Compare, to same conclusion, *In re Klein & Co.*, 8 A. B. R. 559 (D. C. N. Y.): This decision is placed upon the ground that creditors, having permitted the assignee to go ahead and administer the estate in the insolvency court, are bound to reimburse him therefor. This might be good ground for holding those who did so permit him to proceed and therefore might be held to have assented thereto, but how about those who objected and dissented and did their best to get enough creditors together to file a petition in bankruptcy?

Compare, *In re Pattee*, 16 A. B. R. 450, 143 Fed. 994 (D. C. Conn.), where an

would be a hard and subtle construction to say, as seems to have been thought in *Bartlett v. Bramhall*, 3 Gray 257, 260, that when they were instituted they not only avoided the assignment, but made it illegal by relation back to its date, when, if they had not been started, it would have remained perfectly good."

In *re Chase*, 10 A. B. R. 677, 124 Fed. 753 (C. C. A. R. I., reversing *In re Gladding*, 9 A. B. R. 171 [Ref. R. I.] and in effect overruling *Wilbur v. Watson*, 7 A. B. R. 54): "In the present case, the claims of petitioners constituted a lien on the assets in their hands adverse to the trustee, and the portion of the statute cited appertains to nothing of that nature. * * *

"The fact that, under the circumstances, the petitioners paid the trustee the gross amount received by them, and delivered them the other assets, does not, as is clearly settled, deprive them of the right to apply to the court for payment of the sums for which they once had a lien."

§ 1615. **Assignment Must Be "General" and "Bona Fide," Not "Partial" nor "Fraudulent."**—But the assignment must be a general assignment for the equal benefit of all creditors, and not a partial nor preferential assignment, and must be bona fide, else the lien will not attach. The decisions generally qualify the doctrine by saying an assignment "honestly" made.

assignee was allowed compensation and reimbursement for what was done after bankruptcy proceedings were instituted but not for what was done before: being directed to present the latter as a "claim."

Rulings on Assignee's Claims in Bankruptcy before *Randolph v. Scruggs*.—Before the Supreme Court announced its decision in *Randolph v. Scruggs*, 190 U. S. 533; S. C., 10 A. B. R. 1, supra, there were various contrary holdings, to the effect that an assignee for the benefit of creditors was not entitled to reimbursement for expenses nor compensation as assignee incurred nor earned before the filing of the bankruptcy petition; inasmuch as they were incurred with the full knowledge that an act of bankruptcy was being committed, and that the assignment was likely to be nullified; also because the Bankruptcy Act itself limits reimbursement for the preservation of the estate to expenses incurred subsequently to the filing of the petition.

In *re Peter Paul Book Co.*, 5 A. B. R. 105, 104 Fed. 786 (D. C. N. Y.); In *re Gilblom & King*, 2 N. B. N. & R. 60 (Ref. Ohio); In *re Mays*, 7 A. B. R. 764 (D. C. W. Va.); In *re Stearns v. Flick*, 4 A. B. R. 723, 103 Fed. 921 (D. C. Ohio); In *re Tatem, Mann & Co.*, 7 A. B. R. 52, 112 Fed. 50 (D. C. N. Car.); *Wilbur v. Watson*, 7 A. B. R. 54, 111 Fed. 493 (D. C. R. I.). In this connection, see *In re Gladding*, 9 A. B. R. 171 (Ref. R. I., reversed by C. C. A. sub nom. *In re Chase*, 10 A. B. R. 677, 124 Fed. 753 (C. C. A. R. I.). Also, see *In re Kingman*, 5 A. B. R. 251 (Ref. Mass.).

But even before the Supreme Court's decision in *Randolph v. Scruggs* there were various holdings to the same effect: In *re Bussey*, 6 A. B. R. 603 (Ref. Mo.); In *re Schlotz*, 5 A. B. R. 782, 106 Fed. 834 (D. C. Iowa); In *re Klein & Co.*, 8 A. B. R. 559, 116 Fed. 523 (D. C. N. Y.); In *re Pauly*, 2 A. B. R. 333 (Ref. N. Y.).

However, it was held that such assignee should be allowed to prove his claim as a general claim against the estate and be allowed to share in the dividends therefrom the same as any other agent to whom the bankrupt before bankruptcy might have entrusted his property for care and distribution. In *re Gilblom & King*, 2 N. B. N. & R. 60 (Ref. Ohio); In *re Mays*, 7 A. B. R. 764 (D. C. W. Va.); impliedly, In *re Tatem, Mann & Co.*, 7 A. B. R. 52, 112 Fed. 50 (D. C. N. Car.).

Year's Limitation for Proof of Claims Does Not Apply to Assignee's Lien.—The assignee's claim is not a claim within the meaning of § 57 (n) prohibiting proofs of claims after the expiration of a year from the date of adjudication; nor a "debt," as defined by § 1, In *re Levitt*, 11 A. B. R. 411 (D. C. Wis.).

In *re Chase*, 10 A. B. R. 677, 124 Fed. 753: "No criticism is made of the terms of the assignment nor any suggestion that it was not framed in all respects for the advantage of all the creditors."

Summers v. Abbott, 10 A. B. R. 254, 122 Fed. 36 (C. C. A. Mo.): "To prevent misapprehension it is proper to say that this case has none of the odious features about it that sometimes crops out in cases where insolvents make deeds of assignment for the professed benefit of their creditors, but which are in fact made to embarrass and defraud them, and where the assignee is a willing instrument of the fraudulent debtor."

Randolph v. Scruggs, 10 A. B. R. 1, 190 U. S. 533: "The assignment has no general fraudulent intent; mere constructive fraud in an assignment for the equal benefit of all creditors is not a bar to the assignee's receiving compensation, though the case would be different if the assignee were a party to actual fraud."

In *re Harson Co.*, 11 A. B. R. 516 (Ref. R. I.): "In all three of the above cases it is to be noted, however, that the assignment was for the equal benefit of all creditors, while the question now before us is whether an assignment which was for the benefit only of such creditors as chose to assent to receive in full satisfaction, whatever the assignee paid them, is on the same footing. The assignee contends that this was not a preferential assignment. But that an assignment which is so drawn is preferential seems to be the settled law even where such an assignment is held good."

When will the court decide the assignment is not within the rule because not "honestly" made? One case, *In re Congdon*, 11 A. B. R. 219 (D. C. Minn.) held that, under the circumstances of that case, the assignment was fraudulent, the bankrupt being left in charge of his store, to run it, on a salary, under an agreement that the stock should be replenished from time to time; in addition to which the assignment deed itself was peculiar; and, finally, all parties knew bankruptcy proceedings were inevitable.

It must not be partial nor preferential.⁶² But that the assignment provides, in accordance with the state law, permission that only those may participate in its benefits who consent to the debtor's release from his remaining debts, would not necessarily make it fraudulent.⁶³

§ 1616. Receivers Likewise Entitled to Lien Where Receiverships Nullified by Bankruptcy.—The same rule applies in cases of receiverships and trusteeships rendered void by subsequent bankruptcy proceedings under the Amendment of 1903 making such receiverships and trusteeships acts of bankruptcy; provided the receiver or trustee were appointed for the general benefit of all creditors.⁶⁴

In *re Zier & Co.*, 15 A. B. R. 648, 142 Fed. 102 (C. C. A. Ind., affirming 11 A. B. R. 527): "The bankruptcy jurisdiction when properly invoked, supercedes the prior proceedings in the State court for winding up the corporation,

^{62.} In *re Harson Co.*, 11 A. B. R. 516 (Ref. R. I.). Compare, *In re Wertheimer*, 6 A. B. R. 187 (Ref. N. Y.).

^{63.} Compare, analogously, *Patty-Joiner Co. v. Commings*, 4 A. B. R. 272 (C. C. A. Tex.).

^{64.} Compare, inferentially, *In re Zier & Co.*, 11 A. B. R. 527 (D. C. Ind.). Compare for case of trusteeship since 1903, but where question not involved, *In re Hercules Atkins Co.*, 13 A. B. R. 39, 133 Fed. 813 (D. C. Penn.).

'as to which the jurisdiction is not concurrent' (In re Watts and Sachs, 190 U. S. 1, 27, 10 Am. B. R. 113), so that the rule upheld in *Randolph v. Scruggs*, supra, in reference to a voluntary assignment for the benefit of creditors, is equally applicable to this claim. Such claim is allowable only upon equitable considerations for services from which the estate in bankruptcy has derived benefit, and to the extent only that they were beneficial in fact. The rule thus governing the claim was recognized by the District Court in its conclusions, and the order of reversal and disallowance rests primarily on the finding of fact that the services 'were not beneficial to said estate.' Upon the record certified by the referee, and without reference to other matters for the consideration of which error is assigned, we are constrained to the opinion that the services embraced in the claim were so largely directed to delaying and obstructing rightful proceedings in bankruptcy that they cannot be treated as beneficial to the estate, and are without equity for support of the claim to be compensated out of the estate in bankruptcy.

"Institution of the suit against the corporation was plainly within the rights of the plaintiffs therein and their attorneys, the appellants. So the application for and appointment of a receiver to administer the assets and rightful possession thereunder up to the intervention of bankruptcy proceedings are not questionable."

Compare, analogously, *In re Chase*, 10 A. B. R. 683, 124 Fed. 753 (C. C. A. R. I.): "But neither the present statutes of bankruptcy nor any prior act do, or did, unqualifiedly denounce an assignment like that at bar, intended for the equal distribution of the property of a failing debtor among creditors, without any attempt to defraud or embarrass persons to whom he is under liability. In this respect, assignments at common law stand precisely as do proceedings for the appointment of receivers by Federal courts or State courts, which, under the act to amend the Act of July 1, 1898, approved February 5, 1903, become a sufficient basis for an involuntary petition. In § 2 of that act (32 Stat. 797, ch. 487), the making a general assignment and an application for a receiver, under the circumstances named therein, are classed together; so that there is nothing in the terms of the present statutes of bankruptcy to justify a claim that an assignment for the benefit of creditors, like that at bar, is any more in fraud of the statutes, or denounced by them, than the action of a State tribunal, which may be one of the highest authority, in proceeding on an honest application for a receiver. It can be no more reprehensible to make an assignment in favor of creditors, free from any attempt to embarrass them and from any dishonest purpose, than to apply to a Federal court or State court for the appointment of a receiver; and the bankruptcy statutes do not seek to punish one more than the other."

Conversely, where no benefit resulted therefrom.⁶⁵

Even before the amendment making receiverships acts of bankruptcy was passed, such lien was recognized.⁶⁶

Inferentially, *Wilson v. Parr*, 8 A. B. R. 230, 115 Ga. 629: "The services of the receiver and his attorneys inured to the benefit of the creditors of the bankrupt. They were rendered under the order of the State court, and the fund in

⁶⁵. *In re Allison Lumber Co.*, 14 A. B. R. 78 (D. C. Ga.); *In re Zier & Co.*, 11 A. B. R. 527 (D. C. Ind.).

⁶⁶. *Hanson v. Stephens*, 11 A. B. R. 172 (Sup. Ct. Ga.); *In re Rogers*, 8 A. B. R. 723 (D. C. Ga.). Compare, *In re Lengert Wagon Co.*, 6 A. B. R. 535, 110 Fed. 927 (D. C. N. Y.); *Mauran v. Carpet Lining Co.*, 6 A. B. R. 734 (R. I. Sup. Ct.).

that court was the result of the services of the receiver and his attorneys acting under the orders of the court, and ought to be paid. As this fund in any court would be properly chargeable with such costs and expenses, and as the services of both the receiver and the attorneys in the original equitable petition were concluded by the order of transfer, there existed no reason why, before the transfer was made, the expenses of raising the fund transferred should not be paid."

At least wherever the assets already had been converted into money and the court appointing the receiver or trustee had made the allowance before ordering the fund turned over to the bankruptcy court.⁶⁷

§ 1617. Likewise, Mortgagees in Possession under Mortgage Executed for Benefit of All Creditors Assenting.—And the same rule would perhaps apply to mortgagees in possession under a mortgage executed for the benefit of all creditors assenting thereto.⁶⁸

§ 1618. Also, Attaching Creditors Where Attachment Lien Preserved for Benefit of Estate.—It has also been held proper to allow attorney's fees and costs, to creditors who had, prior to bankruptcy, levied an attachment, as to which an unfiled or unrecorded instrument was void, the attachment lien being itself void as against the trustee in bankruptcy, but being preserved for the benefit of the estate,⁶⁹ in order that the property affected by the unfiled instrument might be brought into the estate.

But it is difficult to see any more reason for reimbursing such levying creditors than for reimbursing any other creditors who have sought to gain advantage by levy and have had their efforts come to naught through the intervention of bankruptcy; the attachment not having been brought for the benefit of all.

§ 1619. Where Attachment Really for Benefit of All, Creditor Entitled to Reimbursement.—Where, however, an attachment suit has in reality been brought for the benefit of all, the creditor may be entitled (although not in every State nor in every case) to reimbursement of his costs and expenses. Thus, where the state statute provides for such priority in cases of subsequent sequestrations by receivers, assignees, etc., the same priority may be allowed under § 64 (b) (5).⁷⁰

Again, where property which had been concealed or transferred by the

67. *Wilson v. Parr*, 8 A. B. R. 230, 115 Ga. 629 (Sup. Ct. Ga.).

68. *In re Hutchinson Co.*, 14 A. B. R. 518 (Ref. Mich.).

69. *Receivers v. Staake*, 13 A. B. R. 281, 133 Fed. 717 (C. C. A. Va.), affirmed without, however, adverting to this point, sub nom. *First Nat. Bk. v. Staake*, 15 A. B. R. 639, 202 U. S. 141. See ante, § 1490, and post, § 2018.

But a claim for attachment costs where the attachment lien is vacated by the adjudication and not preserved for the benefit of the estate is not a lien upon the property coming into the bankruptcy court nor is it entitled to priority of payment, ante, § 1485.

70. See post, § 2018. *In re Goldberg*, 16 A. B. R. 523, 144 Fed. 566 (D. C. Me.); *In re Lewes*, 4 A. B. R. 51, 99 Fed. 935 (D. C. Mass.). Obiter, *In re Daniels*, 6 A. B. R. 700, 110 Fed. 745 (D. C. R. I.).

bankrupt, has been recovered through the efforts of the creditor, the creditor may be entitled to reimbursement, under § 64 (b) (2), though such efforts be taken in the form of an attachment, emergency existing.

§ 1620. **Whether Extent of Lien May Be Fixed by State Court before Surrender.**—It has been held impertinence for the State Court to fix the amount of the lien upon the assets in favor of its own officers, at least in state insolvency proceedings suspended by the Bankrupt Act; and that the extent and validity thereof should be left to the bankruptcy court for determination.

In re Rogers, 8 A. B. R. 723 (D. C. Ga.): "The trustee either has or has not the right to the possession of the assets of the bankrupt in the hands of the temporary receiver of the State court. * * * If, then, the proceedings are suspended, as is clearly the effect of the bankruptcy law (this being a State insolvency proceeding) the State court has no right or authority to fix the fees of its receiver having charge of the property and less right to refuse to turn over the same until those fees have been paid by the proper officer of the Bankrupt court. * * * Should such a precedent be recognized, it may not be impossible that in a large number of bankruptcy cases the assets might suffer from a mulcting process of this sort before they reach the hands of the officers appointed under the act of Congress to administer and distribute them."

And there is no good reason for applying a different rule where the custody of the state court is under nullified legal liens, assignments and receiverships, unless perhaps under the doctrine that as to the insolvency proceedings the court was absolutely without jurisdiction in any event, whilst in the other cases the state court's jurisdiction was good until bankruptcy intervened.

And it was held not proper for the state court to make the order turning over the assets conditional on the payment of the receivership expenses, where the assets had not been converted into money, and that, under such circumstances, the extent and validity of the lien was to be left to the discretion of the bankruptcy court.⁷¹

Hanson v. Stephens, 11 A. B. R. 172 (Sup. Ct. Ga.), wherein the court says: "While a fund raised by a sale of the property of an insolvent debtor, through the medium of a receiver under the orders of a State court, may, on the application of a trustee, appointed after an adjudication of such debtor as a bankrupt, for a transfer of such fund in the State court to him, be charged with the cost and expenses of converting the property of the debtor into cash, yet after the property of a debtor has been seized under the order of a State court and placed in the hands of a temporary receiver, and after the adjudication of such person as a bankrupt, and before the conversion of his property into cash has been made by the receiver, the trustee, on application to the State court, is entitled to the possession of the property for the purpose of being sold and administered in the court of bankruptcy; and it is error on the part of the judge of the State court to order the transfer of such property to the trustee on condition that the fees for the attorneys and receiver shall be first paid.

"Where no fund is in the hands of the receiver, out of which such payments

71. Contra, Wilson v. Parr, 8 A. B. R. 230, 115 Ga. 629 (Sup. Ct. Ga.).

may be made, the persons claiming to be paid out of the property must be remitted to the bankruptcy court for the adjudication and establishment of their respective claims."

Contra, *Mauran v. Carpet Lining Co.*, 6 A. B. R. 734 (R. I. Sup. Ct.): "In so doing, however, the question of procedure arises, whether the expenses already incurred shall be first paid out of the fund, or whether the whole fund shall be surrendered and our receiver sent to the Federal court to ask for his fees and expenses. We think that the former is the proper course for several reasons.

"A receiver is an officer of the court, holding property under its order for the benefit of the party entitled to it. All courts therefore hold that the receiver should be paid from the fund, as a part of the expense of the proceeding. It would greatly embarrass courts in securing good receivers if this rule should not be adhered to. They should not be subjected to the uncertainty, inconvenience and delay of awaiting other proceedings and of seeking their pay from other courts."

It has also been held improper for the state court to order the sale of the assets for the purpose of raising the money to pay such charges.

But at all event, in cases where the assets were in the State bankruptcy or insolvency court, the extent and validity of the lien must be left to the United States bankruptcy court for determination;⁷² and it will be considered an impropriety, which may be disregarded, for the state court to attempt to fix them.⁷³

§ 1621. Only Expenses and Compensation for Services Beneficial to Estate and Reasonable, Allowed.—Only such expenses and compensation as were incurred, or earned, in performing services beneficial to the estate or necessary to its preservation, and that are reasonable in amount, may be allowed as part of the lien.⁷⁴

Randolph v. Scruggs, 10 A. B. R. 1, 190 U. S. 533: "We are not prepared to go further than to allow compensation for services which were beneficial to the estate. Beyond that point, we must throw the risk of his conduct on the assignee, as he was chargeable with knowledge of what might happen."

In *re Chase*, 10 A. B. R. 683, 124 Fed. 753 (C. C. A. R. I.): "From the time the assignor declares his insolvency by making an assignment, his property must be held equitably for the benefit of his creditors, and he can do nothing which will embarrass or prejudice them in realizing therefrom, whether the result is that they are administered under the common law assignment or ultimately go into the hands of a trustee in bankruptcy. Therefore, in no event can he impress on them a lien for any amount of compensation arbitrarily agreed on. Anything in this direction beyond what would be reasonable and equitable would be contrary to the policy of the law, and would be declared invalid by the court having jurisdiction of the trust if the assignment

⁷² In *re Rogers*, 8 A. B. R. 723 (D. C. Ga.); In *re Allison Lumber Co.*, 14 A. B. R. 78 (D. C. Ga.).

⁷³ In *re Rogers*, 8 A. B. R. 723 (D. C. Ga.).

⁷⁴ In *re Zier & Co.*, 15 A. B. R. 648, 142 Fed. 102 (C. C. A. Ind., affirming 11 A. B. R. 527), quoted *supra*, § 1616; impliedly, In *re Allison Lumber Co.*, 14 A. B. R. 78, 137 Fed. 643 (D. C. Ga.).

is worked out at common law, or by the court in bankruptcy if the property finally comes under its control. * * *

"Therefore, in the present case, the District Court should ascertain and determine whether, under all the circumstances, the petitioners are equitably entitled to their disbursements, or any part thereof, reasonable allowances for their services, and protection against outstanding claims for rent."

Thus, attorney's services to an assignee that are beneficial to the estate, rendered before the adjudication in bankruptcy, may form part of the assignee's lien upon the assets turned over, where the assignment itself provides for priority of expenses out of the assigned property.⁷⁵

But attorney's services in preparing the deed of assignment are not entitled to a place in the lien upon the assets thus turned over;⁷⁶ though they may be proved as a general claim against the bankrupt's estate.⁷⁷ Nor may attorney's services rendered the assignee or assignor in resisting adjudication of bankruptcy be allowed;⁷⁸ nor attorney's services rendered the debtor or the receiver in the state court in avoiding bankruptcy proceedings, really in behalf of preferred creditors, although ostensibly for the debtor, or in resisting adjudication in bankruptcy.

In *re Zier & Co.*, 11 A. B. R. 527 (D. C. Ind., affirmed 15 A. B. R. 648): "The reason of this rule is that general creditors should pay for services which have actually benefited them. It was never intended to make them pay for unsuccessful assaults upon their interests as well as resistance to those assaults. The suit in the Floyd Circuit Court was collusive and fraudulent. It was fraudulent as against general creditors in bankruptcy, because it permitted the manager of an insolvent corporation to take from its assets a sum equal to one-third of them, and to apply that sum up on the claims of particular creditors. Its natural and inevitable result was to uphold and protect fraudulent preferences, while the bankruptcy proceedings were in the interest of all the creditors alike. Watts, as attorney for the receiver of the Floyd Circuit Court, aided in every possible way in the promotion of this result."

In *re Zier & Co.*, 15 A. B. R. 648, 142 Fed. 102 (affirming 11 A. B. R. 527): "Nor is it material to the present issue that the Supreme Court (*In re Watts and Sachs*, *supra*) held that these parties 'entertained the conviction in good faith that the custody of the State court could not be lawfully interfered with by the bankruptcy court,' and were acting erroneously, but not in contempt of the District Court, and so discharged them from the adjudications of that court for contempt. The services of the appellants were persistent in obstructing both resort to and proceedings in bankruptcy, and caused injury and expense to the estate which were unaffected by their motives; so that their incidental service in making sundry collections and negotiating settlements is not entitled to independent recognition for allowance."

§ 1622. Others' Rights, to Be Worked Out Through Assignee or Receiver.—And the rights of the assignee's attorney and others serving

75. *Randolph v. Scruggs*, 190 U. S. 533; S. C., 10 A. B. R. 1; *In re Byerly*, 12 A. B. R. 186, 128 Fed. 637 (D. C. Penn.).

76. *Randolph v. Scruggs*, 190 U. S. 533; S. C., 10 A. B. R. 1.

77. *Randolph v. Scruggs*, 190 U. S. 533; S. C., 10 A. B. R. 1.

78. *Randolph v. Scruggs*, 190 U. S. 533; S. C., 10 A. B. R. 1.

the assignee or receiver, in the bankrupt fund are to be worked out through the assignee or receiver, and by virtue of the latter's lien; and such attorney or other person has no independent standing in the bankruptcy court.

Randolph v. Scruggs, 10 A. B. R. 1, 190 U. S. 533: "The more difficult question is how to deal with the services rendered to the voluntary assignee. The claim for them must be worked out through the assignee, and cannot be put higher than his claim for allowance, supposing that they had been paid."

In *re Byerly*, 12 A. B. R. 186, 128 Fed. 637 (D. C. Pa.): "As pointed out in *Randolph v. Scruggs*, the claim as is now presented must be worked out through the accountant in his former capacity as assignee and cannot be put any higher than an allowance to him, for necessary counsel fees paid."

Thus, the attorney may not except to the referee's ruling thereon nor prosecute error nor appeal.⁷⁹ So, also, must be worked out the rights of parties furnishing material to the State receiver; and lienholders thereon will have no rights in the bankruptcy court unless the property can be shown to have come into the custody of that court.⁸⁰

§ 1623. How Assignee's or Receiver's Rights to Be Presented.—The assignee or receiver in the State court should present his claim to the bankruptcy court by way of a petition, or perhaps deposition for proof of a secured debt, like any other party claiming a lien on a fund in the custody of the bankruptcy court.⁸¹

§ 1624. No Liability on Assignee's Bond on Superseding of State Court's Custody, to Those Creditors Who Participate in Defeating Assignment.—The assignee's bond is not liable to those who defeat the assignment. Sureties on the bond are not liable for the failure of their principal to account for assets in his hands. The bond was not intended for the benefit of those who attack and defeat the trust.⁸²

DIVISION 3.

STATE BANKRUPTCY OR INSOLVENCY PROCEEDINGS SUPERSEDED BY BANKRUPTCY.

§ 1625. Third Exception to Rule That State Court Retains Jurisdiction if First to Obtain Custody.—The third exception to the rule that the state court retains jurisdiction if first in possession of the res, is where the property at the time of the bankruptcy is in the custody of a state court under state insolvency or state bankruptcy

79. In *re Byerly*, 12 A. B. R. 186, 128 Fed. 637 (D. C. Penn.).

80. In *re Allison Lumber Co.*, 14 A. B. R. 78 (D. C. Ga.).

81. In *re Allison Lumber Co.*, 14 A. B. R. 78 (D. C. Ga.).

82. *Brandt on Suretyship*, § 128.

proceedings, or proceedings amounting to such, in which event such proceedings are superseded by the federal bankruptcy proceedings.⁸³

In *re Kersten*, 6 A. B. R. 519, 110 Fed. 929 (D. C. Wis.): "It is true that jurisdiction over the estate of a bankrupt is essential for its due administration under the provisions of the Act of Congress. * * * The showing in this record of the action pending in the Circuit Court of Calumet County, and of its custody of the estate, through a receiver, under the provisions of the State statute. * * * If such action involves administration of the estates of debtors within the statute, in the nature of insolvency proceedings it cannot be doubted that jurisdiction to that end is suspended when an adjudication of bankruptcy intervenes and becomes paramount under the Bankruptcy Act adopted by Congress in conformity to the powers reserved in the constitution."

In *re Lengert Wagon Co.*, 6 A. B. R. 535, 110 Fed. 927 (D. C. N. Y.): "But the proceedings in the State Court is one incident to the insolvency of the corporation, and it seems to be well settled that the Bankruptcy Act gives exclusive jurisdiction to the United States courts in such matters, where proceedings are properly instituted, and ousts the State courts of all jurisdiction with respect to the possession or distribution of insolvent estates."

Inferentially, In *re Watts*, 10 A. B. R. 113, 190 U. S. 1: "And the operation of the bankruptcy laws of the United States cannot be defeated by insolvent commercial corporations applying to be wound up under State Statutes. The Bankruptcy Law is paramount, and the jurisdiction of the Federal courts in bankruptcy, when properly invoked, in the administration of the affairs of insolvent persons and corporations, is essentially exclusive. Necessarily when like proceedings in the State courts are determined by the commencement of proceedings in bankruptcy, care has to be taken to avoid collision in respect of property in possession of the state courts. Such cases are not cases of adverse possession or of possession in enforcement of pre-existing liens, or in aid of the bankruptcy proceedings. The general rule as between courts of concurrent jurisdiction is that property already in possession of the receiver of one court cannot rightfully be taken from him without the court's consent, by the receiver of another court appointed in a subsequent suit, but that rule can have only a qualified application where winding up proceedings are superseded by those in bankruptcy as to which the jurisdiction is not concurrent."

Potts v. Smith Mfg. Co., 12 A. B. R. 392, 25 Pa. Superior Ct. 209: "The Pennsylvania Act of June 4, 1901, relating to insolvency is suspended by reason of the existence of the Federal Bankrupt Act of July 1, 1898, and does not become operative as to the persons and subjects to which the Federal act applies."

⁸³. *Mauran v. Carpet Lining Co.*, 6 A. B. R. 734 (R. I. Sup. Ct.); In *re Storck Lbr. Co.*, 8 A. B. R. 86, 114 Fed. 860 (D. C. Md.); In *re Smith & Dodson*, 2 A. B. R. 9 (D. C. Ind.); *Herron Co. v. Superior Court*, 8 A. B. R. 493 (Sup. Ct. Calif.); *Wescott v. Berry*, 4 A. B. R. 265, 45 Atl. 352 (Sup. Ct. N. H.); *Carling v. Seymour Lbr. Co.*, 8 A. B. R. 36, 113 Fed. 483 (C. C. A. Ga., reversing In *re Macon Lbr. Co.*, 7 A. B. R. 66); *Ketcham v. McNamara*, 6 A. B. R. 163, 72 Conn. 709; *Parmenter Mfg. Co. v. Hamilton*, 1 A. B. R. 41 (D. C. Mass.); In *re Bruss-Ritter Co.*, 1 A. B. R. 59, 90 Fed. 651 (D. C. Wis.); In *re Etheridge*, 1 A. B. R. 115, 92 Fed. 329 (D. C. Ky.); In *re McKee*, 1 A. B. R. 311 (D. C. Ky.); *Littlefield v. Gray*, 8 A. B. R. 409, 52 Atl. 925 (Me.); In *re F. A. Hall Co.*, 10 A. B. R. 96 (D. C. Conn.); In *re Curtis*, 1 A. B. R. 440, 91 Fed. 737 (D. C. Ills.); *Singer v. Nat'l Bedstead Mfg. Co.*, 11 A. B. R. 276 (N. J. Ch.); *Old Town Bank v. McCormick*, 10 A. B. R. 768, 96 Md. 341; *obiter*, In *re Salmon & Salmon*, 16 A. B. R. 131, 143 Fed. 395 (D. C. Mo.).

§ 1626. **Basis of Supersedece, Paramount Authority Conferred by Constitution, and Necessary Implication from § 70.**—The superseding of State Bankruptcy and State Insolvency proceedings comes about from the fact that the Constitution of the United States in Article 1, § 8, authorizes Congress "to establish * * * uniform laws on the subject of bankruptcies throughout the United States;"⁸⁴ (and that § 71 of the original Act [since stricken out on Amendment], providing that "Proceedings commenced under State Insolvency laws before the passage of this Act shall not be affected by it," necessarily implies the superseding of all other classes of state insolvency proceedings than those expressly excepted).

Potts v. Smith Mfg. Co., 12 A. B. R. 392, 25 Pa. Super. Ct. 209: "The Federal Courts have applied this rule to the subject of bankruptcies, and have held that when Congress has legislated upon the subject by the enactment of a bankrupt law the power of the States is controlled and suspended."

Mauran v. Carpet Lining Co., 6 A. B. R. 737 (R. I. Sup. Ct.): "The plenary and paramount power of Congress to establish uniform laws on the subject of bankruptcies throughout the United States," says Hall, J., in *In re Deposit and Savings Inst.*, Fed. Cas., No. 12, 211, p. 141, 'is given in express terms by the Constitution of the United States. It is therefore very clear that when Congress has exercised the power thus conferred their action must necessarily control or limit the exercise of the power of the States over the same subject matter; and that whenever any State legislation, or any action of the State courts, comes practically into actual conflict with the proper execution of the laws of Congress, constitutionally passed under such grant of power, State legislation and the jurisdiction and action of the State courts must yield to the paramount authority of the national government.'

"The object and intent of the national bankruptcy law is to place the administration of the affairs of insolvent persons and corporations exclusively under the jurisdiction of the Federal courts sitting as courts of bankruptcy; and the enactment of the national bankrupt law now in force suspended all action and proceedings under State insolvent laws not commenced before the passage of the national Bankruptcy Act, at least in all cases provided for by such Bankruptcy Act. In *re Merchants' Ins. Co.*, 3 Biss. 162, 6 Nat. Bankr. Reg. 43, Fed. Cas. No. 9, 441; U. S. Bankruptcy Act, § 70, last clause."

Herron Co. v. Superior Ct., 8 A. B. R. 493 (Sup. Ct. Calif.): "The provisions in the Constitution of the United States conferring upon Congress the power 'to establish uniform laws on the subject of bankruptcies throughout the United States,' of necessity makes any act of Congress pass upon that subject the supreme law of the land, and it was at a very early day determined that the effect of such action of Congress is to suspend and supersede the operation of any State law of insolvency whenever there is any conflict between the two. There can be no concurrent jurisdiction in the two sovereignties over the same subject, and, as the people of the several States have yielded to the United States the power to enact laws upon this subject, it follows that when the United States has enacted a law the power of the State to enforce its own

⁸⁴. In *re Storck Lumber Co.*, 8 A. B. R. 86, 114 Fed. 860 (D. C. Md.); In *re Watts*, 10 A. B. R. 113, 190 U. S. 1; In *re Bruss-Ritter Co.*, 1 A. B. R. 59, 90 Fed. 651 (D. C. Wis.); In *re Etheridge Furn. Co.*, 1 A. B. R. 115, 92 Fed. 329 (D. C. Ky.); In *re McLee*, 1 A. B. R. 313 (D. C. Ky.).

law upon that subject, whether it be similar or different, must yield to what is the supreme law of the land."

Wescott v. Berry, 4 A. B. R. 265, 45 Atl. 352 (Sup. Ct. N. H.): "The power of the several States to enact insolvency laws is subject to the power of Congress to establish 'uniform laws on the subject of bankruptcies throughout the United States.' Accordingly a general bankruptcy act suspends State insolvency laws from the time it goes into effect. * * * The provision that 'proceedings commenced under State insolvency laws before the passage of this act shall not be affected by it' seems conclusive evidence that this was not the intention of Congress; for the provision that this act shall not affect proceedings begun under the State law before its passage necessarily implies that no proceedings can be brought under State insolvency laws after that date.

Carling v. Seymour Lumber Co., 8 A. B. R. 36, 113 Fed. 483 (C. C. A. Ga., reversing *In re Macon Lbr. Co.*, 7 A. B. R. 66): "The Constitution limits the power of a State to legislate on this subject, for it is not permitted to so legislate as to impair the obligation of contracts. U. S. Const., art. I, § 10. This act is clearly a State insolvency law, within the power of the State to enact when the Congress has not exercised its power to pass a uniform bankrupt law. The administration of the estates of insolvents by the State courts under this statute would be inconsistent with the exclusive jurisdiction of the courts of bankruptcy under the bankrupt law. The passage of the bankrupt law by Congress, therefore suspended the operation of the State statute. *Sturges v. Crowninshield*, 4 Wheat. 122-186; *Tua v. Carriere*, 117 U. S., 201-210; *Butler v. Gorely*, 146 U. S. 303-314."

Ketcham v. McNamara, 6 A. B. R. 163, 72 Conn. 709: "The Constitution of the United States gives Congress power to establish uniform laws on the subject of bankruptcies throughout the United States. At the date of the assignment to the plaintiff such laws had been established. They covered, so far as respects the rights of the parties to the case at bar, the same field previously occupied by the insolvent laws of this State, and consequently they superseded them. * * *

The Act of 1898 also differs from that of 1867 in that it makes direct reference to its effect upon State insolvent laws. Its concluding provision is that 'proceedings commenced under State insolvency laws before the passage of this act shall not be affected by it.' The necessary implication is that any such proceedings commenced after the passage of the act are affected by it."

Parmenter Mfg. Co. v. Hamilton, 1 A. B. R. 41 (D. C. Mass.): "The only saving clause affecting the jurisdiction of the State Courts provides for cases commenced in those courts before the passage of the act.

"The plain implication is that proceedings commenced in the State court after the passage of the act are unauthorized. This is in accordance with the earlier language giving the statute full force and effect from the time of its passage, except that the filing of petitions is to be postponed for a short time.

"We are of opinion that the language was chosen to make clear the purpose of Congress that the new system of bankruptcy should supersede all State laws in regard to insolvency from the date of the passage of the statute."

§ 1627. State Bankruptcy and Insolvency Laws Not Prohibited.—

This constitutional provision does not prohibit the states enacting state bankruptcy laws.⁸⁵

⁸⁵ *Herron Co. v. Superior Ct.*, 8 A. B. R. 493 (Sup. Ct. Calif.); *Oldtown Bk. v. McCormick*, 10 A. B. R. 768, 96 Md. 341.

Sturges v. Crowninshield, 4 Wheat. (U. S.) 122: "This establishment of uniformity is perhaps incompatible with State legislation on that part of the subject to which the act of Congress may extend. * * * It does not appear to be a violent construction of the constitution, and is certainly a convenient one, to consider the power of the States, as existing over such cases as the laws of the Union may not reach; but, be this as it may, the power granted to Congress may be exercised or declined, as the wisdom of that body shall decide. If, in the opinion of Congress uniform laws concerning bankruptcies ought not to be established, it does not follow that partial laws may not exist, or that State legislation on the subject must cease. It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the States. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the States."

Potts v. Smith Mfg. Co., 12 A. B. R. 392, 25 Pa. Supr. Ct. 209: "It is not contended that the power vested in Congress by the Constitution of the United States is exclusive of that of the States, and that there remains no power in the latter to legislate upon the subject. It is an established doctrine that the powers granted to Congress are only exclusive of the powers upon the same subject existing in the States when an exclusive power is expressly delegated to Congress, or there is such incompatibility in the exercise of it by the States as to produce the necessary conclusion that it is exclusive in Congress. Where there is no such exclusive grant to Congress, or such incompatibility, concurrent power remains with the States. Where, however, in the case of concurrent powers Congress has exercised its powers on a given subject, the control of the State over that subject is by such action of Congress prohibited. 1 Kent's Com. 390."

Singer v. Nat. Bedstead Co., 11 A. B. R. 278 (N. J. Ch.): "A more or less indefinite, and I think misleading, notion has sometimes been expressed that the Constitution has committed to Congress the whole subject of bankruptcy and insolvency for appropriate legislation, and that therefore whenever Congress passes a general bankrupt law, which it has done four times, each time naming, it a 'uniform system of bankruptcy,' all power on the part of the States to legislate upon the subject of bankruptcy or insolvency is immediately suspended. The premise may be deemed to be correct, but it seems to me that the conclusion is entirely erroneous. Congress is not obliged to legislate on the whole subject of bankruptcy, it may deal with only one or several parts. It is the enactment by Congress of a law applicable to a particular case which suspends any State law which otherwise would be applicable to that case. If every case of bankruptcy or insolvency were within the operation of a National Bankrupt Act, then no possible State law on the subject of bankruptcy or insolvency would have any vigor, but every such law would ipso facto be suspended."

Analogously, *In re Milling Co.*, 16 A. B. R. 454, 457, 144 Fed. 314 (D. C. Tex.): "The prohibition against impairing the obligation of contracts * * * is directed against the States only, and there is no other clause in the constitution laying a like inhibition upon Congress."

Some of the states have very complete bankruptcy laws providing for both involuntary and voluntary proceedings, as for instance, Massachusetts, whose law is called an insolvency law, yet possesses all the distinguishing features of a true bankruptcy law, even to the discharge of debtors from the remainder of their debts. So, also, with the following states: Maine,

New Hampshire, Connecticut, Rhode Island, California, Georgia, Louisiana, Maryland, Minnesota, Nevada, Pennsylvania (*Potts v. Smith Mfg. Co.*, 12 A. R. B. 392, 25 Pa. Super. Ct. 206), North Dakota, and Vermont.

The following States do not have provisions for involuntary proceedings, but do have provisions for assignments or voluntary insolvencies wherein a discharge of the debtor may be granted, to-wit: New Jersey; North Carolina; Oregon; Virginia; Washington; Wisconsin and Wyoming.

It naturally occurs to the mind that for a State to pass a law discharging a debtor from his debts would contravene § 10 of the same Article of the United States Constitution, providing that "no State shall * * * pass any laws impairing the obligation of contracts;" and, in truth, so would such a law, where it made to apply to obligations arising outside the boundaries of the State or arising before the law was passed. But these state insolvency laws discharging debtors from their obligations uniformly have been held not to be retroactive and to be applicable only to debts contracted within the State after their enactment; and thus, under the familiar rule that an existing statute is to be read into every contract as a part of its terms the same as if expressly written into it, the courts have held such discharges do not impair the obligation of contracts made within the State after the law has been enacted. It was impliedly part of the very contract itself that its obligations should be liable to be discharged in the event that the debtor was adjudged insolvent.⁸⁶

Smith v. Parsons, 1 Ohio 236: "State insolvent laws discharging debtors from their debts upon surrendering up all their property are valid as to contracts made between citizens of the same state, within its jurisdiction, after the law is enacted."

Analogously, *In re Milling Co.*, 16 A. B. R. 454, 457, 144 Fed. 314 (D. C. Tex.): "The Bankruptcy Act which was of force at the time of the execution of the two notes in question, entered into and formed part of the contract of the parties as if it had been expressly referred to or incorporated in its terms."

As to debts owed outside the state, the creditor is usually required to consent to the proceedings before he will be allowed to share in the dividends. Perhaps, indeed, it is held that he waives his constitutional right to object to a discharge of his claim against the debtor, by merely proving his claim in the proceedings. However that may be, state bankruptcy laws are legal and are on the statute books of many of the States.⁸⁷

§ 1628. But Suspended during Existence of Federal Bankruptcy Law, as to All Classes Subjected to Latter.—But whenever Congress does pass a bankruptcy law, the law supersedes, as long as it is in existence, all state insolvency or bankruptcy laws relative to persons and acts declared therein to be subjects of bankruptcy; and proceedings under the state insolvency laws regarding debtors who could, upon the doing of the particular act complained of, be subjected to the operation of the federal

^{86.} *Baldwin v. Hale*, 1 Wallace 223 (U. S. Sup. Ct.); *Pullen v. Hillman*, 84 Me. 129. Also, see *Lowenberg v. Levine*, 93 Calif. 215. Also, see *obiter*, *Grensfeld Bros. v. Brownell*, 11 A. B. R. 603 (Sup. Ct. N. Mex.).

^{87.} *Brown v. Smart*, 145 U. S. 457; *Denny v. Bennett*, 128 U. S. 498.

bankruptcy law are absolutely void, whether or not federal bankruptcy proceedings actually follow; the constitutional provision making the law passed in pursuance of it paramount.⁸⁸

Few of the cases state the complete rule as thus given, and it will be necessary to consider the different modified forms of the rule as the various decisions give them.

Singer v. Nat'l Bedstead Co., 11 A. B. R. 279 (N. J. Ch.): "As I read the present Bankrupt Act, the intention of Congress is that every case of bankruptcy or insolvency of which the bankrupt court has jurisdiction is to be dealt with exclusively by that court. The intention of the act is to supply the law of certain cases, and to supply a special court to enforce that law. All other cases of bankruptcy or insolvency are left to be dealt with as the State Legislature may see fit. * * *

"It may be conceded that Congress can provide a law for only a limited number of cases of bankruptcy and insolvency and expressly prohibit the enactment of any other bankrupt or insolvent laws by the States. For present purposes the concession may be that Congress might pass a voluntary system of bankruptcy, and enact that there should be no other law on the subject of bankruptcy or insolvency, voluntary or involuntary, throughout the United States. Even if this be a sound view, it need not be considered, because the present Bankrupt Act contains no words prohibiting States from passing insolvent or bankrupt laws which deal with cases which are not within the operation of the National Bankrupt Act—which are expressly excluded from it. It would be a singular result, indeed, if because Congress has not seen fit to provide a bankrupt law applicable to corporations engaged in operating railroads, steamboats, insurance companies, laundries, livery stables and large numbers of other business enterprises, the inference must be drawn that Congress did not intend that any bankrupt or insolvent laws should be applied to this class of corporations, but that State insolvency laws applicable to them should be suspended.

"So, also, where the corporation might be within the operation of the Federal Bankrupt Act, if it had committed an act of bankruptcy, it remains, it seems to me, without the scope of that act, and within the full operation of State acts in respect of a charge of insolvency which includes no act of bankruptcy as defined by the Bankrupt Act.

"Of course, as I have intimated, it may be admitted that Congress has the power to say in the Bankrupt Act that no natural person or corporation, subject to its provisions, shall be liable to be involuntarily deprived of his or its property because of insolvency, at the instance of his or its creditors, under any State statute or in any State court. Congress, however, has said nothing

88. *Littlefield v. Gray*, 8 A. B. R. 409, 52 Atl. 925 (Me. Sup. Jud. Ct.), quoted post, § 1630. *Herron Co. v. Superior Court*, 8 A. B. R. 493 (Sup. Ct. Calif.), quoted ante, § 1626, and post, § 1630. *Potts v. Smith Mfg. Co.*, 12 A. B. R. 392, 25 Penn. Superior Ct. 209, quoted ante, §§ 1625, 1626, and post, § 1629. *Wescott Co. v. Berry*, 4 A. B. R. 265, 45 Atl. 352 (Sup. Ct. N. H.), quoted, ante, § 1626. *Carling v. Seymour Lbr. Co.*, 8 A. B. R. 36, 113 Fed. 483 (C. C. A. Ga., reversing *In re Macon Lumber Co.*, 7 A. B. R. 66), quoted post, §§ 1633 and 1636. *Ketcham v. McNamara*, 6 A. B. R. 160, 72 Conn. 709, quoted ante, §§ 1626 and 1603. *In re C. D. Adams*, 1 A. B. R. 94 (Ref. N. Y.); *In re Etheridge Furn. Co.*, 1 A. B. R. 112, 92 Fed. 329 (D. C. Ky.); *In re Curtis*, 1 A. B. R. 440, 91 Fed. 737 (D. C. Ills.), quoted ante, § 1603. Inferentially, *In re Wright*, 2 A. B. R. 592, 95 Fed. 807 (D. C. Mass.); (1841) *Ex parte Eames*, 2 Story 322, 325, Fed. Cas. 4,237.

of this kind, nor do I think can such an intention be gathered in any way from any or all of the provisions of the Bankrupt Act. * * *

[Here follows the part quoted, ante, at § 1627.]

"When the present Bankruptcy Act was under discussion in Congress, my recollection is that a large and influential body of our national legislators earnestly proposed to enact merely a voluntary law—a law under which debtors could come into a bankrupt court, lay down their assets and get a discharge. Would anybody seriously argue that if such a 'uniform system of bankruptcy' had been enacted by Congress it would have had the effect to suspend the operation of State bankruptcy and insolvent laws under which insolvent debtors or fraudulent insolvent debtors are brought involuntarily into court and stripped of their assets for the benefit of their creditors?

"The present 'system of bankruptcy,' which Congress saw fit to enact in 1898, does not pretend to cover the whole field of either voluntary or involuntary bankruptcy and insolvency. Corporations are not allowed to become voluntary bankrupts. Large classes of natural persons and corporations are excluded absolutely from the operation of the involuntary system. All corporations as well as natural persons are excluded if their debts do not amount to \$1,000. It would be a most extraordinary state of affairs if transportation companies, insurance companies and many other kinds of business corporations not within the classes enumerated in the present Bankrupt Act, and also manufacturing, mercantile and trading corporations whose debts do not amount to \$1,000, could not be subjected to the operation of our New Jersey statute, which provides a means for winding them up and distributing their assets. The result would be that such corporations, when insolvent, could not be wound up at all at the instance of their creditors. The Bankrupt Act, § 4 (b), expressly provides that national banks and banks incorporated under State or Federal laws shall not be adjudged voluntary bankrupts, the intention plainly being to leave these respective banking corporations to be wound up under national or State statutes particularly applicable to them.

"It is perfectly plain that State systems of voluntary and involuntary bankruptcy may remain to-day in full operation upon large numbers of insolvent natural persons and corporations who cannot be brought within the operations of the National Bankrupt Act under any possible state of facts.

"It is also, it seems to me, equally plain that a State system of involuntary insolvency also remains in full operation upon persons and corporations, who are as possible bankrupts within the operation of the National Bankruptcy Act, so far as the State system deals with cases of which the bankrupt courts under the Federal act can obtain no jurisdiction. To state the point otherwise, I may say that to my mind there is no distinction between an insolvent insurance company, railroad company or laundry company, which owes \$1,000 of debts and has committed an act of bankruptcy, on the one hand, and an insolvent manufacturing, mercantile or trading company which has committed no act of bankruptcy, or does not owe debts amounting to \$1,000, on the other hand, in respect of the operation of the National Bankrupt Act and the New Jersey Insolvent Corporation Act. In neither instance is a case presented of which the Federal bankrupt court can take cognizance. Each case, therefore, is within the full and complete operation of the New Jersey statute."

In re F. A. Hall Co., 10 A. B. R. 96 (D. C. Conn.): "* * * by its terms, it went into full force and effect upon its passage, and, ipso facto, at once suspended and superseded all State insolvent laws. Whether it cuts any deeper it is unnecessary to inquire at the present juncture. It is not important that by an express provision of the Bankruptcy Act a corporation is excepted from the

category of those who are permitted to enjoy its privileges as voluntary bankrupts. A way is provided by which the district courts can and do acquire and retain jurisdiction of the property which, before the passage of the act, could and would have been administered by the probate court."

Parmenter Mfg. Co. v. Hamilton, 1 A. B. R. 40 (Sup. Ct. Mass.): "The act is 'to go into full force and effect upon its passage.' That is to say, the rights of all persons in the particulars to which the act refers are to be determined by the act from the time of its passage. Among these rights is the right to have insolvent estates settled in bankruptcy under the provisions of the act, including the rights to have acts of bankruptcy affecting the settlement of estates determined by it (§ 3), to have the rights of debtors to file voluntary petitions and of creditors to file involuntary petitions determined by it (§ 4), and to have preferences and liens governed by the provisions of it (§§ 60 and 67).

"These various provisions affecting the rights and conduct of debtors and creditors are different from those previously existing in most of the States, and perhaps different from those found in the laws of any State; and they supersede all conflicting provisions."

In re Bruss-Ritter Co., 1 A. B. R. 58, 90 Fed. 651 (D. C. Wis.): "The power of Congress to enact a general bankruptcy statute is secured by constitutional provision. In the absence of such congressional enactment the States are free to provide for insolvency relief of limited extent; but when Congress exercises its authority by a general enactment all State action is suspended from such time, and subject only to such limitations as may be prescribed in the act. *Tua v. Carriere*, 117 U. S. 201, 209-10. As remarked in *Platt v. Archer*, 9 Blatch. 559; Fed. Cas. No. 11,213, this authority of Congress 'is paramount and exclusive, and so is the jurisdiction of the District Court thereunder.' The doctrine thus stated is well established, and is unquestioned upon this motion."

In re McKee, 1 A. B. R. 311 (Ky. County Court): "To whatever extent Congress has undertaken to provide remedies and prescribe procedure, its authority, being unquestionably paramount, State statutes designed for the same or similar purposes must give way. It cannot be, for a moment, presumed that Congress, having full power to prescribe the sole method of procedure, intended to allow concurrent jurisdiction to State courts, which might, acting under different statutes and governed by different precedents, reach entirely different conclusions than those entertained by the Federal courts, nor can it be reasonably contended, that it was ever contemplated, that the same, or similar, remedies, should be exercised by both State and Federal courts, thereby unnecessarily subjecting all parties to double labor and annoyance, and vastly increasing the costs of administering these trusts. Any other construction of this act must ignore the cardinal principle of uniformity, in the settlement and distribution of insolvent estates, that was made the basis for the constitutional provision, under which all national acts of bankruptcy have been passed."

§ 1629. State Insolvency and Bankruptcy Laws Ipso Facto Suspended.—State insolvency and bankruptcy laws are ipso facto suspended (as to the same classes covered by the Federal Bankruptcy Act) no matter whether federal bankruptcy proceedings follow in the particular case involved or not: the state court will not have jurisdiction.⁸⁹

⁸⁹. *Ketcham v. McNamara*, 6 A. B. R. 160, 72 Conn. 709; *Littlefield v. Gray*, 8 A. B. R. 409, 52 Atl. 925 (Me.); obiter, *In re Sievers*, 1 A. B. R. 117, 91 Fed. 366 (D. C. Ky.); *In re Hall*, 10 A. B. R. 88 (D. C. Conn.); *Moody v. Port Clyde Development Co.*, 18 A. B. R. 275 (Sup. Ct. Me.); compare, obiter, in *Carling v. Seymour Lumber Co.*, 8 A. B. R. 29, 113 Fed. 483, C. C. A. Ga., reversing, on

Potts v. Smith Mfg. Co., 12 A. B. R. 392, 25 Pa. Superior Ct. 206: "The only cases decided by courts of last resort holding a different view, which have come under our observation, are *In re Ziegenfuss*, 2 Ired. 463, and *Reed v. Taylor*, 32 Ia. 209. These cases recognize the paramount authority of the Act of Congress, but hold that the State statute is operative up to the time when proceedings are instituted under the National Bankrupt Act. The efficiency of the State statute is made to depend upon action or nonaction under the Bankrupt law. This seems a foundation entirely too unsubstantial upon which to base the right to proceed under the State law, as to persons and subjects affected by the National Bankrupt Act. The law would be vain which would invite legal process liable to be avoided and defeated at any stage of the proceedings by the assertion of another and paramount authority; it should be effective for the purpose of carrying to conclusion proceedings instituted thereunder. It is conceded on all sides, however, that any proceedings under the insolvent law of the State might be rendered abortive by an insolvent debtor or his qualified creditors by filing a petition in bankruptcy where the debtor was subject to the operation of the National Bankrupt Act. The national and State laws are intended, in a large degree, to operate upon the same persons and property, and while there is a close resemblance in the methods of administration, the mode of procedure and remedies are not the same. There might, and doubtless would be, conflict in the operation of the national and State statutes. The latter must, therefore, yield to the former. The uniformity contemplated by the Constitution can only be secured through the Act of Congress, the prosecution of insolvent proceedings under the laws of the various States necessarily tending to confusion and lack of uniformity.

"In view of the manifest purpose of the constitutional provision on the subject of bankruptcy and the great weight of authority in support of the conclusion reached, we feel constrained to hold that the Act of June 4, 1901, relating to insolvency, did not become operative, because of the existence of the bankruptcy law of the United States of July 1, 1898, as to the persons and subjects to which the latter act applies. The order of the court of June 23, 1903, vacating and setting aside the execution of the plaintiff is, therefore, reversed."

Apparently, although obiter, *In re Richard*, 2 A. B. R. 506, 94 Fed. 633 (D. C. N. Car.): "* * * the State law is suspended and inoperative after an adjudication in bankruptcy. The Bankrupt Court takes jurisdiction of the estate and all matters pertaining thereto, and will administer the same to a final settlement."

Apparently, *In re Allison Lumber Co.*, 14 A. B. R. 79, 137 Fed. 643 (D. C. Ga.): "The enactment by Congress of a uniform system of bankruptcy has been repeatedly held to suspend the operation of State bankruptcy or State Insolvency Laws."

Some cases seem to hold that they are void only on the subsequent institution of federal bankruptcy proceedings; but on analysis such cases will

other grounds, *In re Macon Sash, Door & Lbr. Co.*, 7 A. B. R. 66; apparently, *In re Smith & Dodson*, 2 A. B. R. 9 (D. C. Ind.); *In re Macon Sash, Door & Lumber Co.*, 7 A. B. R. 66 (D. C. Ga., reversed, on other grounds—comity—in *Carling v. Seymour Lbr. Co.*, 8 A. B. R. 29, 113 Fed. 483, C. C. A. Ga.); inferentially, *Parmenter Mfg. Co. v. Hamilton*, 1 A. B. R. 41 (Supreme Ct. Mass.); inferentially, *In re Bruss-Ritter Co.*, 1 A. B. R. 58, 90 Fed. 651 (D. C. Wis.); *In re Curtis*, 1 A. B. R. 440, 91 Fed. 737 (D. C. Ills.); obiter, *Patty-Joiner Co. v. Cummins*, 4 A. B. R. 269, 67 S. W. 566 (Tex. Sup. Ct.); impliedly, *Wescott v. Berry*, 4 A. B. R. 264, 45 Atl. 352 (N. H. Sup. Ct.); *Griswold v. Pratt*, 50 Mass. 16, as to Act of 1841.

be found not to be cases under state bankruptcy nor state insolvency laws but rather to be cases under division 1 or 2 of this chapter relating to the custody of property where there are legal liens nullified by bankruptcy, or where an assignment or receivership has been created, voidable only in case of bankruptcy within four months.

§ 1630. Not Suspended nor Inoperative as to Classes Not Covered by Federal Bankruptcy Act.—State insolvency and bankruptcy laws are not suspended nor rendered inoperative, nor void at all, as to those classes of persons exempted from, or not included within, the operation of the federal act.⁹⁰

Old Town Bank v. McCormick, 96 Md. 341; S. C., 10 A. B. R. 767 (Md. Ct. Appeals): "This brings us to the real question in the case, namely, Is there any conflict between our Insolvent Law and the Federal Bankrupt Law? We have already transcribed the provisions of § 4, by which it appears that the defendant is expressly excepted from the provision of the act relating to involuntary bankruptcy, and therefore as to this class to which the defendant belongs (i. e., farmers or tillers of the soil) the Federal power has not been exercised. And it therefore follows that, if this class is not within the State law, there is no existing provision under which those embraced within it can be compelled to distribute their assets fairly and equally among their creditors. In *Geery's Appeal*, 43 Conn. 289, 21 Am. Rep. 653, it was said: 'The benefit of this principle [the equal distribution of a debtor's property without preference] cannot be denied to a creditor without doing him injustice. It is a remedy which he relied on in giving credit, and to which he is fairly entitled. If that remedy is not to be found in the Bankrupt Act, it will not be presumed that Congress intended to take away the remedy provided by the State. Congress having limited and restricted the operation of the Bankrupt Act, leaving a number of cases to which it does not apply, it will not be presumed that it was thereby intended to leave creditors in such cases entirely without remedy, as must be the case if the State law is entirely inoperative. But can it be properly or correctly said that any conflict can exist between the State and the Federal law so long as the latter by express terms excludes from its operation the subject or class of persons expressly provided for by the State law? The power to enact insolvent or bankrupt laws is vested in the States, and it cannot be extinguished except by the establishment of a Federal system in conflict with the State law. And this Federal system of bankruptcy must be a genuine bankrupt law (*Sturgis v. Crowninshield*, 4 Wheat. 122, 4 L. Ed. 529), or, in other words, as expressed in *Ogden v. Saunders*, 12 Wheat. 213, 6 L. Ed. 606, the power to pass a uniform system of bankruptcy must be actually exercised, and the State law must be in conflict with it in order to render the latter inoperative. The question, therefore, logically arises. Does the present Federal Bankrupt Law actually provide for involuntary proceedings against farmers? And the answer must be that it does not, but the answer of the defendant goes further and necessarily must do so in order to save his case. He says it is true that while this class is not included in, and is expressly excepted from, the involuntary feature of the system, yet it is included in the voluntary feature,

⁹⁰. *Singer v. Nat'l. Bedstead M'fg Co.*, 11 A. B. R. 276 (N. J. Ch.), quoted ante, at § 1628. (1841) Also, see *Ex parte Eames*, 2 Story 322, 323, Fed. Cas. 4,237.

and therefore it is within the scope of the national system. We cannot approve of this method of reasoning, not only because it would seem to be a 'contradiction in terms to say that cases excepted from the operation of the most important part of the act are included in its scope,' but because it would seem to involve the proposition that the Federal power can render inoperative the State insolvent laws applicable to involuntary insolvency, without establishing a genuine bankrupt law to take the place of the State law. As we have already seen, it has been held from an early day that it is only to the extent that Congress has actually legislated upon the subject that the statutes of the several States are suspended by its legislation. How, then, can it be said that a failure to legislate—in other words, an express exclusion—raises a conflict? But without pursuing this question further, it seems to us that the position taken by the defendant must necessarily lead to the conclusion that if the Congress of the United States can, by including this class in the voluntary part of the system, and excepting it from the involuntary part, withdraw it from the operation of our State Insolvent Law, it can do the same in regard to any two or more classes (as, for instance, merchants, traders, and corporations); and the result would be that, in spite of the failure on the part of Congress to establish a bankrupt law (that is, to actually exercise the power conferred by the Constitution to pass a genuine bankrupt law, State legislation would become inoperative, and creditors would be deprived of a remedy to which, as was said in *Gerry's Appeal*, 43 Conn. 289, 21 Am. Rep. 653, they are fairly entitled.

"But it was forcibly argued on the part of the defendants that § 70, subsection 'b,' of the Bankrupt Act of 1898, shows that it was the intention of Congress to substitute that act for every provision of every insolvent law of the several States. It provides as follows: 'Proceedings commenced under State insolvent laws before the passage of this act shall not be affected by it.' To sustain their view, the case of *Parmenter Mfg. Co. v. Hamilton*, 1 A. B. R. 39, 172 Mass. 178, decided in 1898 was relied on. But all this case decides is that the Federal act deprives the State court of jurisdiction to entertain jurisdiction in insolvency proceedings filed after 1st July, 1898, when the Federal act went into force. Or as the court said: 'The act is to go into full force and effect upon its passage. That is to say, the rights of all persons, in the particulars to which the act refers, are to be determined by the act from the time of its passage.' After mentioning a number of the rights which are determined by the act, the opinion continues: 'These various provisions affecting the rights and conduct of debtors and creditors are different from those previously existing in most of the States, and perhaps different from those found in the laws of any State, and they supersede all conflicting provisions.' In the concluding part of the opinion the distinguished judge who has recently been appointed chief justice of the Supreme Judicial Court of Massachusetts said that the language of section 70, subsection 'b,' 'was chosen to make clear the purpose of Congress that the new system of bankruptcy should supersede all State laws in regard to insolvency from the date of the passage of the act;' but necessarily this language means only that all conflicting provisions of the State law were thus superseded, for this is the well-settled proposition which he had just announced in a preceding sentence, and which we have quoted above. If, therefore, we are correct in the conclusion already reached, that there is no conflict between the provisions of our Insolvent Law and the present Bankrupt Law, it follows that the language of § 70 relied on by the defendant can have no influence upon our conclusion in this case."

"But again, it was urged that there is a distinction between this case and

cases which arose under laws which did not include the class within its scope—as, for instance, where the Bankrupt Act applied only to debtors whose debts exceeded \$300. It was held in *Shephardson's Appeal*, 36 Conn. 23, that in cases where the debts were less than \$300 the State law was not suspended, and debtors of that class could be proceeded against under State laws. But the true rule was laid down by Chief Justice Marshall in *Sturgis v. Crowninshield*, 4 Wheat. 122, 4 L. Ed. 529, that the power of the State continues to exist over such cases as the Federal law does not reach. And, therefore, if cases involving involuntary proceedings against a class are not provided for by the Federal law, such cases are within the reach of the State law, in spite of the fact that the members of this same class may avail themselves of the voluntary feature; otherwise the rule laid down by Chief Justice Marshall would have to be changed so as to read that the power of the State exists only over such cases as are against natural persons or corporations not within any class provided for by any provision of the Federal law. If this were the rule, then, of course, it would follow, as contended, that the defendant, being of the class called 'Farmers,' and the Bankrupt Act having provided that he may avail himself of the voluntary feature, no case against him could be reached by the State law. But, in our opinion, this is not the proper view, for, as we have already said, it is not within the power of Congress to render inoperative the involuntary feature of State insolvent laws as to any particular class by excepting that class from the involuntary part of the national law. Otherwise the result would be that the State laws as to involuntary insolvency would become inoperative by the mere existence of the power of the United States to establish a system of involuntary bankruptcy. We have seen, however, that it is not the mere existence, but the exercise of the power to establish a genuine bankrupt law in conflict with the State laws, which renders the latter inoperative."

Herron Co. v. Superior Court, 8 A. B. R. 492, 68 Pac. 814, 136 Calif. 279: "If the Bankruptcy Act excepts a class of cases from its operation, either in express terms or by necessary implication, it must be considered that it was the intention of Congress not to interfere in that class of cases with the laws of the several States in reference thereto. The State laws will remain operative in all cases which are not within the provisions of the Bankruptcy Act. * * * Congress may enact a bankruptcy act for certain classes of creditors, and leave to the several States the right to legislate upon the subject with reference to other classes. In such a case there can be no conflict of jurisdiction, as the legislation of the two governments is not upon the same subject. Each statute is operative within its own jurisdiction, and may be enforced without in any respect infringing upon the jurisdiction of the other.

"The Bankruptcy Act passed by Congress in 1898, is not operative upon all classes of creditors, or upon all classes of corporations."

Thus, in the case, *The Old Town Bank v. McCormick*, 96 Md. 341, the court held that a state insolvency law by which persons engaged chiefly in the tillage of the soil may be proceeded against in involuntary insolvency by their creditors, is not superseded as to such persons by the Federal Bankruptcy Act of 1898.

Again, unless a corporation is among the classes that can be proceeded against in bankruptcy it is still subject to the state insolvency law.⁹¹

91. *Herron Co. v. Superior Court*, 8 A. B. R. 492, 68 Pac. 814, 136 Calif. 279: A mining corporation before the amendment of 1903 included such corporations.

Nor are state insolvency or bankruptcy laws suspended as to those persons who have done acts not mentioned as acts of bankruptcy in the federal law but which are prohibited by or come within the purview of the State Insolvency law:⁹²

McCullough v. Goodhart, 3 A. B. R. 85 (Penn. Com. Pleas): “* * * the bankruptcy law of 1898 does not contain any enactment concerning absconding or concealed debtors, and therefore does not come in conflict in any way with the State law relating to domestic attachment.”

Nor as to acts committed before the passage of the Federal Bankruptcy Act.⁹³

Other decisions hold broadly that the state insolvency proceedings are absolutely null and void and inoperative as to any person who, either involuntarily or voluntarily, could become subject to the operation of the federal bankruptcy law.

Littlefield v. Gray, 8 A. B. R. 409, 52 Atl. 925 (Me.): “The question here involved is whether the insolvency law of this State is superseded by the Bankruptcy Act of the United States as to debtors owing more than \$300 and less than \$1000.

“The insolvency law of this State is not wholly superseded by the Bankrupt Act, but when they come in conflict the latter must prevail. *Damon's Appeal*, 70 Me. 155. So far as the person and subject-matter fall within the provisions of the Bankrupt Act, and are within the jurisdiction of the bankrupt court, the State Insolvency Law is superseded and cannot be revoked. *Bank v. Ware*, 95 Me. 395, 50 Atl. 24; *Ogden v. Saunders*, 12 Wheat. 213, 6 L. Ed. 606; *Ex parte Eames*, 2 Story, 324, Fed. Cas. No. 4,237.

“In the case before us, Blackington, the insolvent debtor, owing less than \$1,000, was petitioned into insolvency in 1899 by his creditors, while the United States Bankrupt Act was in force. The State insolvency court took jurisdiction, decreed him insolvent, and appointed the plaintiff assignee. This action is to set aside a conveyance by Blackington, as a preference under the State law.”

“Under the Bankrupt Law, Blackington could have gone into bankruptcy voluntarily, but could not be forced in by his creditors under involuntary proceedings. He was asked to go in and refused. It was argued with great ability that in that condition the State insolvency law may be invoked. Plausible as the argument is, we do not regard it as sound. At any time after proceedings under the State law, Blackington could have voluntarily invoked the Bankrupt Law, and thereupon all proceedings under the State law would necessarily cease. The test of jurisdiction under the State law does not rest upon the volition of the debtor. If his person and property are or may be subject to the Bankrupt Law, then as to him and his possessions the State insolvency law is in abeyance and powerless. Upon any other view, it would be in the power of the debtor at any time to oust the jurisdiction of the State court after it had been assumed. This would result in great confusion. It may be avoided by holding, as we do, that where the person falls within the purview of the Bankrupt Act, whether by voluntary or involuntary proceedings, the State insolvency law must be silent.

“When this case was previously before the court (52 Atl. 925), we said that

92. *Singer v. Nat'l Bedstead Mfg. Co.*, 11 A. B. R. 276 (N. J. Ch.), which was a case of dissolution of a corporation.

93. *Grunsfeld Bros. v. Brownell*. 11 A. B. R. 603 (Sup. Ct. New Mex.).

there might be cases where the insolvency court would have jurisdiction, notwithstanding the Bankruptcy Act. If such cases can arise, it can only be in instances not within the purview of the Bankrupt Act, where its provisions cannot be invoked either by the debtor or his creditors. This case does not fall within that rule.

"It follows that the insolvency court was without jurisdiction in this case, and an appointment of plaintiff as assignee was unauthorized and void. He therefore has no standing in court."

In re F. A. Hall Co., 10 A. B. R. 96, 121 Fed. 992 (D. C. Conn.): "It is not important that by an express provision of the Bankruptcy Act a corporation is excepted from the category of those who are permitted to enjoy its privileges as voluntary bankruptcy. A way is provided by which the district courts can and do acquire and retain jurisdiction of the property which, before the passage of the act, could and would have been administered by the probate courts."

There is considerable force in the argument of the court in *Littlefield v. Gray*, supra, and in the case *In re Hall*, supra, that when the framers of the Constitution gave over to Congress the function of making uniform laws "on the subject" of "bankruptcies" throughout the United States, it must have been their intention that the laws passed by Congress in relation to "bankruptcies," whether including or excluding certain classes of persons, should be the only laws relating to bankruptcies that should be considered to be in force; and that it would follow that persons whom Congress upon grounds of public policy deemed best to exempt from bankruptcy, thereby have been given protection against all kinds of bankruptcy proceedings; also, that Congress having been given exclusive jurisdiction over the entire "subject" of "bankruptcies," and having spoken as to what classes may be proceeded against and as to what may not be proceeded against, those exempted and those included are equally within the scope of its mandate; and that therefore when the States attempt to enforce bankrupt laws of their own, they are encroaching on the functions given by the federal Constitution to Congress, there being no more power in them to nullify the exemptions or exceptions granted by Congress than to nullify the prohibitions.

While the main proposition (ante, § 1628), undoubtedly states the true rule as far as it goes; it is not to be assumed that all State Bankruptcy or State Insolvency proceedings not within the terms of the rule are necessarily not superseded. The converse of the main proposition is not necessarily true. The converse may be stated as follows: It being true that whenever Congress passes a national bankrupt act that Act is paramount as far as it speaks, by virtue of the Constitution, and supersedes ipso facto all state insolvency and bankruptcy laws in case the National Bankrupt Act itself so provides; yet, in case it does not so provide, it supersedes the state insolvency and bankruptcy laws *only to the extent that it makes the particular persons mentioned therein subject thereto upon the doing of the particular acts mentioned therein as grounds for its involuntary action*; it being necessary that the person and the act both be within its purview,

else it will not supersede the state law in the particular case. This converse rule is laid down in *Singer v. Nat'l Bedstead Co.*, supra.

But this converse rule will have to be still further limited by the qualification that the state and federal proceedings must both be involuntary or both voluntary; otherwise no natural person could be proceeded against in state bankruptcy proceedings since all natural persons may go voluntarily into bankruptcy. Interesting questions arise under this construction. Thus, what would be the situation, for instance, as to a natural person who owes only \$300 of debts and whom creditors are seeking to proceed against in state bankruptcy proceedings: is he or is he not exempt from all bankruptcy proceedings against him, state as well as federal, by virtue of his express exemption under the Federal Act? Or, suppose he has perpetrated an act forbidden by state bankruptcy law and not by the federal bankruptcy law: does he remain liable to proceedings under the state law and will the state bankruptcy court retain jurisdiction of his assets if he goes voluntarily into bankruptcy under the federal law within four months?

The reasoning of *Singer v. Nat'l Bedstead Co.* in its statement of the converse rule is exceedingly broad, and the difficulties in the way of adopting its construction are quite serious.

§ 1631. **State Bankruptcy and Insolvency Laws Simply Held in Abeyance.**—The state insolvency and state bankruptcy laws are simply held in abeyance whilst the federal bankruptcy statute is in operation, and upon the repeal of the federal bankruptcy statute, the state insolvency and bankruptcy laws spring again into full vigor without re-enactment.⁹⁴

In re Wright, 2 A. B. R. 592, 95 Fed. 807 (D. C. Mass., affirmed sub nom. In re Worcester Co., 4 A. B. R. 506): "An insolvent law may be amended, repealed, or enacted by a State during the existence of the Bankrupt Law; and such amendment, repeal, and enactment will be valid legislative acts, though the operation of these acts in some respects be suspended while the Bankrupt Law continues in force. When the Bankrupt Law has been repealed, the insolvent laws of the States become operative; and, if amended during the existence of the Bankrupt Law, they doubtless become operative in their amended form. Counsel for the trustee sought in argument an analogy between the insolvent

94. *Sturgis v. Crowninshield*, 4 Wheat. 122, quoted ante, § 1627; obiter, *Littlefield v. Gray*, 8 A. B. R. 409 (Sup. J. Ct. Mo.). See editor's note, *Parmenter Mfg. Co. v. Hamilton*, 1 A. B. R. 41 (Sup. Ct. Mass.); In re Worcester County, 4 A. B. R. 506, 102 Fed. 808 (C. C. A. Mass.); *Butler v. Goreley*, 146 U. S. 314.

State insolvency proceedings begun before the passage of the Bankruptcy Act are not affected thereby, *Bankr. Act*, § 70 (b); *Wescott Co. v. Berry*, 4 A. B. R. 264, 45 Atl. 352 (N. H. Sup. Ct.); also, *Osborn v. Fender*, 11 A. B. R. 224, 92 N. W. 1114 (Sup. Ct. Minn.); compare, to same effect, *Ex parte Eames*, 2 Story 322, 325.

And an assignee or receiver appointed in an insolvency proceeding so begun before the passage of the Bankrupt Act may commence or maintain a suit to recover property fraudulently conveyed or concealed, *Osborn v. Fender*, 11 A. B. R. 224 (Sup. Ct. Minn.).

And State insolvency and bankruptcy laws may be looked to and their priorities be adopted under § 64 (b) (5) though their operation otherwise be suspended, see post, "Priorities Given by Federal and State Laws," §§ 2196 and 2197.

laws thus suspended and a law unconstitutional, and therefore void, but the analogy is very imperfect. To establish that the insolvent laws of the several States now upon their statute books are not 'laws of the States,' it must be shown that they are not laws at all; that they are wholly void, and not merely restricted in their application. Inasmuch, therefore, as the Bankrupt Act of 1898 expressly recognizes the existing validity of these insolvent laws as applied to proceedings commenced before the passage of the Bankrupt Act, and inasmuch as the insolvent laws revive, *ex proprio vigore*, on the repeal of the Bankrupt Law, it follows that the insolvent laws have not been wholly void, but are still laws of the States which adopted them."

Of course mere general assignments are an entirely different thing, as we have heretofore seen; and they are not involved in the discussion as to whether or not insolvency laws are suspended by the bankrupt act.⁹⁵

§ 1632. Bankruptcy and Insolvency Laws, and General Assignment Laws, Distinguished.—There have been many finely drawn distinctions made between insolvent laws and bankruptcy laws but the courts do not seem to have struck an exact line of demarkation.⁹⁶

Hanover Nat'l Bank v. Moyses, 186 U. S. 181 (8 A. B. R. 1): "The whole subject is reviewed by that learned commentator in chapter 16, §§ 1102 to 1115, of his work, and he says (§ 1111) in respect of 'what laws are to be deemed bankrupt laws within the meaning of the Constitution:' 'Attempts have been made to distinguish between bankrupt laws and insolvent laws. For example, it has been said that laws which merely liberate the person of the debtor are insolvent laws, and those which discharge the contract are bankrupt laws. But it would be very difficult to sustain this distinction by any uniformity of laws at home or abroad. * * * Again, it has been said that insolvent laws act on imprisoned debtors only at their own instance, and bankrupt laws only at the instance of creditors. But, however true this may have been in past times, as the actual course of English legislation, it is not true, and never was true, as a distinction in colonial legislation. In England it was an accident in the system, and not a material ground to discriminate, who were to be deemed in a legal sense insolvents, or bankrupts. And if an act of Congress should be passed, which should authorize a commission of bankruptcy to issue at the instance of the debtor, no court would on this account be warranted in saying that the act was unconstitutional, and the commission a nullity. It is believed that no laws ever were passed in America by the colonies or States, which had the technical denomination of "Bankrupt laws." But insolvent laws, quite co-extensive with the English bankrupt system in their operations and objects, have not been unfrequent in colonial and State legislation. No distinction was ever practically, or even theoretically, attempted to be made between bankruptcies and insolvencies. And a historical review of the colonial and State legislation will abundantly show that a bankrupt law may contain those regulations which are generally found in insolvent laws, and that an insolvent law may contain those which are common to bankrupt laws.'"

Sturges v. Crowninshield, 4 Wheat. 122, 195: "The Bankrupt Law is said to

⁹⁵. But see *In re Scholtz*, 5 A. B. R. 782, 106 Fed. 834 (D. C. Iowa), where the court fails to make the distinction, although deciding rightly that the Iowa general assignment law is not suspended by the Bankruptcy Act but is only superseded as to the particular bankruptcies involved.

⁹⁶. *Grunsfeld Bros. v. Brownell*, 11 A. B. R. 602 (N. Mex. Sup. Ct.).

grow out of the exigencies of commerce, and to be applicable solely to traders: but it is not easy to say who must be excluded from, or may be included within this description. It is like every other part of the subject, one on which the legislature may exercise an extensive discretion. This difficulty of discriminating with any accuracy between insolvent and bankrupt laws, would lead to the opinion that a bankrupt law may contain those regulations which are generally found in insolvent laws; and that an insolvent law may contain those which are common to a bankrupt law."

Also much has been said as to whether a particular law has amounted to an insolvency or bankruptcy law, or is a mere assignment law. There is a substantial difference between a proceeding under a State Insolvency Statute, and one under a state statute permitting general assignments.⁹⁷

These discussions are pertinent because it seemed, at least formerly, to have been conceded to be the rule that the passage of a federal bankruptcy statute ipso facto suspends all state insolvency and bankruptcy laws, no matter whether bankruptcy proceedings under federal law were brought within four months, or, for that matter, were ever brought, although it was conceded that mere general assignments for the benefit of creditors were invalidated only in case bankruptcy followed and followed within the four months period.⁹⁸

Thus, it was held by the United States Supreme Court during the existence of the old bankruptcy law of 1867, in the case of *Mayer v. Hellman*, 91 U. S. 496, that the Ohio system of administering voluntary assignments for the benefit of creditors did not amount to an insolvency law, and that a general assignment, therefore, was not absolutely void from the very beginning, but was merely voidable by the institution, within the prescribed time, of federal bankruptcy proceedings. In that case, the bankruptcy occurred more than six months after the assignment, so it had become pertinent to ascertain whether the assignment proceedings were absolutely void or only voidable.⁹⁹

Ketcham v. McNamara, 6 A. B. R. 161 (Conn. Sup. Ct. Errors): "These statutes constitute, in the fullest sense, an insolvent law. They make the title under a general assignment executed by an insolvent debtor in trust for the benefit of all his creditors, which is lodged for record in the Court of Probate, only an inchoate one. To perfect it, requires a judgment of confirmation from

97. *In re Sievers*, 1 A. B. R. 117, 91 Fed. 366 (D. C. Mo., affirmed in 1 A. B. R. 412). But see *In re McKee*, 1 A. B. R. 311 (Ky. Co. Ct.), where assignment cases are included within the same rules.

98. *In re Sievers*, 1 A. B. R. 117, 91 Fed. 366 (D. C. Ky., affirmed in 1 A. B. R. 412). Compare, *In re Smith & Dodson*, 2 A. B. R. 9, 92 Fed. 135 (D. C. Ind.).

99. *Mayer v. Hellman*, 91 U. S. 496 (cited in *In re Plotke*, 5 A. B. R. 171, C. C. A. Ills., and followed in *Simonson v. Sinsheimer*, 3 A. B. R. 824, 95 Fed. 952; and distinguished as based on assignment made before four months period in *In re Chase*, 10 A. B. R. 684, 124 Fed. 753, C. C. A. R. I.).

Patty-Joiner Co. v. Cummins, 4 A. B. R. 269, 57 S. W. 566 (Tex. Sup. Ct.), which was a case of a general assignment under a State Law permitting the debtor to exact a release from any creditor as a condition of receiving any benefit.

In re Romanow, 1 A. B. R. 461, 92 Fed. 510 (D. C. Mass.); [1867] *Boese v. King*, 108 U. S. 379.

that court. Nor, when perfected, is the estate assigned to be applied as directed by the terms of the conveyance. Creditors do not share equally. Certain claims for the wages of labor may be preferred."

If we are to be guided at all by the history of bankruptcy legislation during the last four hundred years, it is obvious that in order for any system to amount to a bankruptcy system, it must provide machinery for the throwing of a debtor into insolvency involuntarily, and for completely administering his assets; and that, if a system of laws does so operate, then it is a bankruptcy system no matter by what name it might be designated. General assignment laws do not have this operation. Primarily, such laws simply provide a system for the administration of voluntary assignments in trust. That is to say, it has always, of course, been possible for a debtor to deed his property in trust to pay all, or some class of his creditors, and chancery always has had jurisdiction to compel such trusts to be properly carried out, precisely as it has as to any other trusts. Indeed, in the *Mayer v. Hellman* case it appears that originally such trusts for the benefit of creditors were simply administered in the Common Pleas Court of the State like any other trust, and no special court, like the probate or Insolvency Court, had jurisdiction. The Supreme Court in that case seems to have held that simply because such trusts subsequently were taken out of the Common Pleas Court and given over to a special court for administration, did not affect a change in their essential features; and that they were not absolutely void, but merely voidable.¹⁰⁰

Compare to this effect, *In re Gutwillig*, 1 A. B. R. 81, 90 Fed. 475 (D. C. N. Y., approved in *Lea v. West*, 174 U. S. 590): "Proceedings like those under the Massachusetts act rest wholly upon State statutes. Such statutes are practically bankruptcy acts, operating, however, only to the extent of the power and jurisdiction of State authority.

"Voluntary assignments for the benefit of creditors, on the other hand, as practised in this and other States, do not originate in the State statutes, but in the common-law power of the debtor to dispose of his property. The statutes of this State passed in 1860, and subsequent acts, regulate to a certain extent this power of distribution, and provide various securities therefor. To a considerable extent, therefore, these statutes, and assignments made in conformity with them, though they make no provision for the discharge of the debtor, do cover in part the original purpose of bankruptcy laws, namely, the equal distribution of the debtor's property among his creditors. The New York Statutes, nevertheless, allow, besides preferences to employees, preferences to other creditors, at the debtor's option, to the extent of one-third of the assets (see *Central N. Bank v. Seligman*, 138 N. Y. 435); in this regard being, therefore, directly opposed to that equality of distribution which bankruptcy laws aim to secure. Though the precise limits of the terms 'bankruptcy' and 'insolvency,' in defining the character of statutes, may not be easy to determine (see *Sturges v. Crowninshield*, 4 Wheat. 194-6; *In re Klein*, 1 How. (U. S.) 277), I do not think that a general assignment made in conformity with laws like those of the

100. Compare, to this effect, *Duryea v. Guthrie*, 11 A. B. R. 234 (Sup. Ct. Wis.); *Patty-Joiner Co. v. Cummins*, 4 A. B. R. 269, 57 S. W. 566 (Tex. Sup. Ct.); *In re Curtis*, 1 A. B. R. 440, 91 Fed. 737 (D. C. Ills.).

State of New York, can be considered 'as a proceeding commenced under State insolvency laws' within the meaning of the last paragraph of the Act of 1898; and the question presented on this motion must therefore be decided upon the general principles of bankruptcy law and upon the other provisions found in the present act."

Likewise in *Missouri*, see *In re Sievers*, 1 A. B. R. 117, 91 Fed. 366 (D. C. Mo.): "While the insolvency laws of the several States are superseded by the enactment of the National Bankrupt Law, this is not the case with State statutes which merely regulate the administration of the trust created by an assignment for the benefit of creditors; and proceedings under such statutes or under a common law deed of assignment are not void or voidable by reason of the existence merely of a Bankrupt Law or unless proceedings in bankruptcy are subsequently instituted against the assignor."

Compare, *Grunsfeld Bros. v. Brownell*, 11 A. B. R. 603 (Sup. Ct. Tex.): "No one can contend that the passage of a bankruptcy act by Congress would render void a general common-law deed of assignment made by a debtor conveying all of his property for the benefit of his creditors ratably according to their claims, but not providing for the release of the debtor. It would be perfectly valid as to all men unless they seasonably took proceedings under the Bankruptcy Act."

As to whether a proceedings is an insolvency proceedings or not, the test is what can be accomplished under it—will it operate to supplant the federal act.¹⁰¹

The holding of the State Courts as to whether an assignment law amounts to a general insolvency statute will control.¹⁰²

It is probably not essential to the idea of a bankruptcy or insolvency law that it shall provide for the discharge of the debtor.¹⁰³

In *re Salmon v. Salmon*, 16 A. B. R. 134, 143 Fed. 395 (D. C. Mo.): "Again, to render a state insolvency law inoperative because in contravention of the federal bankrupt act, it is not essential that the State Act shall contain a provision for the discharge of the debtor. It is rather thought such provision for discharge is an incident to, but not an essential part of such law."

§ 1633. Various Holdings as to What Amount to "Insolvency" Proceedings.—There are various holdings as to what amount to insolvency proceedings.

Thus, a proceedings in the form of a creditor's bill, filed under §§ 2716-2722, Code of Georgia, with the averments and prayers essential under those sections, is an insolvency or State bankruptcy proceedings.¹⁰⁴

101. In *re Macon Lumber Co.*, 7 A. B. R. 66, 112 Fed. 322 (D. C. Ga., reversed, on other grounds, sub nom. *Carling v. Seymour Lumber Co.*, 8 A. B. R. 29, 113 Fed. 483, C. C. A. Ga.). Compare, *In re McKee*, 1 A. B. R. 311 (Ky. Co. Court).

102. In *re Curtis*, 1 A. B. R. 440, 91 Fed. 737 (D. C. Ills.).

103. Compare, to similar effect, *In re Hall Co.*, 10 A. B. R. 88, 121 Fed. 992 (D. C. Conn.); *In re Curtis*, 1 A. B. R. 440, 91 Fed. 737 (D. C. Ills.); *In re Marshall Paper Co.*, 4 A. B. R. 468, 102 Fed. 872 (C. C. A. Mass.); (1867) *In re Reynolds*, Fed. Cas. No. 11,723.

104. In *re Macon Lumber Co.*, 7 A. B. R. 66, 112 Fed. 322 (D. C. Ga., reversed sub nom. *Carling v. Seymour Lumber Co.*, 8 A. B. R. 29, 113 Fed. 483, C. C. A. Ga.); *In re Allison Lumber Co.*, 14 A. B. R. 79, 137 Fed. 643 (D. C. Ga.).

Carling v. Seymour Lumber Co., 8 A. B. R. 35, 113 Fed. 483 (C. C. A. Ga., reversing *In re Macon Lumber Co.*, 7 A. B. R. 66, 112 Fed. 322): "These sections, in brief, provide that when any corporation not municipal, or any trader being insolvent, fails to pay debts at maturity, creditors representing one-third or more of the unsecured debts of the insolvent may invoke by petition the power of a court of equity to collect the debts and distribute the assets of such insolvent. The chancellor is authorized, in cases where the insolvent has fairly surrendered his property for distribution, 'to recommend to the creditors of the defendant that they may release him from further liability.' This insolvent traders' act is held by the Supreme Court of Georgia to be a kind of state bankrupt law. Describing the procedure, the court said: 'It is putting a trader in bankruptcy, and relieving him from past debts, as far as state legislation can do so.' *Comer v. Coates*, 69 Ga. 491-495. In a later case this language is repeated and approved, and the court added: 'The act does in many respects resemble the bankrupt acts of congress.'"

Likewise similar statutory proceedings under Pennsylvania Law;¹⁰⁵ and under West Virginia Law.¹⁰⁶

But if it may also operate as a mere suit in equity to foreclose a pre-existing and valid mortgage lien, it will not be superseded because of its being able also to operate as a state insolvency statute; and this is so, although, as incident thereto, a receiver is appointed to preserve the mortgaged assets.¹⁰⁷

Thus, in some instance *General Assignments* under State statutes have been declared to be in effect general insolvency laws.¹⁰⁸

§ 1634. Receiverships and Winding Up of Insolvent Corporations, Whether Insolvency Proceedings.—Certain receiverships under State law have sometimes been held to amount to state insolvency proceedings and as such to be superseded by bankruptcy.¹⁰⁹

Thus, also, proceedings in state courts for the dissolution and winding up of insolvent corporations have been held to be in the nature of insolvency proceedings and to be subject to the rule that they are suspended by the Federal Bankrupt Act.¹¹⁰

^{105.} *In re International Coal Min. Co.*, 16 A. B. R. 311, 142 Fed. 665 (D. C. Penn.).

^{106.} Compare, to same general effect, inferentially, *In re Porterfield*, 15 A. B. R. 11, 138 Fed. 192 (D. C. W. Va.).

^{107.} *Carling v. Seymour Lumber Co.*, 8 A. B. R. 29, 113 Fed. 483 (C. C. A. Ga., reversing *In re Macon Lumber Co.*, 7 A. B. R. 66, 112 Fed. 322, D. C. Ga.).

^{108.} *In re Curtis*, 1 A. B. R. 440, 91 Fed. 737 (D. C. Ills.); *In re Smith & Dodson*, 2 A. B. R. 9 (D. C. Ind.).

^{109.} *Obiter*, *In re Kersten*, 6 A. B. R. 519, 110 Fed. 929 (D. C. Wis.).

^{110.} *In re International Coal Min. Co.*, 16 A. B. R. 311, 143 Fed. 655 (D. C. Pa., affirmed sub nom. *Coal & Coke Co. v. Stauffer*, 17 A. B. R. 573, 148 Fed. 981, C. C. A. Penn.). Even though no receiver nor trustee appointed, but merely sheriff acts.

In re Storck Lumber Co., 8 A. B. R. 86, 114 Fed. 860 (D. C. Md.). Compare, apparently to same effect, *In re Watts*, 10 A. B. R. 113, 190 U. S. 1; *In re Lengert Wagon Co.*, 6 A. B. R. 535, 110 Fed. 927 (D. C. N. Y.). Compare, as act of bankruptcy, *In re Milbury Co.*, 11 A. B. R. 523 (D. C. N. Y.). Compare (but not void until bankruptcy), *Ex rel Strohl v. Sup. Ct. King's Co.*, 2 A. B. R. 92 (Sup. Ct. Wash.).

Mauran v. Carpet Lin. Co., 6 A. B. R. 734, 50 Atl. 331 (R. I.): "The proceeding in the State court against the Crown Carpet Lining Company, resulting in the appointment of a receiver, was practically an insolvency proceeding."

Thus, proceedings under state statutes to wind up and liquidate insolvent private banks have been held to amount to state insolvency proceedings and not to be within any exception on account of being an exercise of the police power.¹¹¹

On the other hand fraudulent conveyance suits instituted by a receiver of a judgment debtor, have been held not to amount to an insolvency proceedings,¹¹² likewise, fraudulent conveyance suits instituted by creditors without judgment, under favor of state statute.¹¹³ Again, it has been held that a general assignment for the benefit of all creditors who will accept and will release the debtor, are not insolvency proceedings.¹¹⁴ And suits under State statutes to set aside preferential transfers have been held not to be insolvency proceedings within the meaning of the law superseding insolvency proceedings by bankruptcy proceedings.¹¹⁵

§ 1635. Procedure to Procure Surrender from State Bankruptcy or Insolvency Courts.—The same rules as to the method of procedure prevail in regard to obtaining surrender or possession where the state court has custody under state bankruptcy or state insolvency proceedings, as in cases of nullified assignments, receiverships, etc., under state laws not amounting to state bankruptcy or state insolvency laws.¹¹⁶

§ 1636. Thus, State Court Receiver May Be Enjoined.—Thus, injunctions may issue to restrain the proceedings in the state court.

Carling v. Seymour Lumber Co., 8 A. B. R. 41, 113 Fed. 483 (C. C. A. Ga.): "The jurisdiction and authority of the bankruptcy court for the enforcement of the Bankrupt Law is paramount. State insolvency laws are superseded by the Bankrupt Act. While it is a general rule that a Federal court may not enjoin proceedings in a State court, an exception is made in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy. Rev. Stat., U. S., § 720. When the State court is in possession, through its receiver, of assets that it is without jurisdiction or authority to hold against a receiver or trustee appointed in bankruptcy proceedings, instead of making a peremptory order on the receiver of the State court to surrender the funds, an injunction, if necessary, might be granted by the bankruptcy court to prevent the unlawful distribution of the assets, until application could be made to the

111. *In re Salmon & Salmon*, 16 A. B. R. 132, 143 Fed. 395 (D. C. Mo.).

112. *In re Meyers & Co.*, 1 A. B. R. 347 (Ref. N. Y.).

113. *Grunsfeld Bros. v. Brownell*, 11 A. B. R. 599 (N. Mex. Sup. Ct.).

114. *Patty-Joiner Co. v. Cummins*, 4 A. B. R. 269, 57 S. W. 566 (Sup. Ct. Tex.); [1867] *Boese v. King*, 108 U. S. 379.

115. *Grunsfeld Bros. v. Brownell*, 11 A. B. R. 599 (N. Mex. Sup. Ct.).

116. See cases cited under same rule relative to the custody of state officers under nullified legal liens, ante, § 1601, and post, § 1830: under void assignments and receiverships, ante, § 1611: and on the general subject of Summary Orders on Court Officers in possession, § 1860.

State court for an order to its receiver to surrender the assets to the proper custodian. The laws of the United States being equally binding on all the courts, we cannot assume that the State court would refuse to administer them. We are not now called on to decide what course should be taken in the event of a disregard of the Bankrupt Law by the State court. That such application should be made in the first instance to the State court is sustained, not only by the analogous cases relating to comity, but by adjudications directly in point on this question of practice under the Bankrupt Law."

§ 1637. **Comity Requires Resort First to State Tribunal.**—Thus, likewise, comity requires resort first to the tribunal of the state court for an order of surrender.¹¹⁷

Whenever the state court surrenders the assets, the validity and extent of any lien thereon in favor of the insolvency officers must be left to the bankruptcy court for determination, and there is no jurisdiction the state court to fix the same, and any order to that effect will be disregarded.¹¹⁸

DIVISION 4.

VOLUNTARY SURRENDER OF CUSTODY BY STATE COURT.

§ 1638. **Voluntary Surrender by State Court.**—If the state court voluntarily surrenders possession it is divested of jurisdiction, and the bankruptcy court is invested therewith.

In *re Hymes Buggy & Implement Co.*, 12 A. B. R. 477, 130 Fed. 577 (D. C. Mo.): "But passing this by, it affirmatively appears from the referee's findings, and the evidence amply sustains it, that whatever possession of the goods the sheriff acquired under the writ of replevin was on the 4th day of May, 1904, voluntarily surrendered by him to the receiver in bankruptcy. This constituted an abandonment of his seizure, and entitled the receiver in bankruptcy, as the representative pro hac of the debtor and creditors, to receive and to hold it. It is a well-settled rule of law that a release of the goods levied on or seized under writ by a sheriff is an abandonment thereof, and invalidates the levy."

SUBDIVISION "A."

PENDING SUITS BY AND AGAINST BANKRUPTS.

§ 1639. **Pending Suits against Bankrupts—Subrogation of Trustee to Creditor's Lien Where Lien Preserved.**—A trustee may be subrogated to the rights of the plaintiff and be substituted for him in pending actions, wherein a lien by legal proceedings has been obtained within four

117. *Carling v. Seymour Lumber Co.*, 8 A. B. R. 29, 113 Fed. 483 (C. C. A. Ga.); *Hooks v. Aldridge*, 16 A. B. R. 664, 145 Fed. 865 (C. C. A. Tex.).

See also cases cited under same rule as applicable to the custody of State officers under nullified legal proceedings, ante, § 1601, and post, § 1830; void assignments and receiverships, ante, § 1611; and summary orders on custodians, post, § 1860.

118. In *re Rogers*, 8 A. B. R. 723, 116 Fed. 435 (D. C. Ga.); *Carling v. Seymour Lumber Co.*, 8 A. B. R. 41, 113 Fed. 483 (C. C. A. Ga.): ante, § 1620.

months, which would otherwise be nullified by the adjudication in bankruptcy, but which has been preserved for the benefit of the estate.¹¹⁹

§ 1640. Pending Suits by Bankrupt—Substitution of Trustee.—The trustee may, with the approval of the court, be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him.¹²⁰

He may, but need not be so permitted.¹²¹

§ 1641. Preliminary Order of Approval Proper.—An order, signifying the court's approval, should, as a prerequisite, be entered by the referee, authorizing or directing the trustee to prosecute the suit.¹²²

Such preliminary order is not requisite, however, where the trustee institutes the action himself and is not merely substituted for the bankrupt in an action already pending.¹²³

§ 1642. Probability of Success Should Appear.—Probability of success, not certainty of it, is all that is necessary to show in the application for such an order; or, if a proposition of settlement has been made, that more could probably be obtained by the suit than by the settlement.¹²⁴

§ 1643. Only Suits on Rights Passing to Trustee Authorized.—Only such suits will be authorized to be prosecuted as are founded on rights of action that would pass to the trustee in bankruptcy.¹²⁵

Thus, the court would not authorize the trustee to prosecute a slander suit, or a suit for malicious prosecution, begun by the bankrupt before adjudication.¹²⁶

§ 1644. Defendant Not Released by Failure of Trustee to Assume Prosecution.—If the trustee does not take up the prosecution of the suit,

119. See for full discussion of the "Preservation of Nullified Legal Liens," ante, § 1489.

120. Bankr. Act, § 11 (c); (obiter) *Patten v. Carley*, 8 A. B. R. 482 (N. Y. Sup. Ct. App. Div.).

121. *Griffin v. Mut. Life Ins. Co. of N. Y.*, 11 A. B. R. 622, 119 Ga. 664.

122. Bankr. Act, § 11 (c); *In re Price*, 1 A. B. R. 606, 92 Fed. 987 (D. C. N. Y.); *Hahlo v. Cohn*, 15 A. B. R. 591, 112 N. Y. App. Div. 636 (N. Y. Sup. Ct. App. Div.); impliedly, *Traders' Ins. Co. v. Mann*, 11 A. B. R. 272 (Sup. Ct. Ga.); impliedly, *Callahan v. Israel*, 186 Mass. 383; *Bear v. Chase*, 3 A. B. R. 746, 99 Fed. 920 (C. C. A. S. C.).

123. *Hahlo v. Cohn*, 15 A. B. R. 591, 112 N. Y. App. Div. 636 (N. Y. Sup. Ct. App. Div.); *Traders' Ins. Co. v. Mann*, 11 A. B. R. 272 (Sup. Ct. Ga.); *Callahan v. Israel*, 186 Mass. 383; contra, obiter, *In re Ryburn*, 16 A. B. R. 515, 145 Fed. 662 (D. C. Conn.).

124. *In re Phelps*, 3 A. B. R. 396 (Ref. N. Y.).

125. *In re Haensell*, 1 A. B. R. 286, 91 Fed. 355 (D. C. Calif.); inferentially, *In re Price*, 1 A. B. R. 606, 92 Fed. 987 (D. C. N. Y.).

126. *In re Haensell*, 1 A. B. R. 286, 91 Fed. 355 (D. C. Calif.).

the defendant is not released, even where the right of action is one that might have passed to the trustee; but the bankrupt may continue the prosecution.¹²⁷

Hahlo v. Cohn, 15 A. B. R. 593 (Sup. Ct. N. Y.): "An action by or against the bankrupt in the State Court does not abate upon the adjudication in bankruptcy or appointment of a trustee, and in the absence of an application by the trustee for substitution it may be prosecuted or defended by the bankrupt."

He is interested in the fund, either as the source of his exemptions, or as a means of enlarging the estate for his creditors.¹²⁸

And this is so, even though no trustee were appointed.¹²⁹ And the bankrupt need not get leave from the bankruptcy court to continue the suit, at any rate where the right of action could not, in any event, have passed to the trustee.¹³⁰

Thus, the liability of stockholders for unpaid stock subscriptions in a bankrupt corporation the trustee will be ordered to enforce by appropriate action.¹³¹

§ 1645. **Ordering Trustee to Apply for Leave to Defend.**—The bankruptcy court may order the trustee to apply for leave to enter his appearance and to defend any pending suit against the bankrupt.¹³²

§ 1646. **Intervening Not Usually Proper except Where Property Involved.**—Here, again, the touchstone is whether any property of the creditors in bankruptcy is involved.¹³³

If the suit is a foreclosure suit, or a creditor's bill, or replevin¹³⁴ or other suit affecting the property of the bankrupt, of course it will be proper for the trustee to defend and prove the invalidity of the liens, or reduce their amount, or prove right of property; for thus he will increase the assets of the estate.¹³⁵

127. *Griffin v. Mut. Life Ins. Co. of N. Y.*, 11 A. B. R. 622, 119 Ga. 664 (Sup. Ct. Ga.).

128. *Griffin v. Mut. Life Ins. Co. of N. Y.*, 11 A. B. R. 622, 119 Ga. 664 (Sup. Ct. Ga.). But compare, *In re Levy*, 7 A. B. R. 56 (Ref. N. Y.).

129. *Griffin v. Mut. Life Ins. Co. of N. Y.*, 11 A. B. R. 622, 119 Ga. 664 (Sup. Ct. Ga.).

130. *In re Haensell*, 1 A. B. R. 286, 91 Fed. 355 (D. C. Calif.).

131. See ante, "Unpaid Stock Subscriptions as Assets," § 976.

132. Bankr. Act, § 11 (b): "The court may order the trustee to enter his appearance and defend any pending suit against the bankrupt." *Obiter*, *Patten v. Carley*, 8 A. B. R. 482 (N. Y. Sup. Ct. App. Div.).

133. *In re St. Alban's Fdy. Co.*, 4 A. B. R. 594 (D. C. Vt.); impliedly, *In re Klein*, 3 A. B. R. 174, 97 Fed. 31 (D. C. Ills.).

But compare erroneous decision *In re Rogers*, 1 A. B. R. 541 (Ref. Ky.), where the court undertook to stay proceedings and to get possession of property acquired subsequently to bankruptcy for the benefit of a creditor whose claim was not dischargeable.

134. *Inferentially*, *In re Neely*, 7 A. B. R. 312, 113 Fed. 210 (C. C. A. N. Y.).

135. *Heath v. Shaffer*, 2 A. B. R. 98, 93 Fed. 647 (D. C. Iowa).

And the bankruptcy court may restrain the proceedings in the State court to give time for the trustee in bankruptcy to intervene, *In re Klein*, 3 A. B. R. 174, 97 Fed. 31 (D. C. Ills.).

The trustee may be required to respond to garnishment proceedings pending at the time of bankruptcy, wherein the bankrupt was garnishee; but only to the extent of dividends, and only by order of the bankruptcy court. And the garnishment proceedings may be stayed until the dividends can be ascertained.¹³⁶

§ 1647. **Intervening in Suits in Personam.**—The court would hardly order the trustee to defend a suit in personam against the bankrupt, for such suit would not affect the rights of the creditors. Yet, inasmuch as it is possible for judgments obtained after the bankruptcy but before the discharge to be proved (§ 63 (5)), occasion will arise when it will be to the creditors' interest to have the trustee defend even a suit merely in personam. Especially is this so where the bankruptcy court itself has ordered that a pending suit be maintained as a method of liquidating an unliquidated demand, under § 63 (b).¹³⁷

§ 1648. **State Court Governed by State Law and Judicial Policy in Granting or Refusing Application.**—The state court will be governed in deciding the application, by State laws and judicial policy.¹³⁸

Bank of Commerce v. Elliott, 6 A. B. R. 409, 109 Wis. 648: "Counsel insists that because § 11 (b) of the Bankruptcy Act provides that in a proceeding under it, the Federal Court may order the trustee to enter his appearance and defend any pending suit against the bankrupt, and the trustee in the matter of Elliott's bankruptcy was so ordered, the Circuit Court having the garnishee actions in question in charge was found to give effect to such order by granting the motion to make him a party to such actions. That subject was before this court and was fully considered in *Distilling Co. v. Seidel*, 103 Wis. 489, 79 N. W. 744. We there held, and now affirm, that the Federal statute, however mandatory its terms, does not control the practice in State courts, and was not intended to do so. If an order be made under it commanding a trustee to intervene in the State court in an action to which the bankrupt is a party, the former performs his full duty when he makes a proper application to such court to be let in to such action. In disposing of such application the statutes of the State, and the rules and practice of its court, must necessarily govern, the same as when any other party invokes the court's jurisdiction.

"Testing the ruling of the court, refusing to make the trustee in bankruptcy a party to the garnishee actions, by State laws and judicial policy, we fail to

136. *In re The St. Albans Fdy. Co.*, 4 A. B. R. 594 (D. C. Vt.).

137. *In re Simon*, 3 N. B. N. & R. 807 (Ref. Ohio). Compare, *In re Johnson*, 11 A. B. R. 544 (D. C. Nev.), where the State court was permitted to determine the validity of a lien on property in the bankruptcy court's custody and to make the trustee a party defendant.

138. Compare, *In re Price*, 1 A. B. R. 606, 92 Fed. 987 (D. C. N. Y.).

If such an application to intervene is denied, only a party aggrieved by the adverse decision can be heard on appeal therefrom; and the trustee cannot be so heard, unless he shall first have applied to the State court, failed in his application and appealed specially from the decision, *Bank of Commerce v. Elliott*, 6 A. B. R. 409 (Sup. Ct. Wis.).

see why the trustee had any interest in the action that required his presence therein for his due protection, or why the entire controversy in such action, as to the plaintiff, was not susceptible of a complete determination without the trustee being brought in. Therefore, § 2610, Rev. St. 1898, did not require the trial court to grant the motion, but left it free to exercise its discretion in respect thereto. If we say plaintiff acquired a right, by the commencement of the garnishee action, to hold the garnishee liable for some part of its indebtedness to Elliott, and that such right, by operation of law, was displaced by the right of the trustee in bankruptcy so as to bring the latter within the scope of § 2801, *id.*, then it would follow that the action of the trial court could not be disturbed unless it clearly appeared that there was an abuse of judicial discretion. Granting or refusing a motion under that section is, by its terms, addressed to the sound discretion of the court. In any event, since, as will be hereafter seen, there was no controversy between the trustee and appellant as to who should have the benefit of the liability of the garnishee to Elliott, appellant was not prejudiced by the denial of the motion to make the trustee a party, and cannot be heard to complain of such denial on this appeal. Section 2829, *id.*

"Again, regardless of the rights of the trustee under section 2901, Rev. St. 1898, appellant has no standing here to recover on the assignment of error under discussion, because the privilege was one to be asserted by the trustee. He did not appear in the court below and ask to be made a party, as we understand the record, nor is he a party to the appeal."

By intervening, the trustee does not oust the state court of jurisdiction, although the trustee claims the transfer involved is a preferential transfer given within four months of the bankruptcy.

Savings Bk. v. Jewelry Co., 12 A. B. R. 781, 123 Iowa 432: "That the enactment of a general bankruptcy law so far supersedes and suspends the operation of State insolvency laws as that a receiver or assignee in insolvency proceedings instituted under State statutes may be properly required to surrender possession to a trustee in bankruptcy, may be conceded. And such are the cases cited by counsel for appellant. But such doctrine cannot be extended to an action for the enforcement of a specific lien. Jurisdiction of such actions in the State court is not sought to be taken away by the Federal statute, and such could not well be. The action is not one to administer upon the estate of the bankrupt, or any portion of such estate. The purpose thereof is to ascertain if the plaintiff have a right to resort, by virtue of a specific lien claim, to the particular property in controversy, as against all other creditors or claimants, for the payment of his debt or the satisfaction of his demand. His rights would be the same whether presented to the State or the Federal court in an action to foreclose, or by way of a claim made in the bankruptcy proceedings. Hence it is that the court which first takes jurisdiction and assumes control of the property retains it for all the purposes of a final order or decree. True, the trustee in bankruptcy may intervene in such action pending in the State court, as did this intervener, and be heard to contest the existence or the validity of the specific lien claimed, and he may well be awarded the property in the event the existence of the lien claimed is denied by the decree. But that a trustee may work an ouster of jurisdiction in the State court in such cases by pointing out the pendency of the bankruptcy proceedings has no support in reason or well-considered authority."

§ 1649. **Manner of Intervention.**—The intervention may be by way of substitution of the trustee for the bankrupt.¹³⁹

The trustee may limit his application to certain objects.

Bear v. Chase, 3 A. B. R. 746, 757, 99 Fed. 920 (C. C. A. S. C.): "Such petition should have been limited to a request to transfer the money to the Bankrupt Court."

§ 1650. **Trustee Bound as Any Other Litigant, on Intervention.**—When the trustee is substituted for the bankrupt, his submission to the jurisdiction binds him to the judgment rendered, subject only to his rights as a litigant in the State courts.¹⁴⁰

§ 1651 **Stay of Pending Suits.**—The subject of the stay of pending suits is considered elsewhere. So far as such stay is for the benefit of the bankrupt, to give him opportunity to secure his discharge and present it as a defense in bar, it is discussed under the general subject of discharge.¹⁴¹

So far as such stay is for the benefit of the estate, it is considered under the various subjects of injunctions and restraining orders.¹⁴²

139. Obiter, and inferentially, *Griffin v. Mut. Life Ins. Co.*, 11 A. B. R. 623, 119 Ga. 664.

140. *Savings Bk. v. Jewelry Co.*, 12 A. B. R. 781, 123 Iowa 432.

Obiter, *In re Neely*, 7 A. B. R. 312, 113 Fed. 210 (C. C. A. N. Y.), which was a replevin case, in which the court held the trustee bound for costs.

In re Van Alstyne, 4 A. B. R. 42, 100 Fed. 929 (D. C. N. Y.), which was a case of foreclosure of mechanic's lien. Inferentially, *Bank of Commerce v. Elliott*, 6 A. B. R. 409 (Sup. Ct. Wis.).

141. See post, § 2688, et seq.

142. See ante, § 359, et seq.; post, § 1901, et seq.

CHAPTER XXXIII.

JURISDICTION OVER ADVERSE CLAIMANTS.

Synopsis of Chapter.

- § 1652. Jurisdiction over "Adverse Claimants."
- § 1653. Before Amendment of 1903 Neither Summary nor Plenary Jurisdiction over Adverse Claimants Existed in Bankruptcy Court.
- § 1654. Injunctions on Adverse Claimants Issuable in Bankruptcy Proceedings.

DIVISION 1.

- § 1655. "Adverse Claimant" Not Confined to Absolute Owners.
- § 1656. Adverse Claimant and Bankrupt Holding Jointly, Bankruptcy Court Has Jurisdiction.
- § 1657. Adverse Claimant Obtaining Voluntary Possession from Bankruptcy Officer, Not Subject to Summary Jurisdiction.
- § 1658. Claimant Himself Becoming Bankrupt Gives Jurisdiction.
- § 1659. Attaching Creditor Receiving Proceeds within Four Months, Adverse Claimants.
- § 1660. Receiving Proceeds after Bankruptcy, Not "Adverse Claimant."
- § 1661. Proceeds Still in Officer's Hands; Neither Creditor nor Officer Adverse Claimant.
- § 1662. Court Officers in Possession, Adverse Claimants until Adjudication.
- § 1663. Whether Garnishee Adverse Claimant Where Garnishment within Four Months.
- § 1664. Wife "Adverse Claimant" as to Property She May Hold Adversely to Husband.
- § 1665. Assignee or Receiver Not "Adverse Claimant" as to Proceeds Still in Hands.
- § 1666. But "Adverse Claimant" as to Proceeds Already Disbursed.
- § 1667. Agent in Possession Applying Funds on Salary.
- § 1668. Trustee in Possession under Mortgage for Benefit Certain Creditors, "Adverse Claimant."
- § 1669. Alleged but Not Real Partners in Involuntary Partnership Petition, "Adverse Claimants," Not Subject to Summary Seizures of Property.
- § 1670. Executor Holding Legacy to Bankrupt, Not "Adverse Claimant."
- § 1671. But Administrator of Deceased Partner in Possession of Firm Assets, "Adverse Claimant."
- § 1672. Trustees of Spendthrift Trusts, "Adverse Claimants."
- § 1673. Mere Bailee in Possession, Not "Adverse Claimant."
- § 1674. Stock Exchange Not Contesting Sale of Bankrupt's Seat, Not "Adverse Claimant."
- § 1675. Mortgagees in Actual Possession, "Adverse Claimants."
- § 1676. Alleged Fraudulent Transferee in Possession, "Adverse Claimant."
- § 1677. Alleged Preferential Transferee in Possession, "Adverse Claimant."
- § 1678. Assignee of Bankrupt's Wages, "Adverse Claimant."
- § 1679. Lienholder and Secured Creditor as "Adverse Claimants."
- § 1680. Debtors of Bankrupt "Adverse Claimants," Not to Be Proceeded against Summarily.
- § 1681. Thus, Banks Owing "Deposits," "Adverse Claimants."

- § 1682. Likewise, Owner Owing on Building Contract Subject to Mechanic's Liens, "Adverse Claimant."
- § 1683. Also, Employers Holding Wages of Bankrupt Tied Up by Assignment, "Adverse Claimants."

DIVISION 2.

- § 1684. Plenary Suits against "Adverse Claimants" in State Courts.
- § 1685. Distinction between Proceedings in Bankruptcy and "Controversies" Arising Out of Bankruptcy.
- § 1686. Jurisdiction of U. S. Circuit Court in Bankruptcy Matters.
- § 1687. Jurisdiction of State Courts in Bankruptcy Matters.
- § 1688. But by Amendment of 1903 Jurisdiction Conferred Also in Certain Cases upon Bankruptcy Courts.
- § 1689. Cases under § 70 (e) Included Though Not Expressly Mentioned in § 23 (b).
- § 1690. Plenary Suits against "Adverse Claimants" in Bankruptcy Courts.
- § 1691. Plenary Suits by Trustees Not "Proceedings in Bankruptcy," but "Controversies."
- § 1692. But When Not to Be Brought in Bankruptcy Court.
- § 1693. Third Parties Not to Resort to Bankruptcy Court Where Neither Property in Its Custody nor Either Party, Party to Bankruptcy Proceedings.
- § 1694. Actions in Personam for Debts Not to Be Brought in Bankruptcy Courts.
- § 1695. No Plenary Suits before Referee.

SUBDIVISION "A."

- § 1696. Jurisdiction by Consent.
- § 1697. Debtors Owing Money May Confer Jurisdiction by Consent.
- § 1698. What Constitutes Consent.
- § 1699. But Consent Confers Jurisdiction Only in Plenary Actions unless Property in Custodia Legis.
- § 1700. No Jurisdiction by Consent Where No Custody and Neither Litigant Party to Bankruptcy Proceedings.
- § 1701. Trustee May Not Object, if Adverse Claimant Consents.
- § 1702. Thus, Not to Plenary Suit in Bankruptcy Court by Adverse Claimant in Possession.
- § 1703. No Indirect Review by Suing Trustee in U. S. Circuit Court, Where Litigants Dissatisfied in Bankruptcy Proceedings.
- § 1704. After "Consent," Too Late to Retract.

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- § 1705. No "Ancillary" Bankruptcy Proceedings.
- § 1706. But May Marshal Liens and Sell Personal Property in Actual Custody Though in Another State.
- § 1707. Property in Other States Not in Actual Custody, to Be Protected Only by Independent Suits.
- § 1708. Before Adjudication, Bankruptcy Receiver No Power in Another District.
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SUBDIVISION "C."

- § 1710. Other Actions Maintainable by Trustee.
- § 1711. Whether May Maintain Partition Proceedings.

DIVISION 3.

- § 1712. Who May Bring Plenary Suits against "Adverse Claimants."
- § 1713. Legal Proceedings Resulting in Recovery of Concealed Assets, etc., Creditor Entitled to Reimbursement.
- § 1714. Must Have Resulted to Benefit Estate, Else No Reimbursement.
- § 1715. Property Must Have Been "Transferred," or "Concealed" by "Bankrupt," Else No Reimbursement.
- § 1716. Creditors May Not Bring Independent Plenary Actions in Bankruptcy Court.
- § 1717. Receivers May Not Institute Plenary Suits for Property or Debts.
- § 1718. After Appointment of Trustee Suits Not to Be Instituted by Creditors.
- § 1719. Creditors Maintaining Suits in Trustee's Name.
- § 1720. Trustee May Institute Suits for Recovery of Property.
- § 1721. May Sue in State Court.
- § 1722. May Sue without First Obtaining Leave.
- § 1723. May Sue in Bankruptcy Court for Recovery of Property Transferred by Bankrupt.
- § 1724. May Institute Suits against Debtors to Recover Money Judgments.

DIVISION 4.

SUBDIVISION "A."

- § 1725. Nature of Plenary Suits against "Adverse Claimants."
- § 1726. Receivers May Be Appointed.
- § 1727. Writs of Injunction and Sequestration Issuable.
- § 1728. Retransfer or Surrender of Choses in Action May Be Ordered.
- § 1729. Trustee Not Confined to Suits in Equity, and in Proper Case May Sue at Law for Recovery of Property or Its Value.
- § 1730. And Should Sue at Law unless Remedy Inadequate.

SUBDIVISION "B."

- § 1731. Petition to Show Inadequacy of Assets.
- § 1732. Return of Execution Unsatisfied, Not Always Prerequisite.
- § 1733. Insolvency Not Necessary Where Actual Intent to Defraud Proved.
- § 1734. "Insolvency," Here, Means Inadequacy of Assets, Not Mere Inability to Pay "in Due Course."
- § 1734½. Allowance of Claim, Subrogation and Reimbursement of Transferee on Setting Aside Constructively Fraudulent Transfer.
- § 1735. Pleadings to Show Trustee's Representative Capacity.
- § 1736. Trustee Presumed to Represent Creditors and to Be Authorized to Act; Though No Claims Proved.
- § 1737. Tender of Actual Consideration Paid, Not Necessary.
- § 1738. Whether Transfer Voidable Only as to Some Creditors, Nevertheless Avoided as to All.
- § 1739. Charging Same Transaction in Alternative, Fraudulent or Preferential, Not Inconsistent.
- § 1740. All Matters Proper in Creditor's Bill, Proper Here.
- § 1741. Both Bankrupt and Transferee in Fraudulent Transfer Proper Parties, Though Bankrupt and Intermediate Transferee Not Necessary.

- § 1742. Several Acts Committed with Common Design, Joinable.
- § 1743. Property to Be Shown to Belong to Estate.
- § 1744. Fraudulent Intent to Be Alleged and Proved.
- § 1745. Fraud a Question of Fact.
- § 1746. Burden of Proof.
- § 1747. Schedules and General Examination of Bankrupt Inadmissible against Transferee.
- § 1748. Appraisal in Bankruptcy Inadmissible against Transferee.
- § 1749. Declarations of Transferror after Transfer.
- § 1750. Failure to Produce Important Evidence, Presumption of Fraud.
- § 1751. Existence of Other Creditors at Time of Transfer, to Be Shown, unless.
- § 1752. Collateral Attack on Collusive Receiverships.
- § 1753. Suing in U. S. District Court, Suit Follows Usual Course.
- § 1754. Allegation of Diverse Citizenship Not Requisite.
- § 1755. Service on Nonresidence When Suit in U. S. District Court.
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- § 1757. Answering under Oath Requiring Testimony to Overcome.
- § 1758. If Suit in U. S. District Court, Party Not to Impeach Own Witness.
- § 1759. State Statutes Permitting Cross-Examination of Adverse Party, etc., Not Followed.
- § 1760. Where Trustee Sues in State Court, Suit Follows Usual Course and Parties Have Usual Rights, There.

SUBDIVISION "C."

- § 1761. Representative Capacity of Trustee to Be Alleged.
- § 1762. Each Element of Preference to Be Alleged and Proved.
- § 1763. Insolvency at Time of Transfer.
- § 1764. Reasonable Cause of Belief.
- § 1765. Effect of Transfer to Give Greater Percentage of Debt.
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- § 1767. Facts, Not Evidence, nor Legal Conclusions, to Be Pleaded.
- § 1768. Burden of Proof of Each Element on Trustee.
- § 1769. Demand Not Requisite.
- § 1770. Nor Tender Back.

SUBDIVISION "D."

- § 1771. Referee's Order of Allowance or Disallowance, Res Adjudicata.
- § 1772. Also His Order Determining Validity and Priority of Liens.
- § 1773. Referee Not to Impeach Own Order.
- § 1774. Adjudication as to Fraud on Discharge, Not Res Judicata in Suit by Trustee.
- § 1775. Refusal of Summary Order to Surrender Assets Not Res Adjudicata in Plenary Action.
- § 1776. Whether Adjudication in Bankruptcy Res Judicata as to Insolvency When Act Committed, if Insolvency Essential Element.
- § 1777. At Any Rate, Adjudication on Ground of Preference Not Res Judicata on Issue of "Reasonable Cause for Belief."

§ 1652. Jurisdiction over "Adverse Claimants."—Third parties having at the time of the bankruptcy possession of the tangible property or funds involved, under claim of a beneficial or adverse

interest therein, cannot be obliged to surrender them, nor can third parties owing debts to the bankrupt at the time of the bankruptcy, be obliged to pay the debts, nor can such parties be obliged to submit their rights in such property, funds or debts for determination to the bankruptcy court, by summary proceedings in the bankruptcy proceedings, even on notice and hearing: Such property, funds or debts thus owed or adversely held, are to be reached only by instituting plenary suits, in which the parties may be brought into court by due service of summons or subpoena, pleadings may be filed, issues joined and trial had, in accordance with the usual forms of procedure.¹

Obiter, *Bardes v. Bank*, 4 A. B. R. 163, 178 U. S. 524: "It was also repeatedly held by this Court that the right of an assignee in bankruptcy to assert a title in property transferred by the bankrupt before the bankruptcy to a third person, who now claimed it adversely to the assignee, could only be enforced by a plenary suit, at law or in equity, under the second section of the Act of 1867; and not by summary proceedings under the first section thereof, notwithstanding the declaration in that section that the jurisdiction in bankruptcy should extend 'to the collection of all the assets of the bankrupt,' and 'to all acts, matters and things to be done under and in virtue of the bankruptcy' until the close of the proceedings in bankruptcy. *Smith v. Mason* (1871), 14 Wall. 419; *Marshall v. Knox* (1872), 16 Wall. 551, 557; *Eyster v. Gaff* (1875), 91 U. S. 521, 525."

In *re Knickerbocker*, 10 A. B. R. 384, 121 Fed. 1004 (D. C. N. Y.): "On the other hand, if, in the exercise of sound judicial discretion, the referee is satisfied

1. Compare cases cited under the subject of summary jurisdiction over bankrupts and others, post, §§ 1794 and 1795.

Beach v. Macon Grocery Co., 8 A. B. R. 751, 116 Fed. 143 (C. C. A.); In *re Rockwood*, 1 A. B. R. 272, 91 Fed. 363 (D. C. Iowa); In *re Kelly*, 1 A. B. R. 306, 91 Fed. 504 (D. C. Tenn.); In *re Flynn & Co.*, 11 A. B. R. 318, 126 Fed. 422 (D. C. N. Car.); In *re Scherber*, 12 A. B. R. 616, 131 Fed. 121 (D. C. Mass.); *Hinds v. Moore*, 14 A. B. R. 1, 134 Fed. 221 (C. C. A. Tenn., reversing In *re Leeds Woolen Mill Co.*, 12 A. B. R. 136, 129 Fed. 922).

In *re Buntrock Clothing Co.*, 1 A. B. R. 455, 457, 92 Fed. 886 (D. C. Iowa): This case was decided before the Amendment of 1903, and might have been decided on the broader grounds that no jurisdiction, either plenary or summary, existed, yet the decision was placed on the ground that the proceedings were summary; the court saying:

"* * * Upon their refusal to yield up possession thereof he obtained from the referee the issuance of an order directing them to show cause why they did not deliver up possession of the property to the trustee. * * *. As is said by the Supreme Court in the case just cited (*Yeatman v. Inst.*, 95 U. S. 764), if the trustee questions the validity of the mortgages, he can attack the same by proper proceedings to that end, or he may redeem the property by payment of the mortgage liens, or in other ways may perhaps protect the interests of creditors, but he cannot by summary proceedings compel the delivery of possession of property by third parties, who hold the same as mortgagees, and whose possession antedates the filing of the proceedings in bankruptcy."

In *re Davis Tailoring Co.*, 16 A. B. R. 486, 144 Fed. 285 (D. C. N. J.); inferentially, *Horskins v. Sanderson*, 13 A. B. R. 102, 132 Fed. 415 (D. C. Vt.); *Publishing Co. v. Hutchinson Co.*, 17 A. B. R. 427 (Sup. Ct. Mich.).

Contra, where the court sustained the referee in ordering seizure from the possession of an irresponsible vendee of the bankrupt's entire stock of goods, In *re Knopf*, 16 A. B. R. 432, 144 Fed. 245 (D. C. S. C.). This decision is out of line with the cases and cannot be brought into harmony with the great weight of authority.

that the asserted adverse holding of the third party is in good faith, and without intent to thwart or obstruct a just and equitable distribution of the bankrupt estate among the creditors, the moving party must be relegated for his remedy to an action, and is not entitled to summary relief from this court. * * * The remedy of the trustee, however, must be sought in a plenary suit brought under the provisions of § 23 (b), as amended (Act. Feb. 5, 1903, chap. 487, § 8; 32 Stat. 798), either in this court or the proper State tribunal, at his election."

In *re Andre*, 13 A. B. R. 134, 135 Fed. 736 (C. C. A. N. Y.): "Prior to the decision in *Bardes v. Hawarden Bank*, * * * it was supposed by some of the Federal courts that pursuant to the provisions of § 23 of the Act, the bankruptcy courts had jurisdiction of all suits brought by trustees respecting property claimed to belong to the bankrupt's estate which was being administered by the trustee and which the bankrupt had transferred in contravention of the Act, and many of the courts which had adopted this construction of the section sanctioned the exercise by the bankruptcy courts of the power under §§ 2 and 69 to take such property into its custody for the preservation of the estate pending the appointment of the trustee, notwithstanding it was in the possession of some third person claiming an adverse title to it. The *Bardes* case decided that it was the intention of Congress, manifested by § 23, 'that controversies not strictly or properly part of the proceedings in bankruptcy, but independent suits brought by the trustee in bankruptcy, which assert a title to money or property as assets of a bankrupt against strangers to those proceedings should not come within the jurisdiction of the district courts of the United States 'unless by consent of the proposed defendant.' If Congress did not intend these controversies to be adjudicated by the bankruptcy courts, it cannot be reasonably supposed that Congress intended to permit the bankruptcy courts to adjudicate controversies respecting the title to the bankrupt's property with adverse claimants before the appointment of a trustee against the consent of the adverse claimant, and it would follow that the reasonable construction of the power conferred by § 2 and § 69 should be that it extends only to taking custody of property belonging to the bankrupt or which is in his possession or that a third person, as his bailee or agent, and not the property in the possession of an adverse claimant. This power must of course confer jurisdiction upon the bankruptcy court to ascertain whether the property is in the possession of the bankrupt or his bailee or agent, or whether it is in the possession of an adverse claimant and consequently to institute and entertain an appropriate proceeding for that purpose, and this proceeding must necessarily be a summary one, because as no trustee had been appointed there is no person to represent the estate as a party to a formal suit. Section 23 of the Bankrupt Act, as amended in 1903, confers jurisdiction upon the district courts without the consent of the defendant in suits for the recovery of property where the bankrupt has within a specified time made a preferential or fraudulent transfer of any of his property (subdivision b of § 60 and subdivision e of § 67). This amendment, however, cannot affect the original meaning of §§ 2 and 69, and the construction of these sections must remain as it was before. We conclude that it is only in cases in which the property of the bankrupt is in the possession of a party not an adverse claimant that the courts of bankruptcy have authority under these sections to interfere with it unless the adverse claimant chooses to consent, but that these courts have jurisdiction to entertain proceedings to ascertain whether there is an adverse claimant and that the mere refusal of a person in possession to surrender the property does not constitute him an adverse claimant."

McNulty v. Feingold, 12 A. B. R. 338, 129 Fed. 1001 (D. C. Pa.): "The parties here have been adjudged bankrupts, a trustee appointed, and suit is instituted

by him against third parties for the value of property fraudulently conveyed to them by the bankrupt. It is therefore a controversy at law or in equity, within the provision of § 23, and not a proceeding in bankruptcy, wherein summary proceeding can be had."

In *re Adams*, 12 A. B. R. 367, 130 Fed. 381 (D. C. R. I.): "As it is clear from the report of the referee, and from his decree, that Nash was, properly speaking, an adverse claimant, the referee, upon objection, should have declined to finally adjudicate the merits of the case on a summary petition."

In *re Teschmacher & Mrazay*, 11 A. B. R. 549, 127 Fed. 728 (D. C. Pa.): "As I understand the decisions of the Supreme Court in *Bardes v. Bank*, 178 U. S. 524, 4 A. B. R. 163; *Mueller v. Nugent*, 184 U. S. 1, 7 A. B. R. 224; *Louisville Trust Co. v. Comingor*, 194 U. S. 18, 7 A. B. R. 421; *Jaquith v. Rowley*, 188 U. S. 620, 9 A. B. R. 525, and other decisions cited in those cases, a court of bankruptcy, before the amendments of 1903 were passed, had jurisdiction to inquire summarily upon petition and answer whether property alleged to belong to the bankrupt, but found in the possession of a third person when the petition was filed, was held by such person as the bankrupt's agent or mere representative; and in the exercise of this jurisdiction the court was of necessity empowered to inquire to some extent concerning the merits of the claim of title, or of a right to retain possession, that might be set up by the person in whose hands the property was found. If the result of the inquiry was to satisfy the court that a real adverse claimant existed—no matter how ill-supported it might appear to be—the court had no power to go further in that form of proceeding and decide summarily the question whether or not the claimant was entitled to prevail. It then became necessary, because the Bankrupt Act so declared, to remit the contestants to a plenary suit, either in a State court or in a Circuit Court of the United States, whichever might prove to be the appropriate tribunal. In either forum, however, the dispute was to be conducted by a plenary suit, and not in a summary fashion. The amendments of 1903, as I understand their scope, have made at least one change in these rules. They have conferred jurisdiction upon the District Court to entertain some of the plenary suits which theretofore could only have been brought in a State court or in the Circuit Court, but the other rules of procedure laid down by the Supreme Court are still to be followed. The District Court, sitting as a court of bankruptcy, may still inquire summarily concerning the ownership of property alleged to belong to the bankrupt, although it be found in the possession or custody of a third person. But, if the court should discover that such person is holding the property under a real claim of title or right of possession and is not merely the alter ego of the bankrupt, it is still the duty of the court to desist from pursuing the summary remedy further, and to remit the contestants to a plenary suit, although the suit, instead of being brought in a State court or a Circuit Court of the United States, may now be brought in the District Court itself, and may there be pursued to final judgment."

In *re Manning*, 10 A. B. R. 497, 123 Fed. 180 (D. C. S. Car.): "The court in bankruptcy has no jurisdiction by summary proceedings to collect money from parties who are indebted to the estate of the bankrupt."

In *re Cohn*, 3 A. B. R. 421, 98 Fed. 75 (D. C. N. Y.): This case also was decided before the Amendment of 1903 but was placed upon the ground that the proceedings were summary, the court saying:

"She was, therefore, in the position of a third person, not only claiming title, but in possession of the business, as much as its intangible nature was capable of being in possession. If there was any fraud as between her and her mother,

so that her title could be avoided in favor of the trustee, that could only be inquired into and adjudged in a plenary suit brought against her by the trustee. Her rights could not be adjudicated in a summary manner by the referee in the bankruptcy proceeding."

§ 1653. Before Amendment of 1903 Neither Summary nor Plenary Jurisdiction over Adverse Claimants Existed in Bankruptcy Court.

—By the decision of the United States Supreme Court in 1900 in the famous case of *Bardes v. Bank*, cited and quoted below, it was established that no jurisdiction, except by consent, existed in the United States Bankruptcy Courts over adverse claimants, and that such suits could only be brought in the State Courts, or in cases of diversity if citizenship, etc., in the United States Circuit Courts. Of course, since no jurisdiction over such claimant existed in the bankruptcy court at all, a fortiori no jurisdiction existed over them by summary proceedings.

Thereupon, in 1903, Congress amended the Act so as to confer upon the bankruptcy courts (the United States District Courts sitting in Bankruptcy) jurisdiction over suits brought by trustees for the recovery of property or the proceeds of property that had been preferentially or fraudulently transferred by the bankrupt within the four months preceding the bankruptcy, or which otherwise had been transferred by transfers that would have been voidable by creditors had there been no bankruptcy. The Amendment, as later will be noted, does not confer jurisdiction over suits of all kinds in which the trustee is interested, but only over those brought by him for the recovery of property or its proceeds where the property has been transferred by voidable transfer. Likewise, as later will be noted, this additional jurisdiction conferred by the amendment was not to be exercised by summary process, but by regular plenary action. Therefore, the summary jurisdiction exercisable by the bankruptcy courts was not enlarged whatever by the Amendment of 1903, but was left precisely as it existed prior to the amendment.

Although, then, the decisions before the Amendment as well as those since, deny jurisdiction to the bankruptcy court over adverse claimants by summary process, few of them place the denial squarely upon the single ground that the attempt to exercise it was by summary process, but rather upon the more inclusive ground that no jurisdiction whatever over adverse claimants existed. So the cases before the Amendment of 1903 are not, in general, strictly in point under the proposition that no summary jurisdiction over adverse claimants exists in the bankruptcy courts. Yet, in order to understand the scope of the Amendment, it is proper to consider the law as it stood before the Amendment.²

2. See history as set forth in *In re Andre*, 13 A. B. R. 134, 135 Fed. 736 (C. C. A. N. Y.), quoted ante, at § 1652. *Louisville Trust Co. v. Comingor*, 7 A. B. R. 421; 184 U. S. 18 (affirming *Sinsheimer v. Simonson*, 5 A. B. R. 537, 107 Fed. 898, C. C. A. Ky., discussed in *re Michie*, 8 A. B. R. 737, 116 Fed. 749); *Mitchell v. McClure*, 4 A. B. R. 177, 178 U. S. 539 (affirming 1 A. B. R. 53, 91 Fed. 621); *Burnett v. Morris Mercantile Co.*, 1 A. B. R. 229, 91 Fed. 365 (D. C. Ore.); *obiter*, *Tesmacher v. Mrazay*, 11 A. B. R. 549, 127 Fed. 728 (D. C. Pa.); *Perkins*

The Supreme Court, in *Bardes v. Bank*, combated the doctrine that § 2 of the Bankruptcy Act conferred jurisdiction over adverse claimants, and showed that the source of such jurisdiction, if any existed, must be found elsewhere.

Bardes v. Bk., 4 A. B. R. 163, 178 U. S. 524: "In *Lathrop v. Drake*, 91 U. S. 516, the jurisdiction conferred on the District Courts and the Circuit Courts of the United States by the Bankrupt Act of 1867 was defined by this court, speaking by Mr. Justice Bradley, as consisting of 'two distinct classes; first, jurisdiction, as a court of bankruptcy, over the proceedings in bankruptcy, initiated by the petition, and ending in the distribution of assets amongst the creditors, and the discharge or refusal of a discharge of the bankrupt; secondly, jurisdiction, as an ordinary court, of suits at law or in equity, brought by or against the assignee in reference to alleged property of the bankrupt, or to claims alleged to be due from or to him,' and the jurisdiction of the District and Circuit Courts over suits to recover assets of the bankrupt from a stranger to the proceedings in bankruptcy brought by the assignee in a district other than that in which the decree in bankruptcy had been made, was upheld, not under the provisions of § 1 of that act, giving to the District Court original jurisdiction of proceedings in bankruptcy, and of § 2, giving to the Circuit Court supervisory jurisdiction over such proceedings; but wholly under the distinct clause of § 2, which gave to those two courts concurrent jurisdiction of all suits, at

v. McCauley, 3 A. B. R. 445 (D. C. Calif., reversed sub nom. *In re San Gabriel Sanatorium*, 4 A. B. R. 197, 102 Fed. 310, C. C. A. Calif.); obiter, *Heath v. Shaffer*, 2 A. B. R. 98, 193 Fed. 647 (D. C. Iowa); compare, *In re Greater Am. Exp.*, 4 A. B. R. 486, 102 Fed. 986 (C. C. A. Neb.); *In re Carter*, 1 A. B. R. 160 (Ref. Ga.); *In re Grahs*, 1 A. B. R. 465 (Ref. Ohio); *In re Michie*, 8 A. B. R. 734, 116 Fed. 749 (D. C. Mass.); *In re Kelly*, 1 A. B. R. 306, 91 Fed. 504 (D. C. Tenn.); *Wall v. Cox*, 5 A. B. R. 727, 181 U. S. 244 (101 Fed. 403).

Inferentially, *Mueller v. Nugent*, 7 A. B. R. 224, 184 U. S. 1, discussed in *In re Michie*, 8 A. B. R. 736, and quoted under topic of "Summary Orders," post, § 1822. Obiter, *Mueller v. Bruss*, 8 A. B. R. 445, 112 Wis. 406 (Sup. Ct. Wis.). *In re Nixon*, 6 A. B. R. 693, 698, 110 Fed. 633 (D. C. Mont.).

In re Silberhorn, 5 A. B. R. 568, 105 Fed. 809 (D. C. Ills.), although in this case the res was in the custody of the bankruptcy court, and therefore the case was wrongly decided.

Goodier v. Barnes, 2 A. B. R. 328, 94 Fed. 798 (U. S. C. C. N. Y.).

Apparently, contra, *In re Moody*, 12 A. B. R. 718, 131 Fed. 525 (D. C. Iowa): In this case, however, the facts show the bankrupt had actual custody though an adverse claim existed.

Cases before Amendment of 1903 holding bankruptcy courts had jurisdiction to entertain plenary suits by trustees. Some cases before the Amendment of 1903 maintained erroneously that the bankruptcy courts had jurisdiction to entertain plenary suits by trustees: *Carter v. Hobbs*, 1 A. B. R. 215, 92 Fed. 594 (D. C. Ind.); *In re Kerski*, 2 A. B. R. 79 (Ref. Wis.); *In re San Gabriel Sanatorium*, 4 A. B. R. 197, 102 Fed. 310, C. C. A. Calif., reversing *Perkins v. McCauley*, 3 A. B. R. 445 (C. C. A.); *Norcross v. Nathan*, 3 A. B. R. 613 (D. C. Nev.); *Lehman v. Crosby*, 3 A. B. R. 662 (D. C. N. Y.); *Cox v. Wall*, 3 A. B. R. 664, 99 Fed. 546 (D. C. N. Car., affirmed in 4 A. B. R. 659, but reversed by Sup. Ct., 5 A. B. R. 727); *In re Newberry*, 3 A. B. R. 158 (D. C. Mich.); *Murray v. Beale*, 3 A. B. R. 284 (D. C. Utah); *Louisville Trust Co. v. Marx*, 3 A. B. R. 450 (D. C. Ky.); *Pepperdine v. Headley*, 3 A. B. R. 455 (D. C. Mo.); *In re Woodbury*, 3 A. B. R. 457 (D. C. N. Dak.); *Shutts v. Bank*, 3 A. B. R. 492, 98 Fed. 705 (D. C. Ind.). Obiter, *In re Hammond*, 3 A. B. R. 466, 98 Fed. 845 (D. C. Mass.): But this case is wholly obiter on this point, for it was a case of a lien by legal proceedings nullified by bankruptcy as to which the bankruptcy court always has had summary jurisdiction. Obiter, *Robinson v. White*, 3 A. B. R. 88 (D. C. Ind.). Obiter, *In re Sievers*, 1 A. B. R. 117, 91 Fed. 366 (D. C. Ky.).

law or in equity, brought 'by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to or vested in such assignee.' * * *

"The jurisdiction of the courts of the United States over all matters and proceedings in bankruptcy, as distinguished from independent suits at law or in equity, was of course exclusive. But it was well settled that the jurisdiction of such suits, conferred by the second section of the Act of 1867 upon the circuit and District Courts, of the United States for the benefit of an assignee in bankruptcy, was concurrent with that of the State courts. * * *

"The section (§ 2) nowhere mentions civil actions at law, or plenary suits in equity. And no intention to vest the courts of bankruptcy with jurisdiction to entertain such actions and suits can reasonably be inferred from the grant of the incidental powers, in clause 6, to bring in and substitute additional parties 'in proceedings in bankruptcy,' and in clause 15, to make orders, issue process and enter judgments, 'necessary for the enforcement of the provisions of this act.'

"The chief reliance of the appellant is upon clause 7. But this clause, in so far as it speaks of the collection, conversion into money and distribution of the bankrupt's estate, is no broader than the corresponding provisions of section 1 of the Act of 1867; and in that respect, as well as in respect to the further provision authorizing the court of bankruptcy to 'determine controversies in relation thereto, it is controlled and limited by the concluding words of the clause, 'except as herein otherwise provided.'

"These words, 'herein otherwise provided,' evidently refer to § 23 of the act, the general scope and object of which, as indicated by its title, are to define the 'Jurisdiction of United States and State Courts' in the premises. The first and second clauses are the only ones relating to civil actions and suits at law or in equity.

"The first clause provides that 'the United States Circuit Courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy' (thus clearly recognizing the essential difference between proceedings in bankruptcy, on the one hand, and suits at law or in equity, on the other), 'between trustees as such and adverse claimants, concerning the property acquired or claimed by the trustees,' restricting that jurisdiction, however, by the further words, 'in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.' This clause, while relating to the Circuit Courts only, and not to the District Courts of the United States, indicates the intention of Congress that the ascertainment, as between the trustee in bankruptcy and a stranger to the bankruptcy proceedings, of the question whether certain property claimed by the trustee does or does not form part of the estate to be administered in bankruptcy, shall not be brought within the jurisdiction of the national courts solely because the rights of the bankrupt and of his creditors have been transferred to the trustee in bankruptcy.

"But the second clause applies both to the District Courts and to the Circuit Courts of the United States, as well as to the State courts. This appears, not only by the clear words of the title of the section, but also by the use of this clause of the general words, 'the courts,' as contrasted with the specific words, 'the United States Circuit Courts,' in the first and in the third clauses.

"The second clause positively directs that 'suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt whose estate is being

administered by such trustee might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant.'

"Had there been no bankruptcy proceedings, the bankrupt might have brought suit in any State court of competent jurisdiction; or, if there was a sufficient jurisdictional amount, and the requisite diversity of citizenship existed, or the case arose under the Constitution, laws or treaties of the United States, he could have brought suit in the Circuit Court of the United States. Act of August 13, 1888, c. 866; 25 Stat. 434. He could not have sued in a District Court of the United States, because such a court has no jurisdiction of suits at law or in equity between private parties, except where, by special provision of an act of Congress, a District Court has the powers of a Circuit Court, or is given jurisdiction of a particular class of civil suits.

"It was argued for the appellant that the clause cannot apply to a case like the present one, because the bankrupt could not have brought a suit to set aside a conveyance made by himself in fraud of his creditors. But the clause concerns the jurisdiction only, and not the merits, of a case; the forum in which a case may be tried, and not the way in which it must be decided; the right to decide the case, and not the principles which must govern the decision. The bankrupt himself could have brought a suit to recover property, which he claimed as his own, against one asserting an adverse title in it; and the incapacity of the bankrupt to set aside his own fraudulent conveyance is a matter affecting the merits of such an action, and not the jurisdiction of the court to entertain and determine it.

"The Bankrupt Acts of 1867 and 1841, as has been seen, each contained a provision conferring in the clearest terms on the Circuit and District Courts of the United States concurrent jurisdiction of suits at law or in equity between the assignee in bankruptcy and an adverse claimant of property of the bankrupt. We find it impossible to infer that when Congress, in framing the Act of 1898, entirely omitted any similar provision, and substituted the restricted provisions of § 23, it intended that either of those courts should retain the jurisdiction which it had under the obsolete provision of the earlier acts.

"On the contrary, Congress, by the second clause of § 23 of the present Bankrupt Act, appears to this court to have clearly manifested its intention that controversies, not strictly or properly part of the proceedings in bankruptcy, but independent suits brought by the trustee in bankruptcy to assert a title to money or property as assets of the bankrupt against strangers to those proceedings, should not come within the jurisdiction of the District Courts of the United States, 'unless by consent of the proposed defendant,' of which there is no pretense in this case."

In re Ward, 5 A. B. R. 217, 104 Fed. 985 (D. C. Mass.): "* * * the district court is without jurisdiction to take property alleged to belong to the bankrupt out of the possession of a third party, as well temporarily and by summary process, as permanently and by plenary suit."

Jacquith v. Rowley, 9 A. B. R. 528, 188 U. S. 620: "The objection that it is not a suit within the meaning of the 23d section of the Bankruptcy Law is without force. The proceeding was a summary application to the court in bankruptcy to grant an order in a matter, the result of the granting of which would be to immediately take from the surety moneys which had been deposited with him before the commencement of the proceedings in bankruptcy, and thus compel him to come into the bankruptcy court for the litigation of questions as to his right to retain the money claimed by him. It would also enjoin the plaintiffs in the State suits from proceeding to collect their judg-

ments from the surety in the bail bonds. To extend such a jurisdiction over an adverse claimant would be within the prohibition of § 23, a and b * * * whether such jurisdiction were exerted by an action strictly so-called or by a summary application to the court in bankruptcy. It is the exercise of jurisdiction which the section prohibits, and the particular method of procedure in the court is immaterial. The surety in whose hands the money was deposited to indemnify him for his liability on the bail bond was an adverse claimant within the meaning of that section of the act, and could not be proceeded against in the bankruptcy court unless by his consent, as provided for therein."

Bank v. Title & Trust Co., 14 A. B. R. 106, 198 U. S. 280 (reversing *In re Rodgers*, 11 A. B. R. 78, 125 Fed. 569): "The distinction between steps in bankruptcy proceedings proper and controversies arising out of the settlement of the estates of bankrupts is recognized in Sections 23, 24 and 25 of the present Act. * * * This distinction existed under the prior bankruptcy law, and the then decisions in respect of a proceeding in bankruptcy and an independent suit are applicable. It was settled that the bankruptcy court was without jurisdiction to determine adverse claims to property, not in the possession of the assignee in bankruptcy, by summary proceedings, whether absolute title or only a lien was asserted. * * *

"The present Act was plainly framed in recognition of the principle of these cases."

Hicks v. Knost, 2 A. B. R. 153, 94 Fed. 625 (D. C. Ohio): "Now, it is necessary, within the meaning of the law, in order to accomplish these ends, to invest bankruptcy courts with jurisdiction to hear and determine all controversies incident to the collection and conversion into money of the bankrupt's estate? Must all suits and actions for that purpose, actions on accounts, promissory notes and contracts, and suits to foreclose mortgages, set aside fraudulent conveyances and the like, be brought in the bankruptcy courts without reference to the amount involved, the citizenship of the parties, or the questions presented? Must the dockets be crowded and the time of the District Courts be taken up with the hearing of minor controversies at great inconvenience and expense to the litigants, who may be compelled to travel long distances to attend the courts, or was it the intention of Congress to follow its long-established policy of permitting such controversies to be determined in the local State courts, at the doors of the people without necessary expense or inconvenience? * * *

"It seems to me that it was the intention of Congress to permit such controversies, when they could not be settled by compromise or arbitration, to be litigated in the courts, which, under the general law, would have jurisdiction of them, just as assignees under State insolvency laws bring suits in courts of general jurisdiction to collect assets which are afterwards distributed by the Court of Insolvency. The Bankruptcy Court controls the trustee, supervises the administration of his trust, settles his accounts and orders the distribution of the moneys in his hands, but is not required to assume the burden of the litigations necessary for the collection of assets, nor are adverse claimants of property, acquired or claimed by trustees, to be put to unnecessary inconvenience and expense in litigating their rights."

In re Steuer. 5 A. B. R. 213, 104 Fed. 976 (D. C. Mass.): "*Bardes v. Bank* must be taken to decide that a trustee cannot, by petition in bankruptcy, recover from a third party property alleged to belong to the bankrupt's estate, if objection is seasonably taken to the form of the proceedings. Even with the defendants' consent to the general jurisdiction of the court, the court must, if the defendant insists, proceed by plenary suit. But *Stickney v. Wilt, Milner*

v. Meek, and perhaps *White v. Ewing* must still be taken to authorize a proceeding by way of petition where (1) the court has jurisdiction to proceed by way of plenary suit, (2) where no seasonable objection is taken to the form of procedure, and (3) where, under the forum of a petition in bankruptcy, the rights of the respondent are secured as substantial as in a plenary suit. In the case at bar no objection was made to the form of proceeding until the argument before the District Court, and, inasmuch as this court has, through the defendants' submission thereto, jurisdiction by way of plenary suit of the proceedings in question, the objection to the form of proceedings has come too late."

In *re Baudouine*, 3 A. B. R. 651, 101 Fed. 574 (C. C. A. N. Y.): "* * * the language of clause 7 (of § 2) would seem to be sufficiently comprehensive to authorize the determination by Courts of Bankruptcy of every controversy relating to the estates of bankrupts. * * * Nevertheless, it is capable of a narrower construction, and can be read as extending only to controversies about property which actually belongs to the bankrupt's estate, or which arise strictly in the bankruptcy proceeding, such as those in reference to the marshaling of assets, or the extent and priority of conflicting liens."

In *re Sheinbaum*, 5 A. B. R. 187, 107 Fed. 247 (D. C. N. Y.): "The evidence shows that Wasserman was in possession claiming title before the bankruptcy, and hence, under *Bank v. Bards*, I cannot oust him by summary proceedings, except he consent to proceedings in this court."

Obiter, In *re Rochford*, 10 A. B. R. 608, 124 Fed. 182 (C. C. A. S. Dak.): "The District Court sitting in bankruptcy has no jurisdiction over a controversy between trustees in bankruptcy and an adverse claimant relating to the title or possession of property in the custody of the latter, in the absence of his consent, but such an issue is a controversy at law or in equity, as distinguished from a proceeding in bankruptcy, within the meaning of § 23 of the Bankrupt Act of 1898."

Sheldon v. Parker, 11 A. B. R. 170, 92 N. W. 923 (Sup. Ct. Neb.): "Under the law his official character as trustee gives him no greater right to commence an action in the Federal court against residents of this State than he possessed as an individual, and the Federal Congress, having relegated such cases to the jurisdiction of the State courts, has conferred upon the State court full authority to act, and to tax the usual costs and expenses attending such suits, the same as in other cases."

§ 1654. Injunctions on Adverse Claimants Issuable in Bankruptcy Proceedings.—The doctrine of *Bards v. Bank* does not affect the jurisdiction of the Bankruptcy Court to issue restraining orders and injunctions in the bankruptcy proceedings themselves, upon adverse claimants in possession, in aid of the bankruptcy proceedings to preserve the status quo: it affects merely the forum for the recovery of property and debts.³ However some courts have held that injunctions come under the same doctrine; that the enjoining of the disposition of property is the exercise of the same right involved in the ordering of its surrender.⁴

3. In *re Currier*, 5 A. B. R. 629 (Ref. N. Y.); In *re Tiffany*, 13 A. B. R. 310, 133 Fed. 799 (D. C. N. Y.). Also, see post, "Restraining Orders and Injunctions in Aid of Bankruptcy Proceedings," § 1901, et seq.

4. In *re Ward*, 5 A. B. R. 215, 104 Fed. 985 (D. C. Mass.).

DIVISION 1.

WHO ARE ADVERSE CLAIMANTS.

§ 1655. **"Adverse Claimants" Not Confined to Absolute Owners.**—**"Adverse claimant"** is a term not to be confined to those who claim absolute ownership.⁵ Thus a surety holding funds of his principal as indemnity, placed there coincidentally with the signing of the bail bonds, may not be proceeded against summarily.⁶ Chattel mortgagees and vendees of bills of sale, are adverse claimants where the trustee claims they are fraudulent.⁷

§ 1656. **Adverse Claimant and Bankrupt Holding Jointly, Bankruptcy Court Has Jurisdiction.**—But where such third person has not the exclusive possession, but holds along with the bankrupt, the bankruptcy court may have jurisdiction.⁸

§ 1657. **Adverse Claimant Obtaining Voluntary Possession from Bankruptcy Officer Not Subject to Summary Jurisdiction.**—One gaining possession voluntarily from the receiver in bankruptcy, if he be an "adverse claimant," may not be proceeded against summarily by the trustee to regain possession, the summary jurisdiction previously existing being extinguished by the gaining of such voluntary possession afterwards.⁹

§ 1658. **Adverse Claimant Himself Becoming Bankrupt Gives Jurisdiction.**—Adverse claimant becoming bankrupt gives jurisdiction to the bankruptcy court as between the two trustees in bankruptcy.¹⁰

§ 1659. **Attaching Creditor Receiving Proceeds, within Four Months, Adverse Claimant.**—An execution or attaching creditor in receipt of the proceeds of the execution or attachment sale before the bankruptcy although within the four months, is an adverse claimant.¹¹

§ 1660. **Receiving Proceeds after Bankruptcy, Not "Adverse Claimant."**—But where the creditor received the proceeds afterward and with knowledge of the filing of the petition, the creditor is not an adverse

5. *Jacquith v. Rowley*, 9 A. B. R. 528, 188 U. S. 620; *Bank v. Title Trust Co.*, 14 A. B. R. 106, 198 U. S. 280 (reversing *In re Rodgers*, 11 A. B. R. 78, 125 Fed. 569); (1867) *Smith v. Mason*, 14 Wall. 419; (1867) *Marshall v. Knox*, 16 Wall. 551; (1867) *In re Bonesteel*, 7 Blatchf. 175; (1867) *Knight v. Cheney*, 14 Fed. Cas. 60; (1867) *In re Ballou*, 4 Ben. 135; (1867) *In re Marter*, 16 Fed. Cas. 857.

6. *Jacquith v. Rowley*, 9 A. B. R. 528, 188 U. S. 620.

7. *Small v. Mueller*, 8 A. B. R. 448 (N. Y. Sup. Ct., App. Div.), 67 App. Div. 143.

8. *In re Brooks*, 1 A. B. R. 531, 91 Fed. 508 (D. C. Vt.).

9. *Hinds v. Moore*, 14 A. B. R. 1, 134 Fed. 221 (C. C. A. Tenn., reversing *In re Leeds Woolen Mills*, 12 A. B. R. 136, 129 Fed. 922).

10. *In re Rosenberg*, 8 A. B. R. 624, 116 Fed. 402 (D. C. Penn.).

11. See ante, §§ 1477 and 1478.

claimant; for this would be a case where it was not in the possession of the creditor at the "time of bankruptcy."¹²

§ 1661. Proceeds Still in Officer's Hands; Neither Creditor nor Officer Adverse Claimant.—Nor are such creditors adverse parties where the proceeds are still in the hands of the court or officer at the time of the adjudication of bankruptcy;¹³ nor is the officer an adverse claimant.

1662. Court Officers in Possession, Adverse Claimants until Adjudication.—Court officers in possession of property are not subject to the summary jurisdiction of the bankruptcy court until adjudication has nullified the liens. Thus, a sheriff holding the proceeds of an attachment sale in his hands after the filing of the bankruptcy petition but before adjudication, is an adverse claimant, where he is claiming a lien thereon for poundage. He represents a creditor and is holding adversely to the bankrupt by a lien that is not yet void.¹⁴

But it has been held, though on doubtful authority, that court officers in possession, where the property itself is not under the direct custody of the court as it would be in cases of judicial sales, and is being simply held for execution sale, may be ordered to turn over the property notwithstanding the execution levy and lien were obtained before the four months' period, and are therefore good, the lien following the property into the trustee's hands for administration.¹⁵

§ 1663. Whether Garnishee Adverse Claimant Where Garnishment within Four Months.—The courts have appeared, in some decisions, to incline somewhat to the doctrine that a garnishee is not an adverse claimant, where the garnishment is instituted within the four months preceding the bankruptcy.¹⁶

The true rule would seem to be that the garnishee is an adverse claimant if he claims any interest in or lien upon the property in his possession, or if he is a mere debtor of the bankrupt; and that if he is a debtor of the bankrupt or is in possession of property under claim of a right thereto or interest therein, he is not subject to summary process; the fact that he is a garnishee not changing the usual rules in these respects. The cases affirming summary orders on garnishees have been either cases where the point was not raised or where there was no adverse claim on the part of the garnishee and where the garnishee was simply a stakeholder.

12. See ante, § 1484.

13. See ante, §§ 1477, 1478 and 1479.

14. In re Andre, 13 A. B. R. 132, 135 Fed. 736 (C. C. A. N. Y.); post, § 1818 and § 1828.

15. In re Vastbinder, 13 A. B. R. 148 (D. C. Penn.); In re Booth, 2 A. B. R. 770, 96 Fed. 943 (D. C. Ga.).

16. Quære, obiter, In re Beals, 8 A. B. R. 639, 116 Fed. 530 (D. C. Ind.); compare, In re Sharp, 1 A. B. R. 379 (Ref. Ky.). Compare, In re McCartney, 6 A. B. R. 367 (D. C. Wis.), which was a case where the garnishee itself prayed leave to pay over exempt wages to the bankruptcy court and its petition was granted.

§ 1664. **Wife "Adverse Claimant" as to Property She May Hold Adversely to Husband.**—Thus, the bankrupt's wife may be an adverse claimant in Alabama;¹⁷ also in Pennsylvania.¹⁸

§ 1665. **Assignee or Receiver Not "Adverse Claimant" as to Proceeds Still in Hands.**—An assignee or receiver for creditors is not an "adverse claimant," but is an agent of the assignor.¹⁹

Bryan v. Bernheimer, 5 A. B. R. 623, 181 U. S. 188: "The general assignment, made by Abraham to Davidson, did not constitute Davidson an assignee for value, but simply made him an agent of Abraham for the distribution of the proceeds of the property among Abraham's creditors."

Similarly, a bank holding a fund produced from the sale of the debtor's entire stock of merchandise made within the four months period under a receipt expressing on its face that the fund was to be prorated amongst the debtor's creditors as their interests might appear, is a mere agent of the bankrupt and may be summarily ordered by the bankruptcy court to surrender the property; and it does not become an adverse holder by virtue of the fact that after the adjudication, without consent of the debtor nor purchaser, it credits the fund on a claim of its own and also on that of one of the other creditors: as the fund was deposited for a special purpose the bank held it as a trustee before the adjudication, and not as an adverse claimant.²⁰ Thus, also, an assignee for creditors under a void general assignment who claims in his individual capacity part of the assets in his possession as assignee, is not in possession as the adverse claimant but as assignee.²¹ The purchaser at a collusive sale by an assignee under a void general assignment preceding the bankruptcy of the assignor is an adverse claimant.²²

§ 1666. **But "Adverse Claimant" as to Proceeds Already Disbursed.**—But an assignee for creditors, as to disbursements made out of the assigned property before the bankruptcy of the assignor, is an adverse claimant and may not be summarily ordered to account to the bankruptcy court therefor.²³ Likewise, an assignee for creditors retaining and expending, before the bankruptcy of the assignor, his commissions out of the assigned property, is an adverse claimant, and may not be summarily

17. *Blumberg v. Bryan*, 6 A. B. R. 20, 107 Fed. 673 (C. C. A. Ala.).

18. *In re Green*, 6 A. B. R. 270 (D. C. Penn.).

19. *In re Carver & Co.*, 7 A. B. R. 539, 113 Fed. 128 (D. C. N. Car.).

To same effect even where the assignor is not the bankrupt, but is a mere partner in the bankrupt partnership, see *In re Stokes*, 6 A. B. R. 262, 106 Fed. 312 (D. C. Penn.).

20. *In re Davis*, 9 A. B. R. 670 (D. C. Tex.).

21. *In re Thompson*, 11 A. B. R. 719, 128 Fed. 575 (C. C. A. N. Y.).

22. *In re Findlay Bros.*, 4 A. B. R. 745, 104 Fed. 675 (D. C. N. Y.).

23. *Louisville Trust Co. v. Comingor*, 7 A. B. R. 421, 184 U. S. 18 (affirming *Sinsheimer v. Simonson*, 5 A. B. R. 537, 107 Fed. 898); *In re Manning*, 10 A. B. R. 497, 123 Fed. 180 (D. C. S. Car.).

ordered to account to the bankruptcy court therefor.²⁴ But an attorney for an assignee, holding property of the estate, is not an adverse claimant, but is subject to summary order.²⁵

§ 1667. **Agent in Possession Applying Funds on Salary.**—Similarly, an agent in possession claiming to have applied, by agreement with the bankrupt, funds in his possession as manager upon his salary, is an adverse claimant; and, as to funds so applied, can only be reached by plenary action, although as to funds not so applied he is subject to summary jurisdiction.²⁶

§ 1668. **Trustee in Possession under Mortgage for Benefit Certain Creditors, "Adverse Claimant."**—A trustee in possession under a mortgage or trust deed made for the benefit of certain creditors, is an adverse claimant, and not subject to summary jurisdiction.²⁷

§ 1669. **Alleged but Not Real Partners in Involuntary Partnership Petition, Whether "Adverse Claimants," Subject to Summary Seizures of Property.**—Persons alleged to be members of a partnership against whom an involuntary partnership petition is filed, but who are not partners, are adverse claimants, and their property may not be summarily seized.²⁸

§ 1670. **Executor Holding Legacy to Bankrupt, Not "Adverse Claimant."**—An executor holding a legacy belonging to the bankrupt, is not an adverse claimant.²⁹

§ 1671. **But Administrator of Deceased Partner in Possession of Firm Assets, "Adverse Claimant."**—But the administrator of a deceased partner in possession of firm assets, is an adverse claimant where the other partner is the bankrupt.³⁰

§ 1672. **Trustees of Spendthrift Trusts, "Adverse Claimants."**—Trustees of spendthrift trusts are adverse claimants.

In *re Baudouine*, 3 A. B. R. 651, 101 Fed. 574 (C. C. A. N. Y., reversing 3 A. B. R. 55, 96 Fed. 536): "He is entitled to insist that he shall not be prevented from paying it to the beneficiary and compelled to pay it to another. If the fund can be reached by the trustee in bankruptcy after it has come into

24. *Louisville Trust Co. v. Comingor*, 7 A. B. R. 421, 184 U. S. 18 (affirming *Sinsheimer v. Simonson*, 5 A. B. R. 537, 107 Fed. 898).

25. *Obiter*, in *re Michie*, 8 A. B. R. 734, 738, 116 Fed. 749 (D. C. Mass.).

26. In *re Lebrecht*, 14 A. B. R. 445, 135 Fed. 878 (D. C. Tex.).

Whether the party was actually in possession claiming ownership is a question of fact, and the finding of the special master will not be disturbed where there is a conflict of evidence, in *re Kolin*, 13 A. B. R. 533, 134 Fed. 557 (C. C. A. Ills.).

27. *Publishing Co. v. Hutchinson Co.*, 17 A. B. R. 425 (Sup. Ct. Mich.).

28. In *re Nixon*, 6 A. B. R. 693 (D. C. Mont.).

29. In *re May*, 5 A. B. R. 1 (Ref. Minn., affirmed by D. C.).

30. In *re Pierce*, 4 A. B. R. 489, 102 Fed. 977 (D. C. Wash.).

the hands of the bankrupt, the testamentary trustees are not necessary parties to an action. But if it is sought to be reached before they have discharged their fiduciary and statutory obligation towards the beneficiary, they are in duty bound to resist. In defending their trust duties they are hostile to the trustee in bankruptcy, and if they are entitled to be heard at all they are entitled to contest his title as fully as though they were the equitable owners of the fund."

§ 1673. **Mere Bailee in Possession, Not "Adverse Claimant."**—It has been held that a bailee in possession is not an adverse claimant;³¹ even where he has a lien for unpaid services or other charges incident to the bailment.³²

But this rule must be taken with qualification. If there is no dispute over the amount or validity of his lien and if such amount is tendered him, doubtless he could not be termed an adverse claimant in possession. But that he could summarily be deprived of his right of possession were there such a dispute or lack of tender is exceedingly doubtful.

§ 1674. **Stock Exchange Not Contesting Sale of Bankrupt's Seat Not "Adverse Claimant."**—A stock exchange holding the proceeds of sale of a bankrupt member's seat is not an adverse claimant, and will be considered to be holding for the bankruptcy court, where it does not contest the right to transfer the seat.³³

§ 1675. **Mortgagees in Actual Possession "Adverse Claimants."**—Mortgagees who have taken actual possession before the filing of the petition in bankruptcy, are adverse claimants;³⁴ although summary process will lie where the possession thus taken is not exclusive of the bankrupt.³⁵ And in one case it has been held that the mortgagee is not an adverse claimant where the possession was taken before default.³⁶

If the adverse possession by a chattel mortgagee is not exclusive, the mortgagee may not be such an adverse claimant as would defeat the jurisdiction of the bankruptcy court.³⁷

31. In re Muncie Pulp Co., 14 A. B. R. 70, 139 Fed. 546 (C. C. A. N. Y.).

32. In re Pratesi, 11 A. B. R. 319, 126 Fed. 588 (D. C. Del.).

33. Odell v. Boyden, 17 A. B. R. 756, 150 Fed. 731 (C. C. A. Ohio).

Pledgor of Certificate of Membership in Board of Trade, Query.—It has been held that the pledgor of a certificate of membership in a Board of Trade or Exchange or other similar body cannot be required by the bankruptcy court to make written application to the Board of Trade for the posting and sale of the certificate although the certificate is in the trustee's hands as assets of the estate. In re Silberhorn, 5 A. B. R. 568, 105 Fed. 809 (D. C. Ills.). This decision seems out of harmony with the weight of authority. It is difficult to see why a pledgor of property in the trustee's hands is not subject to the jurisdiction of the bankruptcy court for all proceedings requisite to the realization upon the trustee's interest in the pledged property.

34. Heath v. Shaffer, 2 A. B. R. 98, 93 Fed. 647 (D. C. Iowa); In re Buntrock Clothing Co., 1 A. B. R. 454 (D. C. Iowa).

35. In re Brooks, 1 A. B. R. 531, 91 Fed. 508 (D. C. Vt.). Compare, In re Jersey Island Packing Co., 14 A. B. R. 689, 138 Fed. 625 (C. C. A. Calif.).

36. In re Waterloo Organ Co., 9 A. B. R. 427, 118 Fed. 904 (D. C. N. Y.).

37. In re Brooks, 1 A. B. R. 531, 91 Fed. 508 (D. C. Vt.).

§ 1676. **Alleged Fraudulent Transferee in Possession, "Adverse Claimant."**—An alleged fraudulent transferee in possession, is an adverse claimant;³⁸ although the adverse claimant be the wife of the bankrupt;³⁹ or his daughter.⁴⁰ An alleged buyer on an executed sale before the bankruptcy also is an adverse claimant.⁴¹

§ 1677. **Alleged Preferential Transferee in Possession, "Adverse Claimant."**—An alleged preferential transferee in possession is an "adverse claimant."⁴²

§ 1678. **Assignee of Bankrupt's Wages, "Adverse Claimant."**—An assignee of the bankrupt's wages, holding under an assignment of wages to be earned in the future, is an "adverse claimant," and may not be proceeded against summarily.⁴³

§ 1679. **Lienholder and Secured Creditor as "Adverse Claimants."**—It has been questioned whether a lienholder as such is an adverse claimant;⁴⁴ but a lienholder in possession, or rather a lienholder where the bankruptcy court is not in possession, is an adverse claimant and is not subject to the summary jurisdiction of the bankruptcy court.⁴⁵ Thus, where a bankrupt has assigned his future earned wages both the assignee and employer are adverse claimants, not subject to the summary jurisdiction of the bankruptcy court.⁴⁶ But a liveryman, holding possession at the time of the bankruptcy under his lien, has been held subject to the summary jurisdiction of the bankruptcy court.⁴⁷

§ 1680. **Debtors of Bankrupt "Adverse Claimants," Not to Be Proceeded against Summarily.**—Debtors of the bankrupt are adverse claimants and may not be proceeded against summarily.⁴⁸

38. *Wall v. Cox*, 5 A. B. R. 727, 181 U. S. 244; *Hicks v. Knost*, 2 A. B. R. 153, 94 Fed. 625 (D. C. Ohio). Compare, *In re Knopf*, 16 A. B. R. 432, 144 Fed. 245 (D. C. S. C.).

39. *In re Grahs*, 1 A. B. R. 465 (Ref. Ohio).

40. *In re Cohn*, 3 A. B. R. 421, 98 Fed. 75 (D. C. N. Y.).

41. *In re Flynn & Co.*, 11 A. B. R. 318, 126 Fed. 442 (D. C. N. Car.).

42. *Hicks v. Knost*, 2 A. B. R. 153, 94 Fed. 625 (D. C. Ohio); *In re Adams*, 12 A. B. R. 367, 130 Fed. 788 (D. C. R. I.); *Bindseil v. Smith*, 5 A. B. R. 40 (N. J. Ct. Errors).

43. *In re Karns*, 16 A. B. R. 843 (D. C. Ohio). But compare, *In re Home Discount Co.*, 17 A. B. R. 180 (D. C. Ala.).

44. (1841) *In re Christy*, 3 How. 292; (1841) *Norton v. Boyd*, 3 How. 426. See note to *Carter v. Hobbs*, 1 A. B. R. 215, 92 Fed. 594 (D. C. Ind.).

45. *Fitch v. Richardson*, 16 A. B. R. 835, 147 Fed. 196 (C. C. A. Mass.). Apparently contra, *In re Cobb*, 3 A. B. R. 129, 96 Fed. 821 (D. C. N. C.).

46. *In re Karns*, 16 A. B. R. 841 (D. C. Ohio).

47. *In re Pratesi*, 11 A. B. R. 319, 126 Fed. 588 (D. C. Del.): However, this could not be the law unless the lienor in possession were tendered the amount of his lien, in which event the proceedings would amount to a proceedings to redeem.

48. *In re Manning*, 10 A. B. R. 497, 123 Fed. 180 (D. C. S. C.).

§ 1681. **Thus, Banks Owing "Deposits," "Adverse Claimants."**—Thus, banks holding deposits of the bankrupt are debtors, and therefore adverse claimants not subject to summary jurisdiction. Nevertheless, they have frequently been summarily ordered to pay over funds and usually have not resisted where there have been no complications.⁴⁹

§ 1682. **Likewise, Owner Owing on Building Contract, Subject to Mechanic's Liens, "Adverse Claimant."**—The owner of property, owing a balance on a building contract, subject to mechanic's and subcontractors' liens, is an adverse claimant.⁵⁰

Obiter, impliedly, *In re Adams*, 18 A. B. R. 181 (D. C. N. Y.): "* * * but inasmuch as the attorney for the bankrupt, who has prosecuted the mechanic's lien action has an attorney's lien for services therein, and inasmuch as the rights in that action cannot be adjudicated in the bankruptcy proceedings, except as the matter is brought into the bankruptcy court by consent, etc."

§ 1683. **Also, Employers Holding Wages of Bankrupt Tied Up by Assignment, "Adverse Claimants."**—Employers holding wages of the bankrupt tied up by assignment are adverse claimants, and may not be proceeded against summarily.

DIVISION 2.

IN WHAT COURTS MAY PLENARY ACTIONS AGAINST ADVERSE CLAIMANTS BE BROUGHT BY TRUSTEES AND RECEIVERS IN BANKRUPTCY.

§ 1684. **Plenary Suits against "Adverse Claimants" in State Courts.**—Plenary suits against adverse claimants always may be brought in the state court, or the United States circuit court, that

49. Instance, *In re Grive*, 18 A. B. R. 202, 151 Fed. 711 (D. C. Conn.).

50. Impliedly, *In re Grissler*, 13 A. B. R. 508, 136 Fed. 754 (C. C. A. N. Y.); *In re Greater Am. Exposition*, 4 A. B. R. 486, 102 Fed. 986 (C. C. A. Neb.). Compare, as to effect of consent to jurisdiction, *In re Huston*, 7 A. B. R. 92 (Ref. N. Y.).

But compare, *In re Hobbs & Co.*, 16 A. B. R. 544, 145 Fed. 511 (D. C. W. Va.), where the court seems to consider the power conferred in general terms upon the bankruptcy court by § 2 (6) to "bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy" empowers the bankruptcy court to compel mechanics and materialmen holding subcontractor's liens to come into the bankruptcy proceedings and set up their liens, else "this court could not require the owner to pay over to its receivers or trustee the sum due. * * *" But the court in this case overlooks the jurisdictional obstacle that lies at the very threshold: the court even when the lienholders come in would have no power to "require" the owners to pay their debts into the bankruptcy court. The obligation of the owner is a mere debt—to pay the contract price, and mere debts as we have seen the bankruptcy court cannot "require" to be paid into its registry by either plenary or summary process.

Also, see ante, § 1165, and post, § 1692.

would have had jurisdiction of the parties had not bankruptcy intervened.⁵¹

Andrews v. Mather, 9 A. B. R. 301, 134 Ala. 358: "Section 23 does not purport to take away any jurisdiction in law or equity which would otherwise exist in the United States Circuit or State Courts."

§ 1685. Distinction between Proceedings in Bankruptcy and "Controversies" Arising Out of Bankruptcy.—The distinction between proceedings in bankruptcy and controversies arising in bankruptcy proceedings is elsewhere elucidated.⁵²

Bankruptcy proceedings proper are those concerned with the adjudication of the debtor as a bankrupt and his discharge, and also such as concern the sale of assets belonging to the bankrupt estate, and the allowance of creditors' claims, and the distribution of the proceeds to creditors. The bankruptcy court has exclusive jurisdiction of such proceedings. "Controversies" "arising in bankruptcy proceedings," on the other hand, are all other bankruptcy controversies than those mentioned, arising with regard to property in the possession of the bankruptcy court or perhaps (though this point is not settled) with regard to property not in its possession. As to the former, the bankruptcy court in the bankruptcy proceedings themselves has jurisdiction, equally as well as in bankruptcy proceedings proper. Of the latter, the bankruptcy court has no summary jurisdiction whatever, and has only such plenary jurisdiction as is conferred by the Amendment of 1903, to recover property fraudulently or preferentially conveyed.⁵³

51. Bankr. Act, § 23 (b): "Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section sixty, subdivision b, and section sixty-seven, subdivision e."

Bankr. Act, § 23 (a): "The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy between trustees as such and adverse claimants concerning the property acquired or claimed by the trustee, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants."

Bankr. Act, § 70 (e): "The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

Frank v. Vollkommer, 17 A. B. R. 808, 205 U. S. 521.

52. Post, § 2864.

53. Compare, *Burleigh v. Foreman*, 11 A. B. R. 74, 125 Fed. 217 (C. C. A. Mass.); *McNulty v. Feingold*, 12 A. B. R. 338, 129 Fed. 1001 (D. C. Penn.); *Bank v. Title & Trust Co.*, 14 A. B. R. 102, 198 U. S. 280; *Delta Nat'l Bk. v. Easterbrook*, 13 A. B. R. 338, 133 Fed. 521 (C. C. A. Tex.).

Compare, *Brumley v. Jones*, 15 A. B. R. 581, 141 Fed. 318 (C. C. A. Ga.): "The District Court does not possess the general power to entertain a suit in equity, and, unless the Bankrupt Act has conferred upon it jurisdiction to entertain a plenary suit in equity, such a suit cannot be maintained. * * * The bankrupt act confers on the District Courts, as courts of bankruptcy, such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings. As courts of bankruptcy they are vested with power to collect, reduce to money, and distribute the estates of bankrupts, and to determine controversies in relation thereto. * * * We think it clear that the controversies referred to relate to the collection, sale, and distribution of such estates. The jurisdiction of the District Court, as granted by the Bankruptcy Act, is unquestionably bankrupt jurisdiction, and not general jurisdiction to hear and determine controversies between adverse third parties, which are not strictly and properly a part of the bankruptcy proceedings."

§ 1686. Jurisdiction of U. S. Circuit Court in Bankruptcy Matters.

—The Bankruptcy Act, by § 23 (a) does not enlarge the jurisdiction of the United States Circuit Courts. They would only have jurisdiction over suits brought by trustees in bankruptcy in case diversity of citizenship or some other jurisdictional fact existed, which, in the usual procedure, would have conferred jurisdiction on the Circuit Court of the United States in case the bankrupt had sued;⁵⁴ nor unless the amount involved exceeds \$2000;⁵⁵ and even "consent" cannot confer jurisdiction upon the Circuit Court in bankruptcy cases, unless diversity of citizenship, etc., exists.⁵⁶

But the "diversity of citizenship" relates to the bankrupt's citizenship, not to the trustee's citizenship:

Bush v. Elliott, 15 A. B. R. 661, 202 U. S. 477: "That is, while the jurisdiction of the courts was not to be extended because of the bankruptcy proceedings or the citizenship of the trustee, it was preserved to the trustee in the jurisdiction where the bankrupt might have brought or prosecuted the suit but for the bankruptcy proceedings. While this section preserves the jurisdiction of the United States Circuit Courts over cases coming within clause a, in clause b the right of suit by the trustee is limited to courts wherein the bankrupt might have brought or prosecuted the action had the bankruptcy proceedings not been instituted. * * *

"The action in the present case was to recover a sum of money alleged to have been due, prior to the bankruptcy proceedings, to the Southern Car and Foundry Company, which was a citizen of the State of New Jersey. The amount involved and the diverse citizenship of the parties were such that the car company might have sued the defendant, a citizen of the State of Alabama, in the Circuit Court of the United States independently of the bankruptcy pro-

54. *Chattanooga Nat'l Bk. v. Rome Iron Co.*, 3 A. B. R. 582, 99 Fed. 82 (U. S. C. C. Ga.); *Goodier v. Barnes*, 2 A. B. R. 328, 94 Fed. 798 (C. C. U. S.); *In re Rochford*, 10 A. B. R. 608, 124 Fed. 182 (C. C. A. S. Dak.); *In re Reynolds*, 13 A. B. R. 249, 133 Fed. 584 (D. C. Mont.); *Viquesnay v. Allen*, 12 A. B. R. 406, 131 Fed. 21 (C. C. A. W. Va.). Also, see *Spencer v. Duplan Silk Co.*, 11 A. B. R. 563, 191 U. S. 526; for rules as to jurisdiction and rights of appeal and review in such cases.

55. *Swafford v. Cornucopia Mines*, 15 A. B. R. 564, 140 Fed. 957 (U. S. C. C. Ore.). And deficiency in amount cannot be helped out by the addition of a statutory allowance for attorney's fees allowable on recovery.

56. *Contra. In re Seebold*, 5 A. B. R. 358, 105 Fed. 910 (C. C. A. La.).

ceedings. We think, by the terms of this section, it was intended to preserve this right to the trustee in bankruptcy, and that the citizenship of the trustee is wholly immaterial to the jurisdiction of such a case."

§ 1687. **Jurisdiction of State Courts in Bankruptcy Matters.**—Therefore, as a rule, the State Court would be the one to which the trustee would be relegated, were it not for still further exceptions found in § 23 (b) and in § 70e, later discussed.

Thus, even since the Amendment of 1903, the State Court has been a proper forum.⁵⁷ Indeed, before the Amendment of 1903 the State Courts alone possessed such jurisdiction except where diversity of citizenship conferred jurisdiction on the federal Circuit Courts.⁵⁸

The State Court is not debarred from jurisdiction over suits against adverse claimants by any of the provisions of the Act.⁵⁹

Frank v. Vollkommer, 17 A. B. R. 808, 205 U. S. 521: "* * * the Amendment gave the bankruptcy court concurrent and not exclusive jurisdiction."

And where rights conferred by the peculiar provisions of the Bankruptcy Act are involved, such rights are cognizable in the State Court and the State Court will enforce the Bankrupt Law wherever applicable.⁶⁰

Heath v. Schaffer, 2 A. B. R. 102, 93 Fed. 647 (D. C. Ia.): "If, upon the hearing, the State Court holds and adjudges the plaintiff's claim or lien to be invalid and void either at the common law or under the provisions of the Bankrupt Act, that court would, undoubtedly, order the property to be delivered to the possession of the trustee. If the State court holds and adjudges the lien of the plaintiff to be valid, it would, upon the proper showing, also recognize the title and rights of the trustee subject to the lien of the plaintiff and would enforce the same according to the true intent and meaning of the Bankrupt Act. In some of the discussions had upon this general subject, it seems to be assumed that the State courts cannot aid in carrying out the general provisions of the Bankrupt Act, and that the trustee can only appeal to the courts of bankruptcy when seeking to secure a disposition of a bankrupt's estate under that act; but this is a mistaken view of the law. The State courts, in all proceedings pending before them, have the right to apply and enforce the provisions of the Bankrupt Act in the determination of the questions at issue before them, and can give full protection to the rights of the trustee. The Bankrupt Act is the law of the land, and the State Courts have full right to enforce its mandates in all proceedings properly before them. Of course, it is not meant by this

57. Instance, *Breckons v. Snyder*, 15 A. B. R. 112, 211 Penn. St. 176; *Lawrence v. Lowrie*, 13 A. B. R. 297, 133 Fed. 995 (D. C. Penn.); *Pond Trustee v. N. Y. Exch. Bk.*, 13 A. B. R. 343, 124 Fed. 991 (D. C. N. Y.).

58. See ante, § 1653.

59. *Small v. Muller*, 8 A. B. R. 449, 67 N. Y. App. Div. 143; *Mueller v. Bruss*, 8 A. B. R. 445, 112 Wis. 406; *Heath v. Shaffer*, 2 A. B. R. 102, 93 Fed. 647 (D. C. Iowa); *Andrews v. Mather*, 9 A. B. R. 301, 134 Ala. 358; *Silberstein v. Stahl*, 4 A. B. R. 626 (N. Y. Sup. Ct.); *Sheldon v. Parker*, 11 A. B. R. 170, 66 Neb. 610; impliedly, *Breckons v. Snyder*, 15 A. B. R. 112, 211 Penn. St. 176.

60. *Carling v. Seymour L'b'r Co.*, 8 A. B. R. 41, 113 Fed. 483 (C. C. A. Ga.); *Savings Bk. v. Jewelry Co.*, 12 A. B. R. 781, 123 Iowa 432. In *re Lesser*, 3 A. B. R. 823, 110 Fed. 439 (D. C. N. Y., reversed on other grounds): "The obligations of the Bankruptcy Act are as binding upon that court as upon this." See ante, § 1597.

that a State court can adjudge a person to be bankrupt, or grant him a discharge, or control the distribution of the bankrupt's estate; but what is meant is that in all suits pending before them, wherein may be involved a contest between the trustee and a third party, which depends, in whole or in part, upon the provisions of the Bankrupt Act, the State Court must of necessity have full right and jurisdiction to apply and enforce the provisions of the Bankrupt Act, not only in deciding the question of right at issue, but in securing to the parties the proper protection accorded to them under the act."

The conferring of jurisdiction upon State Courts over federal bankruptcy questions is constitutional.⁶¹ And where the trustee thus resorts to the State Courts to recover property he is entitled to all remedies and relief that would be afforded any other party litigant under the same facts.⁶²

Bindseil v. Smith, 5 A. B. R. 40 (N. J. Ch. App. & Err.): "The appellant further insists that, as fraud in the transfer is not alleged, but merely illegality under the Bankrupt Act, a court of equity has no jurisdiction by common law, and such jurisdiction cannot be conferred on a State court by a Federal statute. Conceding that our own laws must point out which of our own courts is competent to afford a remedy in such cases, we think the relief prayed is properly sought in the Court of Chancery. The complainant seeks to compel the defendant to transfer the legal title of certain choses in action, which he now holds. Such a transfer requires the execution of a written instrument by the defendant for obtaining which the procedure in equity is more adapted than that in the courts of law. A judgment against the defendant for damages would not be an adequate remedy for the loss of claims against other persons, one of which is secured also by a lien on lands. The jurisdiction of a court of equity to decree the transfer of such writings is clear."

And, on the other hand, where the trustee thus resorts to the State court he is bound, as *res adjudicata*, by the final determination of the State Court.⁶³

§ 1688. But by Amendment of 1903 Jurisdiction Conferred Also in Certain Cases upon Bankruptcy Courts.—By the Amendment of 1903 to §§ 23 (b) and 70 (e) jurisdiction was conferred also in certain cases upon the bankruptcy courts where formerly lacking. Section 60, subdivision (b), and § 67, subdivision (e), expressly referred to in the Amendment to § 23 (b), are the sections relating to the recovery of property preferentially and fraudulently conveyed, respectively, within the four months preceding the bankruptcy, whilst § 70 (a) provides that the trustee may avoid any transfer which any creditor might have avoided had not bankruptcy intervened; and all these sections, as separately amended, contain similar provisions that "For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have

61. *French v. Smith*, 4 A. B. R. 785 (Minn. Sup. Ct.).

62. *Sheldon v. Parker*, 11 A. B. R. 152, 66 Neb. 610.

63. *In re Reynolds*, 13 A. B. R. 248, 133 Fed. 584 (D. C. Mont.).

concurrent jurisdiction," although only § 60 (b) and § 67 (e) are expressly mentioned again, in the Amendment to § 23 (b).⁶⁴

§ 1689. Cases under § 70 (e) Included Though Not Expressly Mentioned in § 23 (b).—In amending § 23 (b) granting jurisdiction to the bankruptcy court over adverse claimants in certain cases, Congress, by obvious inadvertence, failed to include cases arising under § 70 (e). And it has been denied in some cases that the Amendment of 1903 to § 70 (e) operates to give to the federal courts jurisdiction, without consent, to entertain suits by trustees in bankruptcy to set aside any transfer which any creditor might have set aside other than fraudulent or preferential transfers, inasmuch as § 23 (b) does not include it.⁶⁵

Obiter, *Ryttenberg v. Schefer*, 11 A. B. R. 652, 658, 131 Fed. 313. (D. C. N. Y.): "It may be suggested that if the plaintiff cannot recover on the grounds of a preference or a fraudulent transfer this court has no jurisdiction."

But the construction adopted by these cases would render senseless the addition of the words to § 70 (e):

"The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whomsoever may have received it, except a bona fide holder.

"For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

For even before the Amendment the bankruptcy court already had such jurisdiction by consent.

The true rule is that laid down above in the main proposition, that cases under § 70 (e) are also included.

Hurley v. Devlin, 17 A. B. R. 797, 149 Fed. 268 (D. C. Kas.): "This identical question received the consideration of the distinguished district Judge for the Eastern District of Missouri in *Gregory v. Atkinson* (D. C.), 11 A. B. R. 495, 127 Fed. 183, in which case the jurisdiction of the court was denied, the reasoning there employed being that the whole Act must be so construed as to give effect, if possible, to each of its parts, and as the Congress has had the whole Act under consideration when engaged in the determination of what amendments should be made thereto, and as it expressly excepted the provisions of subdivision 'b' of § 60 and subdivision 'e' of § 67 from the operation of the general provisions of subdivision 'b' of § 23 of the Act, and did not except subdivision 'e' of § 70, under which this suit is brought, therefore that subdivision, as amended, should be so construed as to confer full jurisdiction on this court over the subject matter of this suit, to be exercised, however, only on consent to jurisdiction of the person of the defendant being given by her. This is also the argument employed by solicitors for defendant in support of her plea.

64. *Hurley v. Devlin*, 17 A. B. R. 793, 149 Fed. 368 (D. C. Kans.).

65. *Gregory v. Atkinson*, 11 A. B. R. 495, 127 Fed. 183 (D. C. Mo.).

"I fully recognize the rule of construction which requires an act to be considered as an entirety, complete in all its parts, so that, if possible, effect may be given to each of its separate sections or parts. I also recognize the force of the argument made in support of the construction claimed, but from a careful study of the original Act, the amendments made thereto, and the decisions of the Supreme Court which led to the adoption by Congress of the amendments made, I must decline to accept the views stated; and for these reasons:

"First. This construction would amount to the absolute nullification of the amendment made to subdivision 'e' of § 70 of the Act now under consideration, and leave it standing precisely as it did prior to the attempted amendment, for it cannot be doubted this suit might, with the consent of the defendant, have been brought and prosecuted in this court before the Act was amended. This was the identical question submitted to and settled by the Supreme Court in *Bardes v. Hawarden Bank*, supra. Hence it should not be thought the Congress intended to do an entirely useless thing in its attempt to amend the subdivision of § 70 in question (*Conger v. Kennedy*, 26 Can. Sup. Ct. 404), and such conclusion does violence to the very rule of construction for which defendant's solicitors contend with so much insistence. * * *

"The provisions of this subdivision of § 70, it is true, is not expressly excepted from the operation of the general provisions found in subdivision 'b' of § 23 of the Act, but, in my judgment, it is excepted by such necessary implication as to render the construction here given absolutely imperative."

§ 1690. Plenary Suits against "Adverse Claimants" in Bankruptcy Courts.—Plenary suits against adverse claimants, then, can also be brought in bankruptcy courts, that is to say, in the district courts of the United States sitting in bankruptcy, whenever the trustee is attempting therein to set aside, 1st, a preference;⁶⁶ or 2nd, a fraudulent transfer made within the four months preceding the bankruptcy;⁶⁷ or 3rd, is attempting to set aside any transfer that a creditor might have set aside had there been no bankruptcy.⁶⁸

66. *Delta Nat. Bk. v. Easterbrook*, 13 A. B. R. 338, 133 Fed. 521 (C. C. A. Tex.). *Obiter*, *Off v. Hakes*, 15 A. B. R. 700 (C. C. A. Ills.).

67. *McNulty v. Feingold*, 12 A. B. R. 338, 129 Fed. 1001 (D. C. Penn.): The court held, in this case that under § 67 (e) as amended in 1903, a trustee in bankruptcy might maintain in a United States District Court a suit in equity, for an accounting of money collected by defendants upon accounts fraudulently assigned to them by the bankrupts, though the face value of such accounts were known to the complainants.

68. *Johnston v. Forsyth Mercantile Co.*, 11 A. B. R. 669, 127 Fed. 845 (D. C. Ga.): "Jurisdiction is concurrent with that of the State court and is here invoked to set aside a transfer on the part of an insolvent debtor, which it is alleged is declared to be null and void, as against the creditors of such debtor, by the law of the State. The amendment expressly confers jurisdiction by the proceedings in equity in a District Court to set aside such conveyances."

Jurisdiction Where Transfer after as Well as before Filing of Petition.—The bankruptcy court has jurisdiction in a plenary suit, independently brought, to recover property transferred after as well as before the filing of the petition and even where possession has been obtained by the adverse claimant from the bankruptcy receiver or trustee himself, *Whitney v. Wenman*, 14 A. B. R. 45, 199 U. S. 539.

Jurisdiction Where Property Surrendered by Bankruptcy Receiver without Authority.—Thus, it has jurisdiction in a plenary suit, to recover from an ad-

Horskins v. Sanderson, 13 A. B. R. 102, 132 Fed. 415 (D. C. Vt.): "Jurisdiction over the subject matter seems to be given to this court as a court of bankruptcy by the amendments of 1903 to the Bankruptcy law. It extends by the amendment of § 70 (e) * * * to the recovery of any property from any transfer which any creditor might have avoided; by that of § 60b * * * to the recovery of unlawful preferences; and by that of § 67e * * * to the recovery of property conveyed or transferred within the four months."

§ 1691. **Plenary Suits by Trustees Not "Proceedings in Bankruptcy," but "Controversies."**—Plenary suits by trustees are not "proceedings in bankruptcy," but are "controversies" arising out of bankruptcy proceedings.⁶⁹

§ 1692. **But When Not to Be Brought in Bankruptcy Court.**—But when the adverse claim is not by way of a preference, nor by way of a fraudulent transfer made within the four months preceding the bankruptcy, nor by way of a transfer by the bankrupt that would have been voidable at the suit of some creditor had there been no bankruptcy, the suit for recovery cannot be brought in the bankruptcy court, at all, unless by consent of the adverse claimant so in possession or unless possession has been obtained by him after bankruptcy from an officer of the bankruptcy court himself; but such suit must be brought in the state court or (where facts exist,

verse claimant property surrendered to him by its own receiver (and probably also even if surrendered by the trustee) without authority of court and perhaps for other reasons, *Whitney v. Wenman*, 14 A. B. R. 45, 198 U. S. 539; but it has been held, that the bankruptcy court has not jurisdiction to do so by summary process in a case where the receiver was persuaded to surrender property voluntarily to an adverse claimant, *Moore v. Hinds*, 14 A. B. R. 1 (C. C. A. Tenn., reversing *Leeds Woolen Mills*, 12 A. B. R. 136, 129 Fed. 922).

But that this is doubtful, see suggestive *quære*, *Whitney v. Wenman*, 14 A. B. R. 45, 198 U. S. 539.

And certainly such would be the rule if the surrender were procured collusively.

Query: Whether Where Summary Jurisdiction Exists, Plenary Jurisdiction Also Exists.—Probably it is the rule that wherever summary jurisdiction would exist in the bankruptcy court plenary jurisdiction, a fortiori, would also exist. Compare tenor of court's opinion, *Whitney v. Wenman*, 14 A. B. R. 45, 198 U. S. 539. Also, compare general tenor of the court's decision in *Rytenberg v. Schefer*, 11 A. B. R. 652, 131 Fed. 313 (D. C. N. Y.).

Trustee Not Confined to Suing in Own District Court.—The trustee is not confined to suing in the same district court wherein the bankruptcy proceedings themselves are pending: he may go into districts and sue there, if jurisdiction otherwise exists. *Lawrence v. Lowrie*, 13 A. B. R. 297 (D. C. Penn.).

Nonresident Protected from Service of Summons While in Attendance at Bankruptcy Court in Support of His Claim.—A nonresident is protected from the service of summons upon him in a suit brought by the trustee against him, while he is in attendance at the bankruptcy court in support of his claim as creditor. *Morrow v. Dudley & Co.*, 16 A. B. R. 459 (D. C. Penn.).

69. *McNulty v. Feingold*, 12 A. B. R. 338, 129 Fed. 1601 (D. C. Penn.); *Delta Nat'l Bk. v. Easterbrook*, 13 A. B. R. 338, 133 Fed. 521 (C. C. A. Tex.); *Stelling v. Jones Lumber Co.*, 8 A. B. R. 521, 116 Fed. 261 (C. C. A. Wis.); *Boonville Nat'l Bk. v. Blakey*, 6 A. B. R. 13, 107 Fed. 891 (C. C. A. Ind.). Compare, *Bank v. Title & Trust Co.*, 14 A. B. R. 102, 198 U. S. 280. See post, "Appeals and Error," §§ 2874, 2927.

by way of diversity of citizenship, etc., that would have operated, in case bankruptcy had not intervened, to confer jurisdiction) may be brought in the United States Circuit court.⁷⁰

Thus, the title to property in the possession of an adverse claimant alleged to have been sold to him before the bankruptcy may not be tried out in the bankruptcy court; but, when the purchaser comes into the bankruptcy proceedings to present his claim, it may be diminished, or denied participation in dividends.⁷¹ Thus, the owner of property holding a fund, or owing money, on a building contract subject to mechanics' or subcontractors' liens, may not be sued in the bankruptcy court.⁷² Thus, also, one who has seized the bankrupt's property wrongfully may not be sued by the trustee in the District Court of the United States for its recovery, unless the seizure was made within four months before the bankruptcy and was made by legal proceedings, or unless it amounted to a voidable preference. Nor may a suit be brought there against one who has obtained goods from the bankruptcy court, unless by his own consent to the jurisdiction, for his case does not come within any of the exceptions of the Statute: It is not a case of fraudulent conveyance within four months, nor a voidable preference, nor is it the result of a "transfer" by the bankrupt voidable by creditors. Nor may trust property belonging to the bankrupt, but never in his possession, nor "transferred" by him, be reached in the federal courts.

§ 1693. Third Parties Not to Resort to Bankruptcy Court Where Neither Property in Its Custody nor Either Party, Party to Bankruptcy Proceedings.—Nor may third parties resort to the bankruptcy court to litigate their rights there, where neither the bankruptcy court has custody of the property, nor either of the parties was a party to the proceedings in bankruptcy;⁷³ nor any property is recoverable by general creditors.⁷⁴

§ 1694. Actions in Personam for Debts Not to Be Brought in Bankruptcy Courts.—Likewise, actions for merely money judgments or for other relief in personam, where the courts do not attempt to recover any property transferred by the bankrupt, nor its value, but merely to render judgment in personam for a debt or other obligation not arising from a transfer by the bankrupt, or to order

70. Apparently, *Bank v. Title & Trust Co.*, 14 A. B. R. 102, 198 U. S. 280 (reversing 11 A. B. R. 79). See cases among those cited under main proposition of this chapter, ante, § 1652, et seq.

71. *In re Flynn & Co.*, 11 A. B. R. 318, 126 Fed. 422 (D. C. N. Car.).

72. Compare, inferentially, although before the Amendment, 1903, *In re Greater Am. Exposition*, 4 A. B. R. 486, 102 Fed. 986 (C. C. A. Tenn.). Ante, § 1682.

73. *Henrie v. Henderson*, 16 A. B. R. 621, 145 Fed. 316 (C. C. A. W. Va., reversing *In re Henderson*, 15 A. B. R. 760). See post, § 1700.

74. And only Trustee, not creditors, may bring the plenary action in Bankruptcy Court. See post, §§ 1716 and 1718.

specific performance of some contract or duty, may only be instituted against a debtor, or other third party, in the court in which the bankrupt himself, or his creditors had there been no bankruptcy, might have instituted them, and may not (except by consent) be instituted in the bankruptcy court.⁷⁵

Bush v. Elliott, 15 A. B. R. 565, 202 U. S. 477: "The excepted suits, for the recovery of property, covered by the Amendment of 1903, pertain to actions to recover property conveyed by the bankrupt in fraud of the Act and do not concern actions of the character now under consideration. * * * to recover certain sums of money alleged to have been lent by the bankrupts for goods sold and delivered to the defendant and upon an account stated and for money paid for them by the bankrupt."

Hinds v. Moore, 14 A. B. R. 1, 134 Fed. 221 (C. C. A. Tenn., reversing *In re Leeds Woolen Mills Co.*, 12 A. B. A. 136, 129 Fed. 922): "The case is distinguishable in its facts and upon principle from *White v. Schloerb*. There has been no use of the writ of another court. There has been no taking by force or fraud. Neither is it possible to restore the goods themselves to the custody of the court. A money judgment for the value of the goods is the relief sought, and the only relief possible. To obtain that relief, the trustee concedes that the question of title and value must be tried out under a rule to show cause, * * * Confining ourselves to the case before us, we think the bankrupt court did not have jurisdiction to require the appellant to show cause why he should not pay to the bankrupt's estate the value of the goods so voluntarily surrendered by the referee to him. The court, having voluntarily parted with the custody of the goods, has not the jurisdiction to proceed summarily for their value.

§ 1695. No Plenary Suits before Referee.—Plenary suits in no event can be brought in the referee's court;⁷⁶ for the referee, though included within the term "the court" by clause 7 of § 1 of the Act, has not the machinery at his disposal for the conduction of a plenary suit, with its requirement of formal service of process, rule days, pleadings, trial and ver-

⁷⁵. Also, see instances among cases cited under the main proposition of this chapter, ante, § 1652, et seq.

Only in Cases Where Bankruptcy Occurred Since Amendment.—And such plenary suits cannot be brought in any case in the District Court of the United States unless they grow out of bankruptcy proceedings which were instituted after the amendatory Act of 1903 took effect. That amendment was not retroactive. *In re Hartman*, 10 A. B. R. 387, 121 Fed. 940 (D. C. Mass.). *Contra*, *Pond v. N. Y. Exch. Bk.*, 10 A. B. R. 343, 124 Fed. 992 (D. C. N. Y.).

⁷⁶. *Horskins v. Sanderson*, 13 A. B. R. 102, 132 Fed. 415 (D. C. Vt.); *In re Grahs*, 1 A. B. R. 465 (Ref. Ohio); *In re Scherber*, 12 A. B. R. 616, 131 Fed. 121 (D. C. Mass.); *In re Cohn*, 3 A. B. R. 421, 98 Fed. 75 (D. C. N. Y.).

Contra, *In re Shults & Marks*, 11 A. B. R. 690 (Ref. N. Y.): The referee in this case lays stress on the fact that "the case" was referred to him. The case referred to him, however, was not the independent suit of the trustee against the alleged preferential or fraudulent transferee but the bankruptcy proceedings themselves. All questions relating to the property actually or constructively in the custody of the court are within the referee's jurisdiction: questions relating to other property are not. Thus, property in the possession of a mere agent or one not claiming to hold beneficial interest therein, is not adversely held, and so the referee's jurisdiction extends to such property.

Compare, *In re Steuer*, 5 A. B. R. 209, 104 Fed. 976 (D. C. Mass.). *Quære*, *In*

dicts. A plenary suit brought by a trustee in bankruptcy is, as we have above seen, not a bankruptcy proceeding nor a proceeding in bankruptcy, although it is an action or a proceeding growing out of a bankruptcy proceeding. Referees seem to be restricted in their jurisdiction to purely bankruptcy proceedings, and also to such controversies arising out of bankruptcy proceedings as concern property within the possession or control of the bankruptcy court.

But, undoubtedly, if the property involved is placed within the control of the bankruptcy court, the referee has jurisdiction to try out its title and the rights of lienholders and others in it.

SUBDIVISION "A."

JURISDICTION BY CONSENT.

§ 1696. **Jurisdiction by Consent.**—Jurisdiction may be conferred on the bankruptcy court by the defendant's consent in cases wherein otherwise it has no jurisdiction, and if adverse claimants in possession of the property who would otherwise not be within the jurisdiction of the bankruptcy court, nevertheless voluntarily surrender custody of the property, or consent to the jurisdiction of the bankruptcy court, then the question of ownership and all other questions in relation thereto, as, for instance, the extent, validity and priority of liens upon and interests in the property, may be tried out in the bankruptcy proceedings.⁷⁷

re Goldberg, 1 A. B. R. 385 (Ref. Utah). But compare, where no objection to jurisdiction is made; obiter, In re Scherber, 12 A. B. R. 616, 131 Fed. 121 (D. C. N. Y.).

Lack of Referee's Original Jurisdiction, Cured by Appeal without Original Objection.—And one case has held that where the jurisdiction of the referee was not objected to and the summary petition contained all the substantial allegations of a bill in equity, the judge on appeal had jurisdiction to order the return of the preference involved, whether the referee originally had jurisdiction or not. In re Steuer, 5 A. B. R. 209, 104 Fed. 976 (D. C. Mass.). But compare, In re Scherber, 12 A. B. R. 616, 131 Fed. 121.

77. Bankr. Act, § 23 (b). Obiter, Bryan v. Bernheimer, 5 A. B. R. 631, 181 U. S. 188. In re Hadden-Rodee Co., 13 A. B. R. 604, 125 Fed. 886 (D. C. Wis.).

In re Hymes Buggy & Implement Co., 12 A. B. R. 477, 130 Fed. 977 (D. C. Mo.), which was a case of voluntary surrender by a sheriff to the receiver in bankruptcy, the court holding that thereby the State Court was divested of jurisdiction and the bankruptcy court invested therewith.

In re Antigo Screen Door Co., 10 A. B. R. 359, 123 Fed. 249 (C. C. A. Wis.); In re Riker, 5 A. B. R. 720, 107 Fed. 96 (C. C. A. N. Y.). Obiter, Ryttenberg v. Schefer, 11 A. B. R. 652, 131 Fed. 313 (D. C. N. Y.): This case is obiter, for the fund already was in the trustee's hands and thus in the custody of the court.

Obiter, In re Fowler, 1 A. B. R. 662, 93 Fed. 417 (Ref. Conn.); In re Rochford, 10 A. B. R. 608, 124 Fed. 182 (C. C. A. S. Dak.); In re Steuer, 5 A. B. R. 209, 104 Fed. 976 (D. C. Mass.); In re Kolin, 13 A. B. R. 531, 134 Fed. 557 (C. C. A. Ills.).

Inferentially (possession not being in the adverse claimant), Chauncey v. Dyke Bros., 9 A. B. R. 444, 119 Fed. 1, 3 (C. C. A. Ark., affirming In re Matthews, 6 A. B. R. 96, 109 Fed. 603).

Stelling v. Jones Lbr. Co., 8 A. B. R. 521, 116 Fed. 261 (C. C. A. Wis.), which was a case of disputed possession and disputed title.

Boonville Nat'l Bk. v. Blakey, 6 A. B. R. 13, 107 Fed. 891 (C. C. A. Ind.); Phillips v. Turner, 8 A. B. R. 171, 114 Fed. 726 (C. C. A. Miss.); obiter, In re

Obiter, Bardes v. Bank, 4 A. B. R. 163, 178 U. S. 524: "On the contrary, Congress, by the second clause of § 23 of the present Bankrupt Act, appears to this court to have clearly manifested its intention that controversies, not strictly or properly part of the proceedings in bankruptcy, but independent suits brought by trustees in bankruptcy to assert a title to money or property as assets of the bankrupt against strangers to those proceedings, should not come within the jurisdiction of the District Courts of the United States, 'unless by consent of the proposed defendant,' of which there is no pretence in this case."

In re Blake, 17 A. B. R. 668, 150 Fed. 279 (C. C. A. Mo.): "A court of bankruptcy may acquire by consent of all the parties in interest jurisdiction to determine a controversy between the trustee and an adverse claimant concerning an indebtedness of a third party and the lawful power to adjudicate all the claims of the parties thereto and to enforce their rights against each other by decree and execution."

In re Connolly, 3 A. B. R. 842, 100 Fed. 620 (D. C. Penn.): "Such conduct is certainly 'consent;' and, while it is usually true that consent cannot give jurisdiction, this is not universally true. The rule has no application when a statute clearly implies, as does section 23, that the jurisdiction of a certain class of controversies may be given by consent, for, in such event, to apply the rule would be to make the statute of no effect."

In re Emrich, 4 A. B. R. 89, 101 Fed. 231 (D. C. Penn.): "But in this case the license involved was already in the custody of the bankruptcy court."

Thus, consent may confer jurisdiction over a fund in the owner's hands subject to mechanic's liens;⁷⁸ and over a fund in a trustee's or a stakeholder's hand.

Thus, also, where the ownership of a fund or debt is in dispute between the trustee and a third party, if the holder of the fund or the debtor

Andre, 13 A. B. R. 132, 68 C. C. A. 374 (C. C. A. N. Y.); inferentially, *In re Bender*, 5 A. B. R. 632, 106 Fed. 873 (D. C. Ark.); *In re Porterfield*, 15 A. B. R. 11, 138 Fed. 192 (D. C. Va.).

Instance, *In re Rosenberg*, 8 A. B. R. 624, 116 Fed. 402 (D. C. Penn.), which was a case of an adverse claimant consenting and afterwards himself becoming bankrupt: his trustee was held bound by his consent, as well as that, both being in bankruptcy, the bankruptcy court acquires complete jurisdiction anyway.

But Not on U. S. Circuit Court.—But consent will not confer jurisdiction on the U. S. Circuit Court, unless that court has jurisdiction over the subject matter as well. But see *contra*, *In re Seebold*, 5 A. B. R. 358, 105 Fed. 910 (C. C. A. La.).

⁷⁸ *In re Huston*, 7 A. B. R. 92 (Ref. N. Y.). *Obiter*, inferentially, *In re Adamo*, 18 A. B. R. 181, 151 Fed. 716 (D. C. N. Y.).

Compare, *In re Grissler*, 13 A. B. R. 510, 136 Fed. 754 (C. C. A. N. Y.), where the court inferentially holds that where the contractor (not the owner) is the bankrupt, the State Court is the proper Forum. See owner as adverse claimant, ante, § 1682.

Dispute as to Actual Possession; Also as to Consent.—The determination of the question of fact as to whether there was actually possession or actually consent decided on a conflict of evidence will not be disturbed on review. *In re Kolin*, 13 A. B. R. 531, 134 Fed. 557 (C. C. A. Ills.).

Garnishee on Own Motion Paying Exempt Wages into Court.—A garnishee, on its own petition has been permitted to pay into the bankruptcy court exempt wages, although the State Court had already rendered judgment therefor against the garnishee, and although the judgment creditor did not consent.

In re McCartney, 6 A. B. R. 367, 109 Fed. 621 (D. C. Wis.): This case is of doubtful authority inasmuch as the lien in this instance was not void, it being a lien on exempt property over which the bankruptcy court should not assume jurisdiction.

pay the money into the bankruptcy court by consent of all parties, then the bankruptcy court will have complete jurisdiction.

In *re Blake*, 17 A. B. R. 668 (C. C. A. Mo.): "A court of bankruptcy may acquire by consent of all parties in interest jurisdiction to determine a controversy between the trustee and an adverse claimant concerning an indebtedness of a third party and the lawful power to adjudicate all the claims of the parties thereto and to enforce their rights against each other by decree and execution.

"A court of equity which has acquired jurisdiction of the subject matter and of the parties to a controversy may, and it should, grant complete relief, to the end that litigation over it may cease and a multiplicity of suits may be avoided.

"A trustee in bankruptcy and a county each claimed to recover an indebtedness of a bank for \$16,000, the consideration of which was credits transferred to it by the bankrupts pursuant to an executed agreement to suppress competition in bidding for the use of the county deposits and to divide them. The bank filed a bill in the bankruptcy court wherein it set forth the claims of the county, and the trustee offered to deposit the \$16,000 in court, and prayed to be discharged. The claimants filed answers in which they pleaded their claims and asked to recover the \$16,000. They then made an agreed statement of facts and stipulated that their claims should be determined by the court upon this statement of facts. The court considered the statement, held that the county was entitled to the \$16,000, and ordered the bank to pay it over to the county. The trustee presented a petition for revision. Held, the adjudication in bankruptcy, the controversy between the trustee and the county, and the consent of the parties conferred jurisdiction upon the court to hear the issues upon the agreed statement of facts and to render the judgment, and there was no error in the proceedings nor in the conclusion which had not been waived by the trustee."

§ 1697. Likewise Debtors Owing Money May Confer Jurisdiction by Consent.—Likewise debtors owing money to the bankrupt, or adverse parties obligated to him otherwise than by reason of property fraudulently or preferentially transferred, may confer jurisdiction on the bankruptcy court by consent.⁷⁹

§ 1698. What Constitutes Consent.—Whether consent is given or not is a question of fact, to be decided in general in conformity with the usual rules as to consent to jurisdiction over the person. And the findings of the lower court will not be disturbed on a conflict of evidence.⁸⁰

But it appears from some decisions that the consent required by the Bankruptcy Act is intended to be more complete than is sometimes held sufficient to confer jurisdiction elsewhere.⁸¹

Filing a "demurrer" to the jurisdiction and at the same time answering to

⁷⁹. Instance held not to show consent, *Louisville Trust Co. v. Comings*, 7 A. B. R. 421, 184 U. S. 18.

But consent cannot confer jurisdiction where a receiver in bankruptcy attempts to bring an action to recover a money judgment for a preferential payment, for the receiver has no such power. See ante, "Receivers," § 394.

⁸⁰. In *re Kolin*, 13 A. B. R. 531, 134 Fed. 557 (C. C. A. Ills.).

⁸¹. In *re Michie*, 8 A. B. R. 734, 116 Fed. 749 (D. C. Mass.); In *re Hemby-Hutchinson Pub. Co.*, 5 A. B. R. 569, 105 Fed. 909 (D. C. Ills.).

the merits; and, upon the hearing, urging both grounds, does not show the "consent" meant by the Act;⁸² nor does the failure to object to jurisdiction until, by amended petition, a good case is made, constitute such "consent."⁸³ But answering to the merits without objection is a consent.⁸⁴ The appearance in the bankruptcy proceedings and, without objection to the jurisdiction, the submission of the questions of ownership or of priority to the referee for adjudication, amount to consent.⁸⁵

Going to a hearing on the merits, after an overruling of objections to the jurisdiction, does not amount to "consent," nor to a waiver of objections.⁸⁶

Bank v. Title & Trust Co., 14 A. B. R. 106, 198 U. S. 280, reversing 11 A. B. R. 79: "That they then did not abandon their claims did not amount to a waiver of their objections or to a consent to an exercise of jurisdiction against which they protested."

The invoking of the affirmative action of the bankruptcy court is a consent;⁸⁷ as, for instance, a chattel mortgage creditor procuring the bankruptcy court to appoint a receiver and enjoin interference.⁸⁸ Acceptance of the benefits of an order of the bankruptcy court is consent.⁸⁹ And where a third party intervenes in a proceedings brought by the trustee to compel the bankrupt to execute assignments or other papers in aid of the collection of assets, such as assignments of insurance policies or of licenses or of stock exchange seats, such third parties thereby consent to the jurisdiction;⁹⁰ although perhaps the res is not strictly in custodia legis.

But the mere proving of one's claim in the bankruptcy proceedings is not a consent to the jurisdiction of the bankruptcy court over property of the bankrupt seized more than four months prior to the bankruptcy by the creditor so proving, where, at any rate, the creditor in his proof insists on his

82. *In re Michie*, 8 A. B. R. 734, 116 Fed. 749 (D. C. Mass.).

83. *In re Hemby-Hutchinson Co.*, 5 A. B. R. 569, 105 Fed. 909 (D. C. Ills.).

84. *Ryttenberg v. Schefer*, 11 A. B. R. 652, 131 Fed. 313 (D. C. N. Y.): But in this case consent was unnecessary since the fund was already in the hands of the trustee.

85. *In re Steuer*, 5 A. B. R. 209, 104 Fed. 976 (D. C. Mass.); *Chauncey v. Dyke Bros.*, 9 A. B. R. 444, 119 Fed. 1 (C. C. A. Ark.), in which case, however, the adverse claimant was not in possession of the res, the bankruptcy court itself having its custody.

In re Connolly, 3 A. B. R. 842, 100 Fed. 620 (D. C. Penn.); *In re Emrich*, 4 A. B. R. 89, 101 Fed. 231 (D. C. Penn.).

In re Durham, 8 A. B. R. 115, 114 Fed. 750 (D. C. Md.), in which case, however, "consent" was not necessary, inasmuch as the property already was in the trustee's custody, and therefore the bankruptcy court was the proper forum. *In re Porterfield*, 15 A. B. R. 11, 138 Fed. 192 (D. C. W. Va.); *In re Rochford*, 10 A. B. R. 610, 124 Fed. 182 (C. C. A. S. Dak.).

86. *Louisville Trust Co. v. Comings*, 7 A. B. R. 421, 184 U. S. 18.

87. *In re Porterfield*, 15 A. B. R. 11, 138 Fed. 192 (D. C. W. Va.). *Obiter*, *In re Foundry & Machine Co.*, 17 A. B. R. 294, 147 Fed. 828 (D. C. Wis.).

88. *In re Durham*, 8 A. B. R. 115, 114 Fed. 750 (D. C. Md.); *In re Hadden-Rodee Co.*, 13 A. B. R. 604, 135 Fed. 886 (D. C. Wis.).

89. *In re Noel*, 14 A. B. R. 715, 137 Fed. 694 (D. C. Md.).

90. *In re Emrich*, 4 A. B. R. 89, 101 Fed. 231 (D. C. Penn.).

rights by virtue of the seizure; and the State court retains jurisdiction;⁹¹ nor does the mere proving of a claim give jurisdiction to render personal judgment against the claimant for the excess of the value of the security retained by him over the amount of his claim.⁹²

Failure to object to the jurisdiction of the federal court over the person of the defendant until the case reaches the reviewing court, constitutes consent and the defendant is too late.⁹³ Failure to object to the jurisdiction of the referee until an adverse decision on the merits, also is a consent.⁹⁴

§ 1699. But Consent Confers Jurisdiction Only in Plenary Actions, unless Property in Custodia Legis.—But this "consent" confers jurisdiction only in cases where the suit is a plenary suit, or where it is a summary proceedings and the property involved is within the possession of the bankruptcy court or subject to its control, in which latter case even the referee may have jurisdiction. The referee therefore would not, except in the latter case, possess jurisdiction.⁹⁵

In *re* Teschmacher & Mrazay, 11 A. B. R. 550, 127 Fed. 728 (D. C. Penn.): "The District Court sitting as a court of bankruptcy, may still enquire summarily concerning the ownership of property alleged to belong to the bankrupt, although it be found in the possession or custody of a third person. But, if

91. *Pickens v. Dent*, 9 A. B. R. 47, 187 U. S. 177 (affirming, 5 A. B. R. 644, 106 Fed. 653).

92. *Fitch v. Richardson*, 16 A. B. R. 835, 147 Fed. 196 (C. C. A. Mass.).

93. *Boonville Nat'l Bk. v. Blakey*, 6 A. B. R. 13, 107 Fed. 891 (C. C. A. Ind.): The fact that by the Amendment of 1903 jurisdiction was conferred in the class of cases herein considered does not affect the decision upon this point in the case of *Boonville Nat'l Bk. v. Blakey*.

In *re* Steuer, 5 A. B. R. 209, 104 Fed. 976 (D. C. Mass.); In *re* Emrich, 4 A. B. R. 89, 101 Fed. 231 (D. C. Penn.).

94. In *re* Connolly, 3 A. B. R. 842, 100 Fed. 620 (D. C. Penn.); In *re* Emrich, 4 A. B. R. 89, 101 Fed. 231 (D. C. Penn.). Compare, In *re* Steuer, 5 A. B. R. 209, 104 Fed. 976 (D. C. Mass.). Also, compare, In *re* Scherber, 12 A. B. R. 616, 131 Fed. 121 (D. C. Mass.).

95. In *re* Connolly, 3 A. B. R. 842, 100 Fed. 620 (D. C. Penn.), in which case the bond stood in the place of the property itself, so the case is not contra.

Contra, In *re* Shults & Marks, 11 A. B. R. 690 (Ref. N. Y.). Also, inferentially, contra, In *re* Andre, 13 A. B. R. 132, 68 C. C. A. 374 (N. Y.).

Compare, In *re* Steuer, 5 A. B. R. 209, 104 Fed. 976 (D. C. Mass.): There are some remarks in this case indicating the court held the opinion that jurisdiction to declare a transfer void as a preference could be exercised in any event by the referee upon the transferee's consent to the jurisdiction, but it will be noted the facts do not take the case beyond the rule—the property, to be sure, was not in the actual possession of the bankruptcy court but its representative, the bond for its forthcoming, was in the court's control. Moreover, the consent of the parties actually continued until the case reached the District Judge who had plenary jurisdiction and who in fact treated the proceedings as a plenary suit where the issues had been referred to a referee as special master.

Apparently contra, and apparently to the effect that by consent the referee may order the return of money as a preference, see obiter, In *re* Scherber, 12 A. B. R. 618, 131 Fed. 121 (D. C. Mass.): "In *re* Steuer (D. C.), 5 Am. B. R. 209, 104 Fed. 976, this court decided that, in proceedings to recover a preference, where the jurisdiction of the referee was not objected to, and where the summary petition contained all the substantial allegations of a bill in equity, the judge, on appeal, from the referee, had jurisdiction to decree the return of the preference, whether the referee originally had jurisdiction of the proceedings

the court should discover that such person is holding the property under a real claim of title or right of possession, and is not merely the alter ego of the bankrupt, it is still the duty of the court to desist from pursuing the summary remedy further, and to remit the contestants to a plenary suit, although the suit, instead of being brought in a State court or a Circuit Court of the United States, may now be brought in the District Court itself, and may there be pursued to a final judgment."

Compare, inferentially, *Louisville Trust Co. v. Cominger*, 7 A. B. R. 421, 184 U. S. 18: "And the bankruptcy court has no jurisdiction to finally adjudicate the merits of his claims unless by his consent and then 'only by a plenary suit.'"

Inferentially and obiter, *Hicks v. Knost*, 2 A. B. R. 153, 158 (D. C. Ohio): "I am inclined to think it has reference not to jurisdiction in bankruptcy courts, but to courts having jurisdiction of the subject matter of the action, but not of the person of the proposed defendant."

But, at any rate, where the objection is not raised until on appeal from the referee's order it comes too late, for the judge has jurisdiction if the referee does not have it.⁹⁶

§ 1700. No Jurisdiction by Consent Where No Custody and Neither Litigant Party to Bankruptcy Proceedings.—But, as noted ante, § 1693, third parties cannot by consent confer jurisdiction on the bankruptcy court when neither that court has custody of any property involved nor either litigant was a party to the proceedings in bankruptcy. Thus, the bankruptcy court will not entertain a bill by a third party against a purchaser from the trustee where the dispute is wholly between such third party and purchaser.⁹⁷

Henrie v. Henderson, 16 A. B. R. 621 (C. C. A. W. Va., reversing *In re Henderson*, 15 A. B. R. 760): "Even though it appears that the petitioner did not object to the Federal Court taking jurisdiction of this case, this court would of its own motion refuse to entertain jurisdiction of the parties if it does not affirmatively appear in the record that the court below had jurisdiction. * * *

"This is not a case in bankruptcy in any sense of the word. It is not contended that either the plaintiff or defendant were parties to the proceeding before the referee in bankruptcy."

§ 1701. Trustee May Not Object, if Adverse Claimant Consents.—If the adverse claimant himself consents or voluntarily invokes the

or not. See *Bryan v. Bernheimer*, 181 U. S. 188, 5 Am. B. R. 623, where it is implied, if not expressly decided, that consent will give jurisdiction to the referee over a summary petition against an adverse claimant, although, without consent, the court of bankruptcy would be altogether without jurisdiction."

Also, apparently contra, *In re Folwer*, 1 A. B. R. 637 (Ref. Conn.): But in this case it must be noted that the subject matter of the controversy was a patent and that it is doubtful whether it can be said to have been "held" by the trustee. If the property were actually "held" by the trustee there would have been no reason for refusing jurisdiction to the Bankruptcy Court. Moreover, the point was made that the trustee was not consenting.

The case *In re Blake*, 17 A. B. R. 668 (C. C. A. Mo.), while evidently a case of plenary action, yet on the facts, might have been cognizable before the referee, for there the fund itself was placed in the custody of the Court.

^{96.} *In re Steuer*, 5 A. B. R. 209, 104 Fed. 976 (D. C. Mass.); *In re Scherber*, 12 A. B. R. 619, 131 Fed. 121 (D. C. Mass.).

^{97.} See ante, § 1693.

affirmative action of the bankruptcy court, the trustee will not be heard to object to the jurisdiction.⁹⁸

§ 1702. **Thus, Not to Plenary Suit in Bankruptcy Court by Adverse Claimant in Possession.**—Thus, an adverse claimant in possession of the *res* may institute and maintain in the United States District Court in bankruptcy a plenary petition to enjoin the trustee from interfering with his possession or beclouding his title.

Warehousing Co. v. Hand, 16 A. B. R. 56, 143 Fed. 32 (C. C. A. Wis.): "The pleadings filed by the appellants in the District Court were in substance bills of equity to establish and enforce their liens and rights of possession, and to enjoin the appellees from beclouding their rights and disturbing their possession. The District Court, on the initiative of the appellants, had complete jurisdiction to determine these questions in a plenary suit, which was an independent controversy between adverse claimants and the trustees, and was not a part of the proceedings in the administration of the estate."

§ 1703. **No Indirect Review by Suing Trustee in U. S. Circuit Court, Where Litigants Dissatisfied in Bankruptcy Proceedings.**—But dissatisfied litigants in the bankruptcy proceedings may not obtain indirect review by suing the trustee in the U. S. Circuit Court. Thus, a suit to enjoin the trustee from paying dividends will not be entertained by the U. S. Circuit Court.⁹⁹

§ 1704. **After "Consent" Too Late to Retract.**—After consent to the jurisdiction it is too late to retract and prefer jurisdictional defenses.¹⁰⁰

SUBDIVISION "B."

ANCILLARY BANKRUPTCY PROCEEDINGS AND PROPERTY LOCATED IN OTHER DISTRICTS; ACTIONS OUTSIDE THE DISTRICT WHERE THE BANKRUPTCY PROCEEDINGS ARE PENDING.

§ 1705. **No "Ancillary" Bankruptcy Proceedings.**—"Ancillary" bankruptcy proceedings in another district are not maintainable.¹⁰¹

98. *In re Hadden-Rodee Co.*, 13 A. B. R. 604, 135 Fed. 886 (D. C. Wis.). *Contra*, *In re Fowler*, 1 A. B. R. 637 (Ref. Conn.).

99. *Hatch v. Curtin*, 16 A. B. R. 629, 146 Fed. 200 (C. C. A. Mass.). See *ante*, § 1693.

100. *Obiter*, *In re Durham*, 8 A. B. R. 115, 114 Fed. 750 (D. C. Md.), which case is *obiter* for the reason that consent was not necessary to confer jurisdiction, the property being in the possession of the bankruptcy court.

In re Kolin, 13 A. B. R. 533, 134 Fed. 557 (C. C. A. Ills.); *In re Rochford*, 10 A. B. R. 610, 124 Fed. 182 (C. C. A. S. Dak.).

101. *Foundry Co. v. Foundry Co.*, 10 A. B. R. 624, 124 Fed. 403 (D. C. Tenn.); *In re Von Hartz*, 15 A. B. R. 747, 142 Fed. 726 (C. C. A. N. Y.), a case of a summary order to surrender an insurance policy. (1867) *Sherman v. Bingham*, Fed. Cases, No. 12,762; (1867) *In re Tift*, 19 N. B. Reg. 201, Fed. Cas., No. 14,034; (1867) *Lathrop v. Drake*, 91 U. S. 516. *Contra*, *In re Peiser*, 7 A. B. R. 690, 115 Fed. 199 (D. C. Penn.); *In re Sutter*, 11 A. B. R. 632, 131 Fed. 654 (D. C. N. Y.), refusing to follow *In re Williams*, 9 A. B. R. 744 (D. C. Ark.); *contra*, *In re Benedict*, 15 A. B. R. 232, 140 Fed. 55 (D. C. Wis.).

Apparently *contra obiter*. *In re Owings*, 15 A. B. R. 475, 140 Fed. 739 (D. C.

In *re Williams*, 10 A. B. R. 538, 123 Fed. 321 (D. C. Tenn.): "The elastic or expansive quality of the word 'ancillary' is misleading possibly in relation to this subject, and care must be had not to misapply the practice of proceedings known in the general law as ancillary to the practice under the bankruptcy statute. If one have an action at law pending, he may file a bill of discovery in equity or a bill for some other equitable relief in aid of his action at law, and this bill is auxiliary to his action at law, and in a certain sense ancillary. So, if one have a judgment at law, and his execution thereof be obstructed or hindered, he may file a bill in equity to remove the obstruction, or to subject assets which the execution otherwise will not reach, and this and similar proceedings are auxiliary, and in a certain sense ancillary; and, in the peculiar relation of the jurisdiction of the Federal courts to the citizenship of parties, this principle of ancillary jurisdiction is sometimes resorted to for sustaining supplemental litigation involving a jurisdiction which otherwise a Federal court could not maintain; as, where the judgment at law is between a plaintiff and defendant of adverse citizenship, but the subsequent bill in equity involves a controversy between citizens of the same State, of whom the Federal courts could have no jurisdiction, the proceeding is treated as a continuation of the suit at law and ancillary to it. Such a proceeding is treated as founded on the adverse citizenship of the original parties, this being an enlargement of the doctrine of ancillary jurisdiction to meet the exigencies of that case. Again, where there is a foreclosure of a railroad mortgage covering a line of road running through many States, if not as a matter of right, certainly as a matter of comity the plaintiff may apply to the Federal courts in another State to entertain an identical bill for foreclosure, to appoint the same receiver, and to enter identically the same orders of administration in foreclosure proceedings as are taken in the court of original cognizance. This also is an enlargement of the practice of ancillary or auxiliary jurisdiction to meet the exigencies of the case, and the enlargement of a jurisdiction which courts of equity have in modern times assumed in such cases. Also, cases may be found, like the administration of the 'insolvent' assets of a building and loan association, where resort has been had to such auxiliary proceedings as are common in railroad foreclosure; but this last assumption of jurisdiction is regarded as more doubtful, and when we come to consider the dominant power that every State has over the insolvent assets situated within the boundaries of that State to administer the same, independently and according to its own laws of insolvency, such a jurisdiction is exceedingly questionable.

"It is not necessary to go into the technicalities of any of these examples of ancillary or auxiliary jurisdiction, because the existing bankruptcy statute is absolutely destitute of any hint of such a jurisdiction in aid of proceedings in bankruptcy pending in another district or court of bankruptcy. Possibly, Congress might have adopted such a scheme of bankruptcy, and might have made every District Court in the United States a kind of administrator ad colligen-

N. Car.), in which case the bankruptcy court of the district of the bankrupt's domicile refused to set apart to him a homestead in real estate located in another State having different homestead laws, claiming ancillary proceedings should be instituted.

Contra, *In re Nelson Co.*, 18 A. B. R. 66, 149 Fed. 590 (D. C. N. Y.). Compare, also apparently contra instance, *In re United Button Co.*, 12 A. B. R. 761 (D. C. N. Y.); *In re Schrom*, 3 A. B. R. 352, 97 Fed. 760 (D. C. Iowa, distinguished in *In re Williams*, 9 A. B. R. 744, 120 Fed. 38, D. C. Ark.). Contra, under law of 1867, *In re Richardson*, Fed. Cas., No. 11,774. Contra, under law of 1867, *Marckson v. Heaney*, Fed. Cas., No. 9,098, 1 Dill. 497.

dum of the assets within that district in aid of the original court of bankruptcy charged with the administration of the bankrupt's property; but Congress has done no such thing, and therefore the District Courts in the several States have no such ancillary or auxiliary jurisdiction as has been invoked by these applications. The scheme of the bankruptcy statute is that the trustee is equipped with the fullest possible title to all property of the bankrupt, to all his rights, remedies, and causes of action, and certain specific causes of action have been created for him or given by the statute, as where he may bring suits that the creditors only could have brought without the statute. Besides he is armed with all the legal rights and remedies that the bankrupt had or that any other owner might have to enforce his title and his rights of action, and these he is required to use for the collection of the property and assets of the bankrupt under the guidance of the court which appoints him. He may bring his action of replevin for his race horses or other property; or his action at law for the recovery of money; or his bills in equity for the enforcement of trusts or other equitable remedies; or his libels in admiralty, where that jurisdiction applies; and he must resort to the courts of the State, or to the Federal courts in other States, according to his right to enter each or either of them for enforcing whatever remedies he may have as owner of the bankrupt's estate, and to bring whatever causes of action may be necessary; and this is all he can do in the collection of the bankrupt's property for the payment of his debts. Simply because he is trustee in bankruptcy, or simply because he is engaged in the administration of a bankrupt's estate in one district, he is not authorized to go to another district, or to a bankruptcy court in another district, and ask for ancillary or auxiliary aid of any kind which is not comprehended within the same legal and equitable remedies belonging to other owners, as above set forth."

In *re Granite City Bk.*, 14 A. B. R. 404, 137 Fed. 818 (C. C. A. Iowa, affirming In *re Wilka*, 12 A. B. R. 727, 131 Fed. 1004): "There are no such things in bankruptcy proceedings as courts of prior and ancillary jurisdiction."

In *re Tybo Min. & Reduction Co.*, 13 A. B. R. 62, 132 Fed. 699 (D. C. Nev.): "And an ancillary trustee may not be appointed."

In *re Williams*, 9 A. B. R. 741, 120 Fed. 38 (D. C. Ark.); S. C., in another court, 10 A. B. R. 538, 123 Fed. 321: "The issues in this case are therefore reduced to the simple proposition whether a bankruptcy court of a district other than that in which the proceedings are pending has jurisdiction to grant an injunction to protect the assets of the bankrupt and aid the bankruptcy court in which the proceedings are pending to obtain possession of them. In determining this matter the court must not be influenced by an appeal that unless it assumes jurisdiction great injustice may result from such refusal. Congress alone can grant the jurisdiction and courts overstep their constitutional limits whenever they attempt to remedy the real or imaginary defects of the statutes."

"In my opinion the Bankruptcy Act confers no such jurisdiction. It makes no provision for ancillary or auxiliary proceedings in District Courts other than that in which the proceedings are pending."

§ 1706. But May Marshal Liens and Sell Personal Property in Actual Custody Though in Another State.—But the bankruptcy court, including the referee, has the power to marshal liens and sell free therefrom personal property in the actual possession of its trustee, receiver, bank-

rupt, or agent of either, although the property and lienor are located in another state.¹⁰²

In *re Granite City Bank*, 14 A. B. R. 404, 137 Fed. 818 (C. C. A. Iowa, affirming *In re Wilka*, 12 A. B. R. 727, 131 Fed. 1004): "Counsel for the bank seem strangely affected with notions about State lines under the Bankrupt Act. They challenge the right to reach the bank in South Dakota by notice sent out by the referee in Iowa, and the right of the court in bankruptcy in Iowa to draw the bank from its residence in South Dakota to determine its rights as a preferred mortgagee. Under the scheme of the Bankrupt Act, the District Court of the domicile of the bankrupt takes exclusive jurisdiction of the bankrupt and his property, wherever situated, to administer it and distribute the proceeds *pari passu* among the creditors according to their respective rights and priorities. Only one court—the court making the adjudication—collects, marshals, administers, determines priorities of the parties, and directs the distribution of the assets. There are no such things in bankruptcy proceedings as courts of primary and ancillary jurisdiction. The court in this instance acquired jurisdiction as to the Granite City Bank by giving the notice prescribed by § 58 of the Act, which in this case was supplemented by notice served personally on the president of the bank where the bank was located. The bank could have appeared and contested at its pleasure the propriety of the referee ordering the sale of the property free from all liens, and the District Court of Iowa, and it alone, could pass upon the validity of the bank's claim to the proceeds of the sale of the property. In *re Kellogg*, 10 Am. B. R. 7, 121 Fed. 333, 57 C. C. A. 547. The trustee was authorized to sell the property on the premises in South Dakota, or drive it away, as the court might direct. The Granite City Bank could not replevin it from the trustee. *White v. Schloerb*, 178 U. S. 542, 4 Am. B. R. 178."

§ 1707. Property in Other States Not in Actual Custody, to Be Protected Only by Independent Suit.—Property not in the actual custody of the receiver or trustee in bankruptcy, located in other districts than the one where the bankruptcy proceedings are pending can be protected only by separate suits brought within such district: and neither summary nor plenary proceedings can be maintained in the original bankruptcy case to reach property in other districts.¹⁰³

Ross-Meeham Fdy. Co. v. Southern Car & Fdy. Co., 10 A. B. R. 624, 124 Fed. 403 (D. C. Tenn.): "The very purpose of the Constitution in giving Congress the power to establish a uniform system of bankruptcy, and the object

102. In *re Wilka*, 12 A. B. R. 727, 131 Fed. 1004 (D. C. Iowa, affirmed sub nom. In *re Granite City Bank*, 14 A. B. R. 404, 137 Fed. 818, C. C. A. Iowa).

But compare, In *re Owings*, 15 A. B. R. 476, 140 Fed. 759 (D. C. N. Car.), as to setting apart homestead in property located in another State.

103. Setting Apart Homestead in Another State.—Where a person having a domicile in one State is adjudicated a bankrupt therein, it has been held that the court of bankruptcy has no jurisdiction to set apart to him a homestead in lands located in another State. Obiter, In *re Owings*, 15 A. B. R. 472, 140 Fed. 739 (D. C. N. Car.): Especially would complications arise if the homestead laws of the two States were different and the homestead were set apart in accordance with the law of the domicile, as required by § 6.

In *re Williams*, 9 A. B. R. 741, 120 Fed. 38 (D. C. Ark.), quoted *supra*, § 1705; *contra*, In *re Peiser*, 7 A. B. R. 690, 115 Fed. 199 (D. C. Penn.).

of every bankruptcy statute, is to obviate the disastrous effect of the administration of insolvent estates in broken pieces, according to the insolvency laws of many different States. Ancillary administrations of insolvent assets, as found in equity courts, are neither desirable nor useful as analogies of practice in bankruptcy administrations. They have no application as precedents for bankruptcy proceedings *qua* bankruptcy proceedings, and only are applicable when a trustee in bankruptcy, just as any other litigant, suing another, finds it needful to apply to the ordinary auxiliary or ancillary jurisdiction of the courts to assert his title or other rights devolved on him as an owner in trust. Other than this, ancillary proceedings in bankruptcy, if they may be so called, are unauthorized monstrosities in practice, in my judgment. The necessity for separate administrations and ancillary proceedings should not exist under any well-regulated system of bankruptcy. The design of the statute is to avoid all ancillary proceedings, and secure one uniform possession of the estate by a single court of bankruptcy having the jurisdiction to administer the assets everywhere under the statute."

Nor can the bankruptcy court in the original case maintain proceedings to inquire whether a person in possession of property in another district is a bona fide "adverse claimant" such that summary process may be proper.¹⁰⁴

§ 1708. Before Adjudication, Bankruptcy Receiver No Power in Another District.—Before adjudication the bankruptcy receiver may not go into another State and institute proceedings there for the recovery of property.¹⁰⁵ The proper practice is for creditors during the meanwhile, themselves, to institute the ordinary remedies of creditors, and then, in the event of the adjudication finally being made, they will be reimbursed for their expenses under § 64 (b) (2).¹⁰⁶ However, one case seems to hold that creditors in the meanwhile should institute an anomalous proceeding analogous to an ancillary bankruptcy proceedings, rather than resort to their usual remedies.¹⁰⁷

§ 1709. After Adjudication, Trustee (and Perhaps Also Receiver) May Institute Proceedings in Another District.—After adjudication the trustee and perhaps the receiver, appointed in one district, however, may go into another district and institute replevin suits or any other actions necessary to protect the property there;¹⁰⁸ but a receiver may not do so;¹⁰⁹ unless he be authorized by order of court: for he has only such power as the court that appoints him chooses to give, and unless

104. Inferentially, *In re Waukesha Water Co.*, 8 A. B. R. 715, 116 Fed. 1009 (D. C. Wis.).

105. *In re Schrom*, 3 A. B. R. 352, 97 Fed. 760 (D. C. Iowa). See ante, § 395.

106. See "Creditors Independent Plenary Suits," ante, § 399.

107. *In re Schrom*, 3 A. B. R. 352, 97 Fed. 760 (D. C. Iowa).

108. *Obiter*, *In re Williams*, 10 A. B. R. 541, 120 Fed. 321 (D. C. Tenn.); inferentially, *In re Peiser*, 7 A. B. R. 690, 115 Fed. 199 (D. C. Penn.).

109. *In re Benedict*, 15 A. B. R. 232, 140 Fed. 55 (D. C. Wis.).

he is authorized to leave the court of original jurisdiction and sue elsewhere he is not competent to bring such suit.¹¹⁰

It has apparently been held in some cases that the receiver may not do so even when expressly authorized.¹¹¹

A trustee, however, need not obtain special authority to go into another district to institute legal proceedings.

Obiter, *In re National Mercantile Agency*, 12 A. B. R. 189, 128 Fed. 639 (D. C. Penn.): "It is manifest, therefore, that the receiver was, without power to institute this proceeding, and for this reason the petition must be dismissed. No injury, however, is likely to be done to the bankrupt estate, for, as I am informed, a trustee has since been appointed, and he has ample power to bring an action in the proper forum to recover whatsoever assets of the bankrupt may be found in the possession of other persons."

SUBDIVISION "C."

OTHER ACTIONS THAN THOSE TO SET ASIDE FRAUDULENT CONVEYANCES AND TO RECOVER PREFERENTIAL TRANSFERS.

§ 1710. **Other Actions Maintainable by Trustee.**—The trustee of course may maintain other suits than those brought to recover property fraudulently or preferentially transferred.

§ 1711. **Whether May Maintain Partition Proceedings.**—But it is doubtful whether the trustee may institute partition proceedings, although to realize upon a bankrupt partner's share.

Nevertheless, the trustee of a bankrupt heir may file exceptions to the account of the decedent's administrator and contest the same, and so even where the bankrupt is himself the administrator.¹¹²

DIVISION 3.

WHO MAY BRING PLENARY SUITS AGAINST ADVERSE CLAIMANTS.

§ 1712. **Who May Bring Plenary Suits against "Adverse Claimants."**—Before (but not after) the appointment and qualification of the trustee creditors may institute the ordinary suits for the sequestration or recovery of assets to which they would have been entitled had there been

110. *In re National Mercantile Agency*, 12 A. B. R. 189, 128 Fed. 639 (D. C. Penn.): In this case the court held that a receiver in bankruptcy, under an order empowering him to proceed forthwith to collect and take possession of all the assets of the alleged bankrupt, was not authorized to bring suits in a district other than the one in which he was appointed, the court saying: "As is well known a receiver has such power only as the court, that appoints him chooses to give, and unless he is authorized to leave the court of original jurisdiction and sue elsewhere, he is not competent to bring such a suit."

Compare, analogously, *Boonville Nat'l Bk. v. Blakey*, 6 A. B. R. 13, 107 Fed. 891 (C. C. A. Ind.).

111. Compare, *Booth v. Clark*, 17 How. 327; *Hale v. Allison*, 188 U. S. 56; *Great Western Mineral & Mfg. Co. v. Harris*, 198 U. S. 561.

112. *In re Clute*, 2 A. B. R. 376 (Super. Court San Francisco, Calif.).

no bankruptcy, subject to the control, by restraining orders, of the bankruptcy court; and upon adjudication and the appointment of a trustee, the trustee may be made a party therein, and the lien of the legal proceedings be preserved for the benefit of the estate.¹¹³

As we have seen (ante, § 399, et seq.), creditors, until adjudication, are entitled to make use of all the usual and ordinary remedies of creditors in the State or Federal Courts to recover property; for in the event there subsequently be no adjudication, their right to sue in the ordinary tribunals would be undoubted; and they should not be prevented meanwhile from making use of the ordinary remedies for their protection, nor even deterred from doing so by any fear that subsequent adjudication of bankruptcy will not only rob them of all special advantage, but also throw the costs of suit upon them.¹¹⁴

§ 1713. Legal Proceedings Resulting in Recovery of Concealed Assets, etc., Creditor Entitled to Reimbursement.—In the event the legal proceedings ultimately result in recovery of assets transferred or concealed by the bankrupt, the creditor will be entitled to reimbursement for his reasonable expenses in the suit.¹¹⁵

This provision was added by the Amendment of 1903, yet, without it, it would doubtless have been true that such assets would have come into the bankruptcy court burdened with a lien in favor of the creditor through whose efforts and expense they were ultimately recovered. Such would be a logical deduction from the doctrine enunciated in *Randolph v. Scruggs*, 10 A. B. R. 1, 190 U. S. 533, where the Supreme Court held assets turned over by a State Court assignee came into the bankruptcy court with such a lien upon them.

§ 1714. Must Have Resulted to Benefit Estate, Else No Reimbursement.—As was noted (ante, § 400), probably only those suits that were undertaken for the benefit of all creditors are strictly entitled to the benefits of § 64 (b) (2); yet the advantages of that section have been extended to cases operating to the advantage of all creditors, although the cases were not so intended originally.¹¹⁶ Thus, where an attachment lien, dissolved as to the attaching creditor by the debtor's bankruptcy, is preserved for the benefit of the estate under § 67 (f), the lien for the costs also is preserved.¹¹⁷

^{113.} Bankr. Act, §§ 67 (f); 67 (b); 64 (b) (2). See "Creditors' Independent Plenary Suits Pending Adjudication," ante, § 399, et seq. See "Preservation of Liens for Benefit of Estate," § 1490.

^{114.} But simple contract creditors may not thus sue in the federal courts to set aside a fraudulent conveyance in aid of a pending bankruptcy petition even, though diversity of citizenship exists. *Viquesnay v. Allen*, 12 A. B. R. 402, 131 Fed. 21 (C. C. A. W. Va.).

^{115.} Bankr. Act, § 64 (b) (2). Ante, § 399. Post, § 2015.

^{116.} Compare, *In re Francis-Valentine Co.*, 2 A. B. R. 522, 94 Fed. 793 (C. C. A. Calif.).

^{117.} *Receivers v. Staake*, 13 A. B. R. 281, 133 Fed. 717 (C. C. A. Va., affirmed sub nom. *First Nat. Bk. v. Staake*, 15 A. B. R. 639, 202 U. S. 141); *First Nat. Bk. v. Staake*, 15 A. B. R. 639, 202 U. S. 141.

§ 1715. **Property Must Have Been "Transferred," or "Concealed" by "Bankrupt," Else No Reimbursement.**—The wording of § 64 (b) (2) permitting reimbursement would seem to restrict the benefits of that section to cases of recovery of assets that had been transferred or concealed by the bankrupt, thus not covering cases of recovery of debts due the bankrupt or assets belonging to the estate not transferred or concealed by the bankrupt. Yet, it is considered that, under the doctrine of *Randolph v. Scruggs*, supra, and of the other cases cited supra, it is probable that, on showing made of benefit to the estate, reimbursement might be allowed in the latter cases as well.

§ 1716. **Creditors May Not Bring Independent Plenary Actions in Bankruptcy Court.**—But creditors, even though they may bring plenary actions, as above stated, nevertheless may not bring them in the federal courts of bankruptcy; for the jurisdiction conferred by the Amendment of 1903, upon the bankruptcy courts, to entertain plenary suits for the recovery of property, or its value fraudulently or preferentially transferred, authorizes only suits by trustees and not by creditors.¹¹⁸

§ 1717. **Receivers May Not Institute Plenary Suits for Property or Debts.**—The receiver in bankruptcy has no title. He is simply custodian. And it has been held that he may not institute plenary suits for the recovery of property or debts.¹¹⁹

Booneville Nat'l B'k v. Blakey, 6 A. B. R. 13, 107 Fed. 891 (C. C. A. Ind.).
 "The authority for the appointment of a receiver in bankruptcy proceedings comes from the act and is limited by the act. The order of the court appointing him cannot be broader than the statute. The receiver is a statutory receiver, and not a general receiver. The latter is appointed by a court of chancery by virtue of its inherent power, independent of any statute. His authority is derived from, and his duty prescribed by, the order of appointment, and he is called a common-law receiver. *Herring v. Railroad Co.*, 105 N. Y. 340, 12 N. E. 763. A statutory receiver is one appointed in pursuance of special statutory provisions. He derives his power from the statute, and to it must look for the duty imposed upon him. He possesses such power only as the statute confers, or such as may be fairly inferred from the general scope of the law of his appointment. We are therefore referred to the Bankrupt Act (30 Stat., ch. 541) to ascertain the powers of the bankruptcy court to appoint a receiver, and the extent of the power which the act confers upon him. * * * We can now discover, as we think, the general purpose of this law. It was that the property of the bankrupt should be vested in a trustee, to be selected by creditors; that such officer should have the general control and management of the estate, and the right to recover for the benefit of creditors all property transferred in fraud of the act. It contemplated that between the filing of the petition and the adjudication of bankruptcy an emergency might arise with respect to the care of the bankrupt's property; and in invol-

¹¹⁸. Bankr. Act, § 23 (b) and § 70 (e). *Viquesnay v. Allen*, 12 A. B. R. 402, 131 Fed. 21 (C. C. A. W. Va.). Contra, *Horner-Gaylord Co. v. Miller & Bennett*, 17 A. B. R. 257, 147 Fed. 295 (D. C. W. Va.). See ante, § 401.

¹¹⁹. *Beech v. Macon Grocery Co.*, 8 A. B. R. 751, 116 Fed. 143 (C. C. A. Ga.). *Obiter*. In re *Kolin*. 13 A. B. R. 533, 134 Fed. 557 (C. C. A. Ills.).

untary cases for the protection of the property in the interval between the filing of the petition and the adjudication, the bankruptcy court was authorized to direct the marshal to seize and hold the property pending adjudication. So, also, in voluntary or involuntary cases, when it was found absolutely necessary for the preservation of an estate, the court should appoint a receiver or the marshal to take charge of the property of the bankrupt until the petition is dismissed or the trustee is qualified. It plainly was not contemplated that the receiver or the marshal so designated should supersede the trustee or exercise the general powers conferred upon a trustee. There is no such power specifically conferred or any provision in the act from which such power can reasonably be implied. Such temporary receiver, whether he be the marshal or another, is not a trustee for the creditors, but is a caretaker and custodian of the visible property pending adjudication and until a selection of a trustee. If in any sense a trustee, he is trustee for the bankrupt, in whom is the title to the property until it passes by operation of law as of the date of adjudication to the trustee selected by the creditors. The duty required and the power conferred clearly are that the receiver or the marshal should take possession of the property that would otherwise go to waste, and hold it and preserve it, so that it might come to the trustee, when selected, without needless injury. There might also be an occasion when the business of the bankrupt ought not, in the interest of the creditors, to be temporarily suspended, as for example, in the case of a hotel or other business, where the value of the goods will require that it should be kept a going concern until the trustee should be appointed, and for a limited time after the trustee was appointed, that he might dispose of it profitably for the creditors."

In *re Schrom*, 3 A. B. R. 352, 97 Fed. 760 (D. C. Iowa): "Under these circumstances it is difficult to see how this court can exercise jurisdiction or control over the property in Illinois, or can confer any authority on the receiver to bring suit in Illinois against third parties to obtain possession of the property. The proper course to pursue is for the petitioning creditors to take proceedings in the proper court, State or Federal, in Illinois, in their own name, setting up the proceedings now pending in bankruptcy in this court as the basis of their action, and asking that court to protect the rights of the creditors in the property situated in Illinois, either by the appointment of a receiver, by injunction, or any other appropriate remedy. If the adjudication in bankruptcy is had, then the trustee who will be appointed can then appear in that case on behalf of the creditors, and take control of the proceedings."

Contra, *obiter*, In *re Fixen & Co.*, 2 A. B. R. 822, 96 Fed. 748 (D. C. Calif.): "The duty of a receiver is 'to take charge of the property of the bankrupts.' If an action at law or suit in equity is necessary to the accomplishment of that purpose, the receiver not only has the power, but it is his duty, to institute such action or suit. To say that he cannot resort to legal proceedings when necessary to take charge of the property of the bankrupt, while conceding that he may employ all other suitable agencies and instrumentalities for the purpose, is wholly illogical. Legal proceedings are sometimes the only means whereby the property of bankrupts can be preserved. Suppose that an estate consists of personal property, which has come into the hands of wrongdoers, who are about to secrete it or carry it beyond the jurisdiction of the court. Can it be seriously claimed in such a case that the receiver must sit quietly by and suffer the property to be irretrievably lost, on the ground that his functions are limited to the receipt of such property as may be voluntarily surrendered to him? The statement of the claim is its refutation. I hold that it is clearly within the jurisdiction of the court appointing a receiver in bank-

ruptcy to authorize him to institute necessary actions for the recovery of the bankrupt's property."

§ 1718. After Appointment of Trustee Suits Not to Be Instituted by Creditors.—After the appointment and qualification of the trustee suits may not be instituted by creditors to recover or protect assets for the estate, except in the trustee's name and when the court has authorized it upon the trustee failing to act. It is a general rule that after the appointment of the trustee all actions and proceedings for the recovery of property alleged to belong to the bankrupt estate must be brought by or in the trustee's name.¹²⁰

Compare, under law of 1867, *Glenny v. Langdon*, 98 U. S. 20: "1st. It is only through the instrumentality of his assignee that creditors can recover, and subject to the payment of their claims, the property which the bankrupt fraudulently transferred prior to the adjudication in bankruptcy, or which he concealed from and fails to surrender to his assignees."

Viquesnay v. Allen, 12 A. B. R. 402, 131 Fed. 21 (C. C. A. W. Va.): "Neither the original Bankruptcy Act nor the amendment seems to us to afford any ground for the contention of the appellee. The original act, § 23 a, relates only to controversies between the trustee in bankruptcy and adverse claimants to property acquired or claimed by the trustee. So, also, 23b relates only to suits brought by trustees in bankruptcy. And the amendment, if applicable here, likewise only applies to suits by trustees in bankruptcy."

Smith v. Belden, 6 A. B. R. 423 (Sup. Ct. N. Y.): "His only interest is that of a general creditor in the successful prosecution of the action and in the disposition of its fruits. It is settled that on account of such interest he should not be made a party in the absence, as is the case upon this motion, of any allegations touching the good faith and diligence of the trustee for the creditors."

In re Adams, 1 A. B. R. 96 (Ref. N. Y.): "As has been seen, the Bankruptcy Act of 1898 not only vests in the trustee property fraudulently conveyed by a bankrupt, but, more than that, subrogates the trustee to all rights of creditors to recover such property. Under a provision of the former Bankrupt Act (U. S., R. S., § 5046) vesting in the assignee under that act 'all property conveyed by the bankrupt in fraud of his creditors,' it was held, that the sole right to attack a fraudulent assignment, belonged to the assignee in bankruptcy; and it was repeatedly decided that it was only through the instrumentality of the assignee that a creditor could recover and subject to the payment of his debt property fraudulently transferred by a bankrupt prior to the adjudication of bankruptcy. *Olney v. Tanner*, 22 Blatchf. 540; *Glenny v. Langdon*, 98 U. S. 20; *Trimble v. Woodhead*, 102 U. S. 647; *Moyer v. Dewey*, 103 U. S. 301. In the case of *Olney v. Tanner*, it was further held, that all the creditor's right of action to reach such property passes to the assignee.

120. *Barnes Mfg. Co. v. Norden*, 7 A. B. R. 553 (Sup. Ct. N. J.); *In re Pearson*, 2 A. B. R. 821 (Ref. Pa.); *In re Carter*, 1 A. B. R. 160 (Ref. Ga.); *In re Rothschild*, 5 A. B. R. 587 (Ref. Ga.); impliedly, *In re Bailey*, 18 A. B. R. 226, 151 Fed. 953 (D. C. Penn.).

But compare instance where a judgment creditor was permitted to institute a suit after the debtor had been adjudged bankrupt more than two months, to declare a fraudulent trust in property and to subject the same to the creditors' own judgment. *Evans v. Staalle*, 11 A. B. R. 182 (Supreme Court Minn.).

now the trustee, as a statutory right, and he acquires not only all the rights of the creditor, but he is enabled to assail transfers which the creditor could not assail, unless he had acquired a right to or lien upon the specific property.

"If, by reason of their diligence in commencing their creditor's action before the filing of the petition in this case, and because the property fraudulently transferred was transferred before the passage of the act, the creditors opposing this motion have obtained equities superior to those of other creditors, undoubtedly they have no more to be lost under the provisions of the existing Bankruptcy Law than they were under the former law, under which it was held that the assignee took the estate in the plight in which he found it and subject to all vested liens and equities. *Yeatman v. Savings Institution*, 96 U. S. Rep. 764. Nor will those superior equities, if they exist, be lost when a trustee is appointed in this proceedings, because he will then be subrogated to the right of these creditors to prosecute their action."

§ 1719. Creditors Maintaining Suits in Trustee's Name.—Undoubtedly, creditors may maintain suits, using the trustee's name by leave of court, in cases where the trustee refuses or fails to act.¹²¹

In *re Bailey*, 18 A. B. R. 226, 151 Fed. 953 (D. C. Penn.): "The order of the court is that upon the * * * filing of a bond in the court in the sum of five hundred dollars (\$500.00), conditioned for the payment of costs that may accrue in any litigation which the petitioner may require the trustee to institute for the recovery of property alleged to belong to the bankrupt's estate, that the trustee is hereby directed to institute such suits for the recovery of property as the petitioner and his counsel may direct, and any litigation so instituted to be directed and conducted for the trustee by petitioner's counsel; and it is so ordered."

And the court may require such creditors to indemnify the trustee against the costs and expenses of the litigation.¹²²

§ 1720. Trustee May Institute Suits for Recovery of Property.—The trustee may himself, of course, commence and maintain suits for the recovery of property.

§ 1721. May Sue in State Court.—He may sue in the State Court.¹²³

§ 1722. May Sue without First Obtaining Leave.—He may sue in the State Court without first obtaining leave from the bankruptcy court.¹²⁴

^{121.} See, on analogous subject of "Parties to Object to Claims," ante, §§ 824 and 826. Also, "Parties on Appeal," etc., post, § 2827, et seq.

^{122.} In *re Bailey*, 18 A. B. R. 226, 151 Fed. 953 (D. C. Penn.).

^{123.} *Traders' Ins. Co. v. Mann*, 11 A. B. R. 269 (Sup. Ct. Ga.); *Chism v. Bank*, 5 A. B. R. 56 (Sup. Ct. Miss.); In *re Mersman*, 7 A. B. R. 46 (Ref. N. Y.); *Robinson v. White*, 3 A. B. R. 88 (D. C. Ind.); *Breckons v. Snyder*, 15 A. B. R. 112, 211 Penn. St. 176.

See for further instances the many cases cited under the subject of jurisdiction over adverse claimants: Subdivision "A," of this Division and Chapter, "Where Such Actions May Be Brought."

^{124.} *Callahan v. Israel*, 186 Mass. 383; *Chism v. Bank*, 5 A. B. R. 56 (Sup. Ct. Miss.), wherein the court held that it is incident to the trustee's right and duty. Impliedly, obiter, *Hahlo v. Cohn*, 15 A. B. R. 592 (D. C. N. Y.).

But see contra, In *re Mersman*, 7 A. B. R. 46 (Ref. N. Y.): "Trustee should

Traders' Ins. Co. v. Mann, 11 A. B. R. 269 (Sup. Ct. Ga.): "There is a marked difference between the two (receiver and trustee). The powers of a receiver are not fixed by law but by the order of appointment. His duties vary in each case. In some instances they are active. He must operate a railroad, sell a stock of goods, manage a farm, or collect rents. He is often a mere stakeholder to preserve the property until final decree. He has no fixed duty or inherent power. Unless authorized so to do he has no right to bring suit. Civ. Code, 1895, §§ 4900, 4906. But the duties of a trustee in bankruptcy are fixed by statute. 'They shall collect and reduce to money the property of estates for which they are trustees'—words as fully warranting him to sue as an administrator, with the same power and duty. The fact that this is to be 'under the direction of the court' no more requires a preliminary order to sue than it would necessitate a special order to authorize him to go in person and present a note and demand payment. The money, when collected, after suit or without suit, and the use to be made thereof, was to be 'under the direction of the court.' But being bound to collect, he was not obliged to secure a special order to bring a suit necessary to collect. As to actions by or against the bankrupt pending at the time of the adjudication, the act requires him to obtain instructions from the court intervening. But the express requirement that he must obtain an order in such instances, while being silent as to the necessity therefor in cases like this, is conclusive that special permission was not necessary where he had to sue in order to collect a debt due the estate. The fact that the original Bankrupt Act (Act, March 2, 1867, ch. 176, 14 Stat. 517) required this action to be brought in a State court is here sufficient authority to begin this proceeding. Section 23b."

§ 1723. May Sue in Bankruptcy Court for Recovery of Property Transferred by Bankrupt.—He may also sue in the federal court, as we have seen ante, this Chapter and Division, Subdivision "A," "Where Plenary Actions against Adverse Claimants May Be Brought."¹²⁵

§ 1724. May Institute Suits against Debtors to Recover Money Judgments.—The trustee may institute suits to recover money judgments against debtors, and may maintain such suits already started by the bankrupt.

not begin suits to set aside alleged fraudulent or preferential transactions without applying for and obtaining the direction of the referee in charge. Such application should be made at some regular meeting of creditors."

But the trustee must get the approval of the bankruptcy court in advance where he seeks to be substituted for the bankrupt in a suit pending at the time of bankruptcy, see ante, § 899.

Objections of the secured creditor whose security is the object of attack are entitled to but little weight, *In re Mersman*, 7 A. B. R. 46 (Ref. N. Y.).

The trustee may be required to give security for costs in some States, when the cause of action arose before the bankruptcy, *Joseph v. Raff*, 9 A. B. R. 227 (Sup. Ct. N. Y. App. Div.); *Joseph v. Makley*, 8 A. B. R. 18 (Sup. Ct. N. Y. App. Div.); but compare, obiter, *In re Barrett*, 12 A. B. R. 626, 132 Fed. 362 (C. C. Tenn.).

¹²⁵ And neither the trustee nor the receiver will be required to give security for costs nor to be personally liable therefor, unless acting in bad faith or unreasonably or oppressively; certainly not where there are assets in the bankrupt estate, nor where there are no assets, unless due in fairness to opposite parties to indemnify them against costs, *In re Barrett*, 12 A. B. R. 626, 132 Fed. 362 (D. C. Tenn.).

DIVISION 4.

PLEADINGS AND PRACTICE IN PLENARY ACTIONS AGAINST ADVERSE CLAIMANTS TO RECOVER PROPERTY OR ITS VALUE.

SUBDIVISION "A."

NATURE OF SUCH ACTIONS.

§ 1725. Nature of Plenary Suits against "Adverse Claimants."

—Plenary suits against adverse claimants to recover property or its value transferred by the bankrupt, are generally in the nature of creditors' bills to set aside fraudulent or preferential transfers, and in general follow the rules of practice of such bills,¹²⁶ and the trustee is not confined to suits at law to recover the property or its value.

Pond v. N. Y. Exch. Bk., 10 A. B. R. 343, 124 Fed. 992 (D. C. N. Y.): "This suit is analogous to a judgment creditor's suit to set aside a fraudulent conveyance. The original payment when made was valid. It would not have been voidable by the bankrupt. It has only become voidable at the election of the trustee in bankruptcy, in the same manner as a fraudulent conveyance may be set aside by a judgment creditor. The jurisdiction in such cases has always been in equity. Many such suits in equity were brought by trustees in bankruptcy under the Act of 1867, for instance, *Grant v. National Bank*, 97 U. S. 80; *Rogers v. Palmer*, 102 U. S. 263; *Stucky v. Masonic Savings Bank*, 108 U. S. 74."

Lesser v. Realty Co., 17 A. B. R. 524, 116 App. Div. (N. Y.) 212: "The rule now seems to be well settled that whenever it is necessary, in an action of this character, to set aside a written instrument to enable the trustee to reclaim property unlawfully transferred, the action must be brought in equity and not at law."

§ 1726. **Receivers May Be Appointed.**—Thus, receivers may be appointed therein.¹²⁷

¹Obiter, *Sheldon v. Parker*, 11 A. B. R. 170, 66 Neb. 630: "The trustee in a proper case may have a receiver pending the trial or pending an appeal, if the circumstances attending the case would entitle any other litigant to the same relief."

But a receiver will not be appointed to collect the rents and profits where the transferee is financially responsible.¹²⁸

^{126.} *Parker v. Black*, 16 A. B. R. 203, 143 Fed. 560 (D. C. N. Y., affirmed in 18 A. B. R. 15, 151 Fed. 18).

Carter v. Hobbs, 1 A. B. R. 215, 92 Fed. 594 (D. C. Ind.): This case and the next, *Wall v. Cox*, are not, however, to be followed on the point that such suits could be brought in the bankruptcy court before the Amendment of 1903.

Wall v. Cox, 5 A. B. R. 727, 181 U. S. 244, reversing 4 A. B. R. 659, 101 Fed. 403; *Volkommer v. Frank*, 14 A. B. R. 697, 107 App. Div. 594; *Bryan v. Madden*, 15 A. B. R. 388, 109 App. Div. 876; *Parker v. Black*, 18 A. B. R. 15, 151 Fed. 18 (C. C. A. N. Y., affirming 16 A. B. R. 202). Obiter, *Off v. Hakes*, 15 A. B. R. 700, 142 Fed. 364 (C. C. A. Ill.); *Andrews v. Mather*, 9 A. B. R. 301, 134 Ala. 358 (Sup. Ct. Ala.); *Beasley v. Coggins*, 12 A. B. R. 355, 48 Fla. 215 (Fla. Sup. Ct.); *Wall v. Cox*, 4 A. B. R. 659, 101 Fed. 403 (reversed, on other grounds, in 5 A. B. R. 527, 181 U. S. 244); impliedly, *Bardes v. Bank*, 4 A. B. R. 163, 178 U. S. 524.

^{127.} Compare, inferentially (where refused), *Rowland v. Auto. Car Co.*, 13 A. B. R. 799 (C. C. Pa.); *Cox v. Wall*, 3 A. B. R. 664, 99 Fed. 546 (D. C. N. Car., reversed, on other grounds, sub nom. *Wall v. Cox*, 5 A. B. R. 727, 181 U. S. 244, supra).

^{128.} *Webb v. Manheim*, 16 A. B. R. 472, 109 App. Div. 63.

§ 1727. **Writs of Injunction and Sequestration Issuable.**—Thus, likewise, writs of sequestration or of injunction may be issued therein to take possession, or prevent the removal, of property.¹²⁹

§ 1728. **Retransfer or Surrender of Choses in Action May Be Ordered.**—Thus, decrees for the retransfer or surrender of choses in action may be made therein.¹³⁰

§ 1729. **Trustee Not Confined to Suits in Equity, and in Proper Case May Sue at Law for Recovery of Property or Its Value.**—The trustee is not confined to suits in equity; but in a proper case may sue at law for the recovery of the property or its value.¹³¹

Obiter, *Parker v. Black*, 16 A. B. R. 204, 143 Fed. 560 (D. C. N. Y.): "It was not necessary for the trustee to invoke his equitable remedy: he was not exclusively confined to seek redress in a court of law. Either remedy apparently was open to the trustee in this case."

§ 1730. **And Should Sue at Law unless Remedy Inadequate.**—And the trustee should sue at law unless his remedy at law is inadequate. But the objection that he does not do so comes too late when first made after submission of an adverse report of a special master.¹³²

SUBDIVISION "B."

PLEADINGS AND PRACTICE IN ACTIONS BY TRUSTEE TO SET ASIDE FRAUDULENT TRANSFERS.

§ 1731. **Petition to Show Inadequacy of Assets.**—The petition must show that the trustee has not sufficient assets in his hands to satisfy creditors.

Deland v. Miller, 11 A. B. R. 744, 119 Iowa 368: "Another aspect of the case is fatal to appellant's contention. He does not allege, nor did he offer to prove, that the assets in his hands were insufficient to satisfy the claims of all creditors. Under the Federal Bankrupt Act a trustee has power to avoid

129. *Horskins v. Sanderson*, 13 A. B. R. 101, 132 Fed. 415 (D. C. Vt.); *Lawrence v. Lowrie*, 13 A. B. R. 297, 133 Fed. 995 (D. C. Mass.). Compare, *Rowland v. Auto. Car Co.*, 13 A. B. R. 799 (C. C. Penn.). Instance, *Blake v. Nesbet*, 16 A. B. R. 269, 144 Fed. 279 (D. C. Mo.).

As to whether injunction bond may be dispensed with, see obiter, *In re Barrett*, 12 A. B. R. 627, 132 Fed. 362 (D. C. Tenn.).

Actual notice of granting of injunction sufficient to bind, *Blake v. Nesbet*, 16 A. B. R. 269, 144 Fed. 279 (D. C. Mo.). Analogously, *In re Krinsky Bros.*, 7 A. B. R. 535, 112 Fed. 972 (D. C. N. Y.).

130. *Bindseil v. Smith*, 5 A. B. R. 40 (N. J. Court App. & Err.). Impliedly, *Off v. Hakes*, 15 A. B. R. 700, 142 Fed. 364 (C. C. A. Ills.).

131. *Wetstein v. Franciscus*, 13 A. B. R. 326, 133 Fed. 900 (C. C. A. N. Y.). Instance, *Suffel v. McCartney Nat'l Bk.*, 16 A. B. R. 259, 106 N. W. (Wis.) 837.

Burns v. O'Gorman, 17 A. B. R. 815 (U. S. C. C. R. I.): "A trustee in bankruptcy may sue in trover for a conversion of goods occurring either after or before bankruptcy."

Suing Debtors of Bankrupt after General Assignment Superseded by Bankruptcy.—Practice: Demurrer to Petition: *Cohen v. Wagar*, 16 A. B. R. 381, 183 N. Y. 33.

132. *Mitchell v. Mitchell*, 17 A. B. R. 382 (D. C. N. Car.).

any transfer which any creditor might have avoided. A creditor could not have avoided this mortgage without showing some fraud as to him. The mortgage was good as between the parties, and, unless some one was harmed, it should be permitted to stand."

Mueller v. Bruss, 8 A. B. R. 442, 112 Wis. 406: "A third proposition is that the trustee cannot maintain this action unless it is shown by the complaint that he has not sufficient assets in his hands to satisfy the claims of the creditors of the debtor. No such showing is made in the complaint. For all that appears therein, there may be money and property enough in his hands to pay every claim filed against the debtor. The conveyances attacked were good between the parties thereto. *Ellis v. Land Co.*, 108 Wis. 313, 84 N. W. 417. Third parties are not allowed to impeach them unless it is necessary to do so in order that justice may be done. The trustee has no right superior to that of the creditors he represents. If we admit that the facts stated show such transfers to have been fraudulent, still no right to avoid them exists unless it appears that some one was harmed. It seems quite evident, without argument, that, unless it is made to appear that the property so conveyed is needed to pay the claims filed against the debtor, the trustee has no right to set such conveyances aside. The complaint is insufficient in this respect. It ought to show the amount of claims filed, and the value of the assets in his hands, so that the court may determine the necessity or resorting to this proceeding. Its infirmity in this respect renders it susceptible to the demurrer."

But compare, apparently but not really contra, *Breckons v. Snyder*, 15 A. B. R. 112, 211 Pa. St. 176: "The adjudication was evidence of the bankrupt's insolvency at its date, and it was not necessary to prove insolvency at the trial."

§ 1732. **Return of Execution Unsatisfied, Not Always Prerequisite.**—The obtaining of judgment and issuance and return of execution unsatisfied as evidence of exhaustion of legal remedies may be excused.¹³³

Mueller v. Bruss, 8 A. B. R. 442, 112 Wis. 406: "Obtaining judgment on the claim with a return of an execution unsatisfied, is prima facie evidence of the exhaustion of all legal remedies against the debtor. The rule stated, however, is not inexorable and without exceptions. If it appears that for any reason a judgment against a debtor cannot be obtained, it will be excused as a preliminary to a creditors' suit. *Smith Eq. Rem. of Cred.*, § 167. The exceptions noted and discussed in the book last referred to, fairly illustrate the law on that subject. The principle involved in the exceptions to the rule is that when a party has done all that is possible for him to do to prepare his case for equitable cognizance, he is not to be denied access to the only tribunal capable of granting relief. This leads us to the consideration of the situation presented by the allegations of the complaint. It is not alleged that any of the creditors have ever obtained judgment on their claims. The trustee has not secured a judgment, and it is not perceived how either he or the creditors could do so, under the provisions of the Bankrupt Act. By section 11 all suits founded on a claim from which a discharge would be a release, pending at the

133. *Platt, Assignee v. Matthews*, 10 Fed. 280 (D. C. N. Y.).

But compare, *Viquesney v. Allen*, 12 A. B. R. 402, 131 Fed. 21 (C. C. A. W. Va.): This was a peculiar case. A simple contract creditor undertook, after the involuntary proceedings had begun although before adjudication, to institute an independent suit in aid of the bankruptcy proceedings, as ancillary thereto, to set aside an alleged fraudulent conveyance. The court held two points: a simple contract creditor could not maintain the action, and that a creditor was not the proper party, in any event.

time of the petition, are to be stayed until after an adjudication or the dismissal of the petition, and, if such person be adjudged a bankrupt, such suits are to be stayed until 12 months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined, so that, unless the creditor had obtained a judgment before petition filed, he could not do so until after a discharge. Such discharge releases the bankrupt from all provable debts except such as are mentioned in § 17. In the meantime the trustee is vested with all the rights the creditors had to avoid transfers made by the debtor. The creditors could not sue and obtain judgment pending the bankruptcy proceedings. The trustee had no greater right. Hence, by the operation of a paramount law of the United States, the creditors were prevented from obtaining a judgment upon which to base the right to attack the conveyance of their debtor, alleged to have been fraudulently made. This brings the case within the exception before mentioned, and excuses the trustee from obtaining a judgment and issuing execution as a preliminary to the suit."

Compare, *Brown v. Barker*, 8 A. B. R. 450, 458, 68 App. Div. 594, 74 N. Y. Supp. 43: "The courts are not inclined to extend the cases in which a plaintiff will be excused from pursuing the ordinary course of obtaining a judgment upon his indebtedness, and we think that it will not be going too far to hold that a plaintiff seeking to make such an excuse as is urged in this case shall clearly allege and show that the restraining order has been made against his opposition and without his procurement or consent."

In *re Martin*, 5 A. B. R. 424, 105 Fed. 723 (D. C. N. Y.): "Is it essential that the plaintiff proceed to judgment, and exhaust his remedy in the manner specially pointed out by the undertaking? I am clearly of the opinion that it is not necessary. The plaintiff, by the restraining order of the bankruptcy court, is prevented from proceeding to judgment and execution in the pending suit before the justice of the peace by the paramount authority of the bankruptcy court. This court has power to stay pending suits founded upon a claim for which a discharge would be a release. The performance of the conditions imposed on the plaintiff in the suit by virtue of the stay becomes impossible, and the discharge of the bankrupt from his debts has the same effect as the return of an execution wholly or partly unsatisfied."

Beasley v. Coggins, 12 A. B. R. 355, 57 So. Rep. 213 (Sup. Ct. Fla.): "The general rule is that, before a creditor can maintain a bill in equity to set aside a conveyance by his debtor of his real estate on the ground of fraud, the creditor must reduce his claim to judgment, or its equivalent, a decree for a balance remaining after a foreclosure sale of mortgaged property, creating a lien on such real estate; and, when personal property or equitable assets are pursued, he must have an execution issued and returned nulla bona. *Robinson v. Springfield Company*, 21 Fla. 203. But does this rule apply to such a suit by a trustee in bankruptcy? * * * Section 70e * * * was intended to provide simply that the trustee in bankruptcy should have the same right to avoid conveyances as was possessed by creditors, or any of them, and this with especial reference to the statute of 13 Elizabeth. Under the Bankruptcy Act, when one is thereunder adjudged a bankrupt creditors are not permitted to attack fraudulent conveyances of their debtor, made more than four months of the adjudication of bankruptcy; and, if the trustee could not do so, then the act would constitute 'a device to permit fraudulent conveyances to take effect with impunity in case they are successfully concealed for the specified four months.' * * * The case of *Platt, Assignee v. Matthews* (D. C. N. Y.) 10 Fed. 280, arose under the bankrupt law previous

to that of 1898. A bill was filed by the assignee to reach property alleged to have been fraudulently transferred by the bankrupt. It was contended on demurrer that, as no creditor had a judgment and execution against the bankrupt, such a bill would not lie. The court held that, inasmuch as the Bankruptcy Act vested the assignee with the title of all property conveyed by the bankrupt in fraud of creditors, the assignee acquired his rights through the act, and not through what had been done by the creditors. The court overruled the demurrer.

"In *Bump on Fraudulent Conveyances*, § 553, it is stated that, in order for an assignee in bankruptcy to maintain a bill to set aside a fraudulent conveyance, it is not necessary that he shall have a lien on the property, and obtain a return of nulla bona. In *Cady v. Whaling*, 7 Biss. 430, Fed. Cas., No. 2,285, an assignee in bankruptcy filed a bill to set aside a fraudulent conveyance made before the Bankrupt Act was passed. It was contended that such a bill could not be maintained on behalf of general creditors who had no specific lien. The contention was overruled."

§ 1733. **Insolvency Not Necessary Where Actual Intent to Defraud Proved.**—It is not necessary to show insolvency if an actual intent to hinder, delay and defraud is proved without showing insolvency, unless the action be brought under a statutory provision requiring such showing.¹³⁴

§ 1734. **"Insolvency," Here Means Inadequacy of Assets, Not Mere Inability to Pay "in Due Course."**—"Insolvency," as understood in dealing with contracts or conveyances challenged on the ground of fraud, actual or constructive, has reference to insufficiency of assets to cover liabilities, even in jurisdictions where the term "insolvency," as understood in the administration of insolvency laws, is the inability of the debtor to pay his debts as they mature in the regular course of business.¹³⁵

§ 1734 1/2. **Allowance of Claim, Subrogation and Reimbursement of Transferee on Setting Aside Constructively Fraudulent Transfer.**—On the setting aside of a transfer which is not actually fraudulent, but merely constructively so, the claim of the transferee has been allowed; and he has been subrogated to the rights of those who had received the

134. *Inferentially, Lansing Boiler Wks. v. Ryerson & Son*, 11 A. B. R. 560, 128 Fed. 701 (C. C. A. Mich.). *Inferentially* (this being a case where the fraud was urged as an act of bankruptcy), *In re Pease*, 12 A. B. R. 66, 129 Fed. 446 (D. C. Mich.). *Inferentially, In re Steinger Mercantile Co.*, 6 A. B. R. 68, 107 Fed. 669 (C. C. A. Ga.).

135. *Marvin v. Anderson*, 6 A. B. R. 520 (Wis. Sup. Ct.), 87 N. W. 226.

Sales by Insolvent Corporations.—"Trust fund" doctrine, so-called, has no application to a going corporation. Its creditors have no equitable lien upon its assets. Such lien does not attach till the corporation is insolvent and has either suspended business or is on the verge of collapse, so that it may reasonably be said to be civilly dead as regards the purposes for which it was organized, *Marvin v. Anderson*, 6 A. B. R. 520, 87 N. W. 226 (Wis. Sup. Ct.).

Presumption of Authority of Officers of Corporation.—The presumption is that the officers were authorized to execute the transfer. *Marvin v. Anderson*, 6 A. B. R. 520, 87 N. W. 226 (Wis. Sup. Ct.).

consideration paid by him, less deduction of the expense of setting aside the transfer.¹³⁴

Barber v. Coit, 16 A. B. R. 419, 144 Fed. 381 (C. C. A. Ohio): "In order to set aside a transfer under this section (§ 6343, Rev. Stats. Ohio) it is not necessary that actual fraud or intent to defraud be shown. The intent to prefer is made constructively fraudulent and renders the transfer voidable. * * * This is a finding that the sale was made to prefer certain creditors and therefore was constructively fraudulent. It goes no further. * * * Under these circumstances, since the creditors have received the full benefit of the money which Coit paid to Payne, and since Coit has nothing to show for this money, the property which he received in exchange having been taken away from him and handed over to the trustee for the benefit of the creditors, it seems to us that Coit has a valid claim against the trustee for the full amount of the money he paid, less the expenses of setting aside the sale. The creditors lose nothing they are justly entitled to by giving up the money, for they have the property, and it would be manifestly inequitable for them to hold both property and money."

And such fraudulent transferee has been allowed reimbursement or offset for taxes, repairs and interest actually paid by him.¹³⁵

§ 1735. Pleadings to Show Trustee's Representative Capacity.—The pleadings must show the trustee sues in his representative capacity. But the title and pleadings may be considered together to determine the capacity. Thus, where the title simply shows "trustee" but the petition clearly shows he sues in his representative capacity "as trustee," it will not be construed as *descriptio personæ* merely.¹³⁶

§ 1736. Trustee Presumed to Represent Creditors and to Be Authorized to Act; Though No Claims Proved.—The trustee may sue although no claims are proved by creditors in the bankruptcy proceedings. The trustee is entitled to institute and maintain a suit to set aside an alleged fraudulent conveyance even though no creditor has proved his claim in the bankruptcy proceedings. He is presumed to represent creditors, and the burden of proof of rebuttal is upon those who deny his authority.

Oliver v. Hilgers, 11 A. B. R. 178, 92 N. W. 911 (Minn.): "We think it is necessarily implied from the language and spirit of that act that the trustee is empowered to proceed to protect the rights of creditors, and to take possession of all property of the bankrupt, without waiting for any proof to be filed by any particular creditors, and that, when it appears that such trustee has been appointed in voluntary bankrupt proceedings, it will be presumed that he represents creditors; and it will also be presumed that the creditors in existence at the time of filing the petition were not paid subsequently, and the burden was upon appellants to show the contrary."

But compare, inferentially, *contra*, but *obiter*, *Breckons v. Snyder*, 15 A. B. R. 115, 211 Pa. St. 176: "* * * It is argued that it was incumbent on the

134. Ante, § 775.

135. *In re Chase*, 13 A. B. R. 294, 133 Fed. 79 (D. C. Mass.).

136. *Newland v. Zodikow*, 11 A. B. R. 770, 39 Misc. 541, 80 N. Y. Supp. 375.

plaintiff to show that there were unsatisfied creditors at the time of the transfer, at the time the suit was brought, and at the time of the trial, for the reason that, if there were no creditors when the transfer was made, there was no one to be defrauded by it, and if there were none afterwards there was no one in whose interest the trustee could maintain the action. The first ground of objection would not be without merit if a recovery had been sought because of a preferential transfer within the time prohibited by law. But the second count was withdrawn, and the only issue at the trial was whether a debt had existed and had been paid. No other right to retain the money was set up. If it had not been given to the defendant in discharge of a debt, it was the bankrupt's money in the defendant's hands, which the trustee could recover for creditors."

The presumption is that the trustee has complied with all the requirements of the Bankrupt Act and is qualified to act, although the record does not show he has obtained an extension of time for filing his bond after the expiration of the time provided by the Bankrupt Act.¹³⁷

§ 1737. Tender of Actual Consideration Paid, Not Necessary.—The tender of the actual consideration paid which is necessary in a suit to rescind a sale between the vendor and vendee, need not be alleged where the bill sufficiently alleges a sale for an inadequate consideration with intent to hinder creditors, participated in by the purchaser. Whether refund of any part will finally be decreed is to be later determined.¹³⁸

§ 1738. Whether Transfer Voidable Only as to Some Creditors, Nevertheless, Avoided as to All.—Where a conveyance is set aside and thereby property recovered which is not void as to all creditors but only as to a part of the creditors, nevertheless it is probable that, the conveyance being set aside, it is set aside for all purposes and all creditors are entitled to share therein, although as to some so sharing the conveyance would not have been void. The bankrupt law entitles the trustee to avoid for the benefit of all creditors any transfer which any creditor might have avoided.¹³⁹ The estoppel of some creditors does not necessarily work an estoppel of the trustee.¹⁴⁰

§ 1739. Charging Same Transaction in Alternative, Fraudulent or Preferential, Not Inconsistent.—The joinder of a fraudulent conveyance and a voidable preference, alleged as to the same facts, is not a joinder of inconsistent causes of action.¹⁴¹

^{137.} *Breckons v. Snyder*, 15 A. B. R. 115, 211 Pa. St. 176.

^{138.} *Johnson v. Forsythe Mercantile Co.*, 11 A. B. R. 673, 127 Fed. 845.

^{139.} *Bankr. Act*, § 70 (b). But compare, *contra*, *In re Cannon*, 10 A. B. R. 64, 121 Fed. 582 (D. C. S. C.).

^{140.} Compare, inferentially, but not directly in point, *Frank v. Musliner*, 9 A. B. R. 230 (N. Y. Sup. Ct. N. Y., 76 N. Y. App. Div. 617).

^{141.} *Bryan v. Madden*, 11 A. B. R. 763, 78 N. Y. Supp. 220; *Wright v. Skinner*, 14 A. B. R. 500, 136 Fed. 694 (D. C. N. Y.); *Pratt v. Christie*, 12 A. B. R. 1 (N. Y. Sup. Ct., 95 App. Div. 282). Compare instance, but no ruling made, *Laundry v. Nat'l Bk.*, 11 A. B. R. 223 (Kans. Sup. Ct.).

But of course it would be different if the fraudulent conveyance were alleged to be wholly without consideration. Such a conveyance would be inconsistent with a preference, for a preference can only be made to a creditor.

§ 1740. **All Matters Proper in Creditor's Bill, Proper Here.**—All matters and causes of action proper in a creditor's bill are proper in an action brought by the trustee in the bankruptcy court to set aside a fraudulent conveyance.¹⁴²

§ 1741. **Both Bankrupt and Transferee in Fraudulent Transfer Proper Parties, Though Bankrupt and Intermediate Transferee Not Necessary.**—Both the transferor and the transferee in an alleged fraudulent transfer are proper parties, though charged with different acts of fraud affecting different parts of the estate, their acts having been done with a common fraudulent purpose;¹⁴³ but the bankrupt is not a necessary party;¹⁴⁴ nor is a fraudulent transferee who has transferred to another fraudulent transferee all the property rights received under the transfer a necessary party.¹⁴⁵

§ 1742. **Several Acts Committed with Common Design, Joinable.**—A bill is not multifarious if it join different defendants charged with different acts of fraud affecting different portions of the estate, provided it shows they were committed with a common fraudulent purpose, and the object of the suit is simply to wipe out the fraud, clear the title and recover the value of the property for the creditors, the fraud, as alleged, relating to the same general subject in which each defendant has a common interest, centering in the real point in issue.¹⁴⁶

§ 1743. **Property to Be Shown to Belong to Estate.**—The property involved must be shown to be of a kind that would pass to the trustee; that is to say, to be such as, but for the transfer complained of, could have been transferred or seized by legal process at the time of the filing of the bankruptcy petition. Thus, in the case of the fraudulent conveyance by a bankrupt beneficiary of an insurance policy on the life of another, the petition must show that such beneficiary's interest was of a kind that made it transferable by some means or leviable upon at the time of the bankruptcy.¹⁴⁷

^{142.} *Carter v. Hobbs*, 1 A. B. R. 215, 92 Fed. 594 (D. C. Ind.).

^{143.} *Carter v. Hobbs*, 1 A. B. R. 215, 92 Fed. 594 (D. C. Ind.).

^{144.} *Cox v. Wall*, 3 A. B. R. 664, 99 Fed. 546 (D. C. N. Car.); *French v. Smith*, 4 A. B. R. 785 (Sup. Ct. Minn.).

^{145.} *Skillen v. Endelman*, 11 A. B. R. 766, 79 N. Y. Supp. 413.

^{146.} *Carter v. Hobbs*, 1 A. B. R. 215, 92 Fed. 594 (D. C. Ind.).

^{147.} *Carr v. Myers*, 15 A. B. R. 116, 211 Penn. St. 349.

§ 1744. **Fraudulent Intent to Be Alleged and Proved.**—Fraudulent intent must be alleged and proved.¹⁴⁸

§ 1745. **Fraud, a Question of Fact.**—"Fraud" is a question of fact.¹⁴⁹

§ 1746. **Burden of Proof.**—The burden of proof is on the trustee;¹⁵⁰ except that when brought under Sec. 67 (e), the burden of proving the bona fides of the transferee is on the transferee.¹⁵¹

§ 1747. **Schedules and General Examination of Bankrupt Inadmissible against Transferee.**—The schedules of the bankrupt are inadmissible against the transferee: they are not his admissions.¹⁵² Likewise, the general examination of the bankrupt is inadmissible.¹⁵³

§ 1748. **Appraisal in Bankruptcy Inadmissible against Transferee.**—The appraisal in bankruptcy is inadmissible against the transferee.¹⁵⁴

§ 1749. **Declarations of Transferrer after Transfer.**—It is a query whether the declarations of the alleged fraudulent transferrer made after the transfer may be admitted.

Compare, *In re Foster*, 11 A. B. R. 133, 126 Fed. 1014 (D. C. Pa.): "It may, perhaps, be true that declarations concerning the financial relation between Frank and himself, although made after the deed was delivered, are evidence in this issue between the bankrupt and the petitioning creditors. Upon this point the referee cited *Johnson v. Wald*, 2 Am. B. R. 84; but an examination of the report will show that it has no value as an authority. Evidence of similar declarations was no doubt received at the trial of that case, but there was no dispute concerning the fact that the vendee was a creditor, and the declarations were received without objection. In the Circuit Court of Appeals only one question was raised, and that concerned a different matter. But even if such declarations are evidence in an issue like this, the value of the testimony is evidently not great, and it certainly should be scanned with

148. *Halbert v. Pranke*, 11 A. B. R. 620 (Sup. Ct. Minn.).

149. *Sherman v. Luckhardt*, 9 A. B. R. 307, 65 Kans. 610 (overruled, on other grounds, by same court, in 11 A. B. R. 26).

Provinces of Court and Jury.—Where the principal witness for the plaintiff has given substantial testimony upon the issue to which the jury might in the proper exercise of its function give credit, it is error to direct a verdict for defendant upon the ground that the witness, in the opinion of the trial judge, was not worthy of belief, *Waters v. Davis*, 16 A. B. R. 667 (C. C. A. Tenn.).

150. *Halbert v. Pranke*, 11 A. B. R. 620 (Sup. Ct. Minn.).

151. *Horner-Gaylord Co. v. Miller & Bennett*, 17 A. B. R. 257, 147 Fed. 295 (D. C. W. Va.), which case is not authority, however, as to the right to bring the action in the bankruptcy court.

152. *Halbert v. Pranke*, 11 A. B. R. 620 (Sup. Ct. Minn.); *Hackney v. Raymond Bros. Clark Co.*, 10 A. B. R. 213 (Sup. Ct. Neb.); contra, *In re Docker-Foster Co.*, 10 A. B. R. 584 (D. C. Penn.). Also, ante, § 494.

153. *Breckons v. Snyder*, 15 A. B. R. 112, 211 Penn. St. 176; ante, § 1555.

154. See, on analogous principle, cases cited in preceding paragraph, § 1747. Contra, *In re Docker-Foster Co.*, 10 A. B. R. 584 (D. C. Pa.).

much care, especially since it stands alone without corroborating testimony. A peculiar result of sustaining the referee's finding might be, that in a suit by the trustee in bankruptcy against Frank the bankrupt's declarations made after the transfer could not be heard to affect his vendee's title, unless, perhaps, collusion were first shown (*Grimes Co. v. Malcom*, 164 U. S. 490; *Padgett v. Lawrence*, 40 Am. Dec. 232, note, and *Horton v. Smith*, 42 Am. Dec. 632) and we should have the anomaly of a cloud upon the vendee's title that depended solely upon evidence that could not be heard."

§ 1750. **Failure to Produce Important Evidence, Presumption of Fraud.**—Failure to produce important books or witnesses in a party's control raises a presumption that the evidence would be unfavorable to the party.¹⁵⁵

§ 1751. **Existence of Other Creditors at Time of Transfer, to Be Shown, unless.**—It must appear that other creditors, or another creditor, existed at the date of the transfer complained of, than simply the ones or one to whom the transfer was made. Subsequent creditors can not complain unless it is shown a scheme existed to defraud future creditors.¹⁵⁶ But if the conveyance were made in pursuance of a scheme to defraud subsequent creditors, it may be avoided.¹⁵⁷

§ 1752. **Collateral Attack on Collusive Receiverships.**—No collateral attack on a State Court receivership, as being fraudulent or collusive, will be permitted by the bankruptcy trustee where he might have raised the question in the State Court.¹⁵⁸

§ 1753. **Suing in U. S. District Court, Suit Follows Usual Course.**—Where the plenary action is brought in the United States District Court, it follows the usual course of procedure therein.¹⁵⁹

155. *Murray v. Joseph*, 16 A. B. R. 704 (D. C. N. Y.); *Nat'l Bk. v. Hobbs*, 9 A. B. R. 190 (U. S. C. C. Ga.); *In re Kellogg*, 7 A. B. R. 624, 113 Fed. 120 (D. C. N. Y.); instance, *Ott v. Doroshov*, 17 A. B. R. 417, 147 Fed. 762 (D. C. N. J.); instance, analogously (summary order on bankrupt), *Moody v. Cole*, 17 A. B. R. 825, 148 Fed. 295 (D. C. Me.).

156. *Brake v. Collison*, 11 A. B. R. 797, 129 Fed. 196 (C. C. A. Fla., affirming *In re Collison*, 12 A. B. R. 344, 130 Fed. 987).

157. *Beasley v. Coggins*, 12 A. B. R. 355; S. C., 57 So. Rep. 213, 48 Fla. 215. Obiter, *In re Collison*, 12 A. B. R. 344, 130 Fed. 987 (D. C. Fla.).

Instance held not in fraud of subsequent creditors, *In re Foss*, 17 A. B. R. 439, 147 Fed. 790 (D. C. Mo.).

158. *Frazier v. Southern Loan & Trust Co.*, 3 A. B. R. 710, 99 Fed. 707 (C. C. A. N. Car.).

159. Thus, the time limit for appeal in such cases is not ten days, as it would be under § 25; but is governed by the provisions of the act creating the Circuit Courts of Appeal. *Boonville Nat'l Bk. v. Blakey*, 6 A. B. R. 13 (C. C. A. Ind.).

The rule that the bankruptcy court has no terms and that its orders may be vacated on good cause and proper application even after expiration of the current term of the District Court is hardly applicable to plenary actions for the recovery of property. It is confined to bankruptcy proceedings proper. Compare broad statement of the rule in *In re Ives*, 7 A. B. R. 692, 113 Fed. 911 (C. C. A. Mich.).

§ 1754. **Allegation of Diverse Citizenship Not Requisite.**—Allegation of diverse citizenship is not necessary, except where the action is brought in the United States Circuit Court. The jurisdiction depends upon its being a bankruptcy controversy cognizable under the Act, not upon diversity of citizenship.¹⁶⁰

§ 1755. **Service on Nonresidents When Suit in U. S. District Court.**—Service may be had over nonresidents interested in the property under U. S. Rev. Stat., § 738.¹⁶¹

§ 1756. **Security for Costs and Injunction Bond When Suit in U. S. District Court.**—Security for costs will not be required of receivers or trustees suing in independent actions, at least in the same jurisdiction wherein appointed, if there are sufficient assets in the estate, unless the suits are not brought in good faith.¹⁶²

§ 1757. **Answering under Oath Requiring Testimony to Overcome.**—If suit be in the U. S. District Court and the defendant answers under oath it will require the testimony of two witnesses or of one witness and corroborating circumstances to overcome the oath; if the answer under oath is waived, however, it will not so require.¹⁶³

§ 1758. **If Suit in U. S. District Court, Party Not to Impeach Own Witness.**—If the suit be brought in the U. S. District Court a party may not impeach his own witnesses and is bound by their testimony, except that he may show a mistake.¹⁶⁴

§ 1759. **State Statutes Permitting Cross-Examination of Adverse Party, etc., Not Followed.**—State statutes permitting cross-examination of adverse party and providing that his answers shall not conclude the party

160. *Wright v. Skinner*, 14 A. B. R. 500, 136 Fed. 694 (D. C. N. Y.).

161. *Horskins v. Sanderson*, 13 A. B. R. 101, 132 Fed. 415 (D. C. Vt.).

Costs and Expenses in Suits Brought by Receivers and Trustees in Bankruptcy against Third Parties.—If the court decides that the property was wrongfully seized, then no part of the costs nor any part of the expenses of its care can be charged against the successful party. *Beach v. Macon Grocery Co.*, 11 A. B. R. 104, 125 Fed. 513 (C. C. A. Ga.).

The bankruptcy court may order the trustee or receiver to comply with the judgment of the court to pay costs where the suit is unsuccessful, impliedly. *In re Howard*, 12 A. B. R. 462, 130 Fed. 1004 (D. C. Calif.). But only where there are funds sufficient: otherwise execution or action is the only remedy.

In re Howard, 12 A. B. R. 462, 130 Fed. 1004 (D. C. Calif.): "The judgment of the Circuit Court, in so far as it relates to costs, can only be enforced by execution or by action. It cannot be enforced in this summary proceeding, as it is conceded that there are not now, and never have been, any funds in the hands of the trustee belonging to the petitioner or to the estate of the bankrupt with which to satisfy the same."

162. *In re Barrett*, 12 A. B. R. 626, 132 Fed. 362 (D. C. Tenn.).

163. *Jacobs v. Van Sickle*, 11 A. B. R. 479, 127 Fed. 62 (C. C. A. N. J.).

164. *Jacobs v. Van Sickle*, 11 A. B. R. 479, 127 Fed. 62 (C. C. A. N. J.).

so examining, but may be rebutted, are not applicable to federal equity practice.¹⁶⁵

§ 1760. **Where Trustee Sues in State Court, Suit Follows Usual Course and Parties Have Usual Rights, There.**—Where the trustee resorts to the State Court to recover fraudulently conveyed property or property otherwise recoverable, he is entitled to all remedies and all relief that would be afforded any other party litigant under the same facts.¹⁶⁶ Thus, where the State law permits a simple contract creditor to maintain a suit to set aside a fraudulent conveyance, the trustee has the same right.¹⁶⁷

Thus, also, in New York it is held, in suits brought by trustees in the State courts, that the rule that unfilled chattel mortgages are "void as against creditors" does not require the existence of levying creditors; but that, if judgment creditors exist, it is enough.¹⁶⁸ Such does not, however, seem to be the rule where the suit is brought in the Federal Court there.

Thus, also, the trustee is bound to give security for costs where such security would be required of others.¹⁶⁹ And the alleged fraudulent transferee is entitled to urge all defenses against the trustee.

SUBDIVISION "C."

PLEADINGS AND PRACTICE IN PROCEEDINGS TO SET ASIDE AND RECOVER PREFERENCES.

§ 1761. **Representative Capacity of Trustee to Be Alleged.**—The representative capacity of the trustee of course must be alleged. But the entire pleading may be taken to ascertain the allegation.¹⁷⁰

§ 1762. **Each Element of Preference to Be Alleged and Proved.**—Each element of the preference must be alleged, and proved.

165. *Jacobs v. Van Sickle*, 11 A. B. R. 479, 127 Fed. 62 (C. C. A. N. J.).

Also, see *Dravo v. Fabel*, 132 U. S. 489.

But Communications Privileged by State Law, Privileged in Federal Courts.—Communications privileged under State law have been held to be privileged in the U. S. District Court. Thus, where a husband and wife are prohibited by State statute from testifying against each other the schedules in bankruptcy of one have been held inadmissible in a fraudulent conveyance suit against the other. *Halbert v. Pranke*, 11 A. B. R. 621, 91 Minn. 204.

166. *Sheldon v. Parker*, 11 A. B. R. 152, 66 Neb. 610.

167. *Andrews v. Mather*, 9 A. B. R. 300, 134 Ala. 358; *Grunsfeld Bros v. Brownell*, 11 A. B. R. 601 (Sup. Ct. New Mexico).

168. *Gove v. Morton Trust Co.*, 12 A. B. R. 297, 96 App. Div. 177 (Sup. Ct. N. Y. App. Div.). Compare, *In re Beede*, 11 A. B. R. 387, 120 Fed. 853 (D. C. N. Y.); *Skilton v. Codrington*, 15 A. B. R. 819, 185 N. Y. 80.

169. *Joseph v. Raff*, 9 A. B. R. 227 (App. Div. Sup. Ct. N. Y.).

170. *Newland v. Zedikow*, 11 A. B. R. 770, 80 N. Y. Supp. 378.

Miscellaneous decisions: *Richter v. Nimmo*, 6 A. B. R. 680, 71 N. Y. Supp. 501; *Chism v. Bank*, 5 A. B. R. 56, 77 Miss. 599 (Sup. Ct. Miss.); *Lesser v. Bradford Realty Co.*, 17 A. B. R. 524, 116 App. Div. 212 (N. Y.).

Defense that title had never passed because of misrepresentation, and that the sale had been rescinded, should aver intent to deceive and actual reliance on the misstatements. *Lumber Co. v. Taylor*, 14 A. B. R. 231, 137 Fed. 321 (C. C. A. Penn.).

§ 1763. **Insolvency at Time of Transfer.**—Thus, the petition to recover the preference must allege that the bankrupt was, at the time, insolvent; and an allegation that he was in failing circumstances and unable to meet his debts is insufficient on demurrer; such allegation not being the equivalent of insolvency.¹⁷¹ But the pleader should not allege the amount of the indebtedness, nor the value of the debtor's assets.¹⁷²

§ 1764. **Reasonable Cause of Belief.**—It must allege that the creditor had reasonable cause to believe a preference was intended thereby, and it must be alleged definitely and certainly.¹⁷³

§ 1765. **Effect of Transfer to Give Greater Percentage of Debt.**—It must allege that the effect was to give the creditor, etc., a greater percentage of his claim than some other of the same class;¹⁷⁴ but it need not set forth facts showing why.¹⁷⁵ It need not, on the other hand, allege the legal conclusion if it does set forth the facts.¹⁷⁶

West v. Bank of Lahoma, 16 A. B. R. 733, 16 Okla. 508: "A petition by a trustee in bankruptcy against a creditor of the bankrupt to recover money alleged to constitute a preferential transfer, must, among other averments, show that, if the transfer is permitted to stand, the creditor will receive a greater percentage of its debt than other creditors of the same class, and, failing to show such state or facts, it is not error to sustain a demurrer to such petition."

§ 1766. **Antecedent Debt.**—It must also be alleged and proved that the transfer was to apply upon an antecedent debt.¹⁷⁷

§ 1767. **Facts, Not Evidence, nor Legal Conclusions, to Be Pleaded.**—The pleader is to state facts, not to demonstrate them nor allege the evidence of them.¹⁷⁸ And the legal conclusion that the transfer is voidable is not necessary when the facts pleaded show it to be voidable.¹⁷⁹

171. *Martin v. Bigelow*, 7 A. B. R. 218 (Sup. Ct. N. Y.).

172. *Crooks v. People's Bk.*, 3 A. B. R. 243 (N. Y. Sup. Ct. App. Div.).

173. *Johnson v. Anderson*, 11 A. B. R. 294 (Sup. Ct. Neb.); *Peck v. Cornell*, 8 A. B. R. 500 (Super. Ct. Pa.); *In re Blair*, 4 A. B. R. 220, 102 Fed. 987 (D. C. N. Y.).

It is not necessary also to allege that the creditor had reasonable grounds to believe the debtor was insolvent: belief of insolvency is included within belief of preferential intent. Compare, ante, § 1404. *Contra*, *Hicks v. Langhorst*, 6 A. B. R. 178 (Com. Pleas Ohio).

But it should not allege why the creditor had such reasonable cause, nor the evidence to demonstrate it. *Crooks v. People's Bk.*, 3 A. B. R. 244 (N. Y. Sup. Ct., App. Div.).

174. *Crooks v. People's Bk.*, 3 A. B. R. 243 (N. Y. Sup. Ct., App. Div.).

175. *Crooks v. People's Bk.*, 3 A. B. R. 243 (N. Y. Sup. Ct., App. Div.).

176. *Lesser v. Bradford Realty Co.*, 17 A. B. R. 526, 116 App. Div. 212 (N. Y.).

177. *Lesser v. Bradford Realty Co.*, 15 A. B. R. 123, 47 N. Y. Misc. 463 (N. Y. Sup. Ct., affirmed 17 A. B. R. 524).

178. *Crooks v. People's Bk.*, 3 A. B. R. 243 (N. Y. Sup. Ct., App. Div.).

179. *Lesser v. Bradford Realty Co.*, 17 A. B. R. 527, 116 App. Div. 212 (N. Y.).

§ 1768. **Burden of Proof of Each Element on Trustee.**—The burden of proof is on the trustee to prove each element of the preference.¹⁸⁰

§ 1769. **Demand Not Requisite.**—No allegation of demand is necessary, and no demand need be proved;¹⁸¹ for the beginning of the action is sufficient demand, even if the action be in trover.¹⁸²

§ 1770. **Nor Tender Back.**—The trustee need not tender back any of the preference actually already received.¹⁸³

SUBDIVISION "D."

RES ADJUDICATA IN ACTIONS BY OR AGAINST TRUSTEES.

§ 1771. **Referee's Order of Allowance or Disallowance, Res Judicata.**—The referee's order of allowance or disallowance of a claim is res judicata in subsequent actions between the same creditor and the trustee.¹⁸⁴

Clendening v. Red River Valley Nat'l Bk., 11 A. B. R. 245 (Sup. Ct. N. Dak.):
 " * * * referees are judicial officers clothed with power to adjudicate in the first instance over the allowance or disallowance of claims presented against the bankrupt's estate, and their findings are entitled to the respect and credit given to officers acting judicially. * * * It is unnecessary to say that we have no supervisory or appellate jurisdiction over referees in bankruptcy or over the decisions of courts of bankruptcy.

"The question which the plaintiff seeks to have us determine has been judicially determined by a tribunal having jurisdiction, and is therefore binding upon us. *Smith v. Walker*, 77 Ga. 289, 3 S. E. 256. Whether the referee intended to decide these questions is not material. As we have seen, they were necessarily involved, and were in fact determined by his adjudication. Whether, his decision was right or wrong we need not discuss. It is sufficient for the purpose of this case to say that the question has been adjudicated by the order of allowance made by the referee, and that the same has not been reconsidered by him or reversed by the judge upon a petition for review. If the trustee was dissatisfied with the adjudication made by the referee, he had a speedy remedy in the bankruptcy court upon a petition for review, and also by appeal from the order of the bankruptcy court if adverse to him."

180. As to insolvency, see *In re Chappell*, 7 A. B. R. 608, 113 Fed. 545 (D. C. Va.). As to reasonable cause for belief, *In re Keith v. Gettysburg Nat'l Bk.*, 10 A. B. R. 762 (23 Penn. Super. Ct. 14).

181. *Eau Claire Nat'l Bk. v. Jackman*, 17 A. B. R. 675, 204 U. S. 522 (affirming 125 Wis. 478); *Wright v. Skinner*, 14 A. B. R. 500, 136 Fed. 694 (D. C. N. Y.).

182. *Eau Claire Nat'l Bk. v. Jackman*, 17 A. B. R. 675, 204 U. S. 522.

183. *Stern, Falk & Co. v. Trust Co.*, 7 A. B. R. 305, 112 Fed. 501 (C. C. A. Ky.).

Insufficiency of Assets to Be Alleged.—It has been held that the petition also must allege an insufficiency of assets in the trustee's hands. *Lesser v. Bradford Realty Co.*, 15 A. B. R. 123, 47 N. Y. Misc. 463 (N. Y. Sup. Ct.).

184. Contra, unless perhaps the same issue were actually litigated, *Buder v. Columbia Distill. Co.*, 9 A. B. R. 331, 70 S. W. 508, 96 Mo. App. 558. Compare, ante, § 1359 and § 791.

And State Courts are without power to review, revise or reverse a referee's order allowing a claim.¹⁸⁵

§ 1772. **Also His Order Determining Validity and Priority of Liens.**—The referee's order determining the validity and priority of a lien on the bankrupt's property is *res judicata*. Thus, a mortgagee of the bankrupt's real estate, to whom, after due hearing, has been awarded the amount of her lien from the proceeds of sale, is protected by the order of the referee, which established her right to the money, until the order is set aside by proceedings directly taken for that purpose.¹⁸⁶

§ 1773. **Referee Not to Impeach Own Order.**—A referee will not be permitted to testify that he had not undertaken to pass upon the question of preference when he allowed the claim: it was necessarily involved in the allowance.¹⁸⁷

§ 1774. **Adjudication as to Fraud on Discharge, Not Res Judicata in Suit by Trustee.**—An adjudication as to the fraudulent character of a conveyance, made on the discharge, is not *res adjudicata* in a suit by the trustee to set aside the alleged fraudulent conveyance.

Paxton v. Scott, 10 A. B. R. 80, 92 N. W. 611 (Neb.): "It is now claimed that the discharge operated as a bar to these proceedings, and that the whole question of fraud is *res judicata*, and that the State court had no jurisdiction to proceed further after that decision.

"We are not able to sustain this contention as to the effect of the discharge."

§ 1775. **Refusal of Summary Order to Surrender Assets Not Res Adjudicata in Plenary Action.**—The refusal of a summary order is not necessarily *res judicata* in a plenary suit against the same person for the same property; present possession must be proved to obtain the summary order, but is not necessary to a judgment to recover the value of property unlawfully transferred; likewise, the degrees of proof are different.

Murray v. Joseph, 16 A. B. R. 716 (D. C. N. Y.): "Ordinarily, of course, if a man is sued in a lawsuit, and there is a judgment recovered in that case, he cannot sue again for the same thing. The first judgment determines the question. But this was a summary proceeding, based upon the theory that there was clear and conclusive proof that the parties proceeded against in this case had property in their possession. In those cases, where the proof is perfectly clear and substantially decisive, the courts of bankruptcy exercise a summary jurisdiction in such cases, and order that property be turned over to the trustee; and, if it is not obeyed, the parties under those circumstances are committed to jail for contempt for not obeying the order. But it is per-

185. *Clendening v. Red River Valley N. Bk.*, 11 A. B. R. 245 (Sup. Ct. N. Dak.).

186. *In re Wilkesbarre Furn. Mfg. Co.*, 12 A. B. R. 472, 130 Fed. 796 (D. C. Penn.).

187. *Clendening v. Red River Valley Nat'l Bk.*, 11 A. B. R. 245 (Sup. Ct. N. Dak.).

fectly well-settled law that a case may be sufficiently doubtful to prevent the court of bankruptcy from making a summary order in one of those proceedings, although there may be sufficient evidence in the case, such that if it were submitted to a jury on a trial it would justify a verdict against the party, which the court would not feel authorized to set aside. Therefore, it is my opinion that any order made in a proceeding of this kind which does not find the party proceeded against liable to pay over is not a legal bar to a suit brought by a trustee where the evidence can be taken in full, and the jury can pass upon the question."

§ 1776. Whether Adjudication in Bankruptcy Res Adjudicata as to Insolvency When Act Committed, if Insolvency Essential Element.

—It has been held that the adjudication in bankruptcy will be evidence of the bankrupt's insolvency at and since the act of bankruptcy was committed;¹⁸⁸ at any rate, if insolvency was a necessary element in the proof of the act.

But the better reasoning seems to be that the doctrine of *res judicata* does not apply in such cases for the reason that the subject matter in the two cases is not the same. In the first case the status of the debtor is the subject matter, and upon that point the adjudication in bankruptcy is binding upon the whole world, being an adjudication in a proceedings *in rem*; but in the latter case the subject matter is the property, and though it is also a proceedings *in rem*, the *res* is different.¹⁸⁹

§ 1777. At Any Rate, Adjudication on Ground of Preference Not Res Judicata on Issue of "Reasonable Cause for Belief."—At any rate, an adjudication on the ground of preference is not *res judicata* on the issue of the existence of a reasonable cause for belief.¹⁹⁰

^{188.} *Breckons v. Snyder*, 15 A. B. R. 112, 116, 211 Penn. St. 176; *In re Virginia Hardwood Mfg. Co.*, 15 A. B. R. 137, 139 Fed. 209 (D. C. Ark.).

^{189.} *Silvey & Co. v. Tift*, 16 A. B. R. 12, 123 Ga. 804. See ante, "Effect of Adjudication in Subsequent Litigation," § 444. Also, ante, § 1362. Also, compare, *Levor v. Seiter*, 5 A. B. R. 576, 69 N. Y. Supp. 987 (reversed, on other grounds, in 8 A. B. R. 459, 74 N. Y. Supp. 499).

^{190.} *Hussey v. Dry Goods Co.*, 17 A. B. R. 516, 148 Fed. 598 (C. C. A. Kans.), quoted § 446.

CHAPTER XXXIV.

RECEIVERS AND TRUSTEES AS DEFENDANTS IN PLENARY SUITS.

Synopsis of Chapter.

- § 1778. Receivers and Trustees as Defendants in Plenary Suits.
- § 1779. May Be Made Party Where State Court Has Custody of Res.
- § 1780. May Be Sued in Personam for Conversion or Trespass for Wrongful Seizure.
- § 1781. Such Suits Generally Not Enjoined by Bankruptcy Court.
- § 1782. But May Be Enjoined if Equity Demands It.
- § 1783. May Be Sued without Leave of Bankruptcy Court.
- § 1784. Need Not Be Sued in Official Capacity, but Merely as Individual.
- § 1785. Execution against Receivers and Trustees.
- § 1786. Orders by Bankruptcy Court to Pay Judgments Out of Funds of Estate.
- § 1787. Garnishee, etc., as Bankrupts—Trustee to Respond.
- § 1788. Dissatisfied Litigants in Bankruptcy Proceedings Attempting to Obtain Indirect Review by Bringing Independent Suits against Trustee.

§ 1778. **Receivers and Trustees as Defendants in Plenary Suits.**—Receivers and trustees in bankruptcy may be sued elsewhere than in the bankruptcy proceedings.¹

§ 1779. **May Be Made Party Where State Court Has Custody of Res.**—Where another court has jurisdiction over the res, the parties therein may make the trustee or receiver a party defendant, to cut off his rights.²

§ 1780. **May Be Sued in Personam for Conversion or Trespass for Wrongful Seizure.**—Also a receiver or trustee may be sued in the State Court in an action in personam for a money judgment for converting property in his possession belonging to another.³

In re Gutman & Wenk, 8 A. B. R. 252, 114 Fed. 1009 (D. C. N. Y.): "The fact that the petitioner was a receiver of a court would not ordinarily afford him immunity for a tortious act."

1. In re Smith, 9 A. B. R. 603, 121 Fed. 1014 (D. C. N. Y.).

2. In re Smith, 9 A. B. R. 603, 121 Fed. 1014 (D. C. N. Y.).

3. In re Kanter & Cohen, 9 A. B. R. 372, 121 Fed. 984 (C. C. A. N. Y.); In re Mertens & Co., 16 A. B. R. 831, 147 Fed. 177 (C. C. A. N. Y.); In re Foundry & Machine Co., 17 A. B. R. 291, 147 Fed. 828 (D. C. Wis.); Conversion for selling mortgaged chattels without notice to mortgagee. McLean v. Mayo, 7 A. B. R. 115, 113 Fed. 106 (D. C. N. Car.); obiter, In re Russell & Birkett, 3 A. B. R. 658, 101 Fed. 248 (C. C. A. N. Y.); compare, Chauncey v. Dyke Bros., 9 A. B. R. 444, 119 Fed. 1 (C. C. A. Ark.); Welch v. Polley, 11 A. B. R. 215 (197 N. Y. 177); In re Spitzer, 12 A. B. R. 346, 130 Fed. 879 (C. C. A. N. Y.); impliedly, In re Kelly Dry Goods Co., 4 A. B. R. 530, 102 Fed. 747 (D. C. Wis.). Instance, In re Freeman, 9 A. B. R. 68 (D. C. N. Y.), where such right is assumed to exist. See post, § 1814.

Or for trespass for wrongful seizure of property belonging to another;⁴ or for wrongfully detaining property belonging to another.

Skilton v. Codington, 15 A. B. R. 810, 185 N. Y. 80: The court in this case held in substance that where a trustee in bankruptcy retains out of the proceeds of the sale of the bankrupt's property a certain sum for the benefit of any liens or claims that might be established against the property, the State Court has jurisdiction to hear and determine an action brought against such trustee for detaining the property covered by a chattel mortgage executed by the bankrupt and recover the amount due on a note which the mortgage was given to secure, if the bankruptcy court does not enjoin the prosecution of such action.

§ 1781. Such Suits Generally Not Enjoined by Bankruptcy Court.

—And such actions will not be restrained by the bankruptcy court,⁵ except where it appears without dispute that the third party cannot possibly have any legal rights to be established by the litigation in the State Court.⁶

§ 1782. But May Be Enjoined, if Equity Demands It.—Nevertheless the bankruptcy court has power to prohibit the prosecution thereof if equity so demands.⁷

In re Gutman & Wenk, 8 A. B. R. 252, 114 Fed. 1009 (D. C. N. Y.): "But the statutes which permit such actions without leave of court, provide that they should be subject to the general equity jurisdiction of the court in which the receiver was appointed, so far as the same shall be necessary to the ends of justice."

In re Schermerhorn, 16 A. B. R. 509 (C. C. A.), 145 Fed. 341: "After various proceedings before the referee the District Court made an order permitting the petitioner to sue the trustee in a State Court, but it was upon an ex parte application and showing and without notice to the trustee or his counsel of record. The District Court, upon being advised of the true situation as disclosed by the record, found that its order had been improvidently granted and it promptly vacated it, and enjoined the petitioner from proceeding further in the State Court. There can be no doubt of the power of the court to do this, nor that its power was well exercised."

In re Mertens, 12 A. B. R. 706, 131 Fed. 507 (D. C. N. Y.): "Is not the bankruptcy court, in possession of the property, possessed of power and jurisdiction to try and determine this question? Or must it await the trial and determination of a suit for conversion against its officer in the State Court before proceeding to administer the trust and wind up the bankruptcy proceedings? It is conceded that in such a case as this the bankruptcy court

4. *McLean v. Mayo*, 7 A. B. R. 115, 113 Fed. 106 (D. C. N. Car.).

But he may not, at any rate, be sued in equity, *Treat v. Wooden*, 14 A. B. R. 736, 138 Fed. 934 (U. S. C. C. Mass.).

5. *In re Kanter & Cohen*, 9 A. B. R. 372, 121 Fed. 984 (C. C. A. N. Y.); *McLean v. Mayo*, 7 A. B. R. 115, 113 Fed. 106 (D. C. N. Car.); *In re Spitzer*, 12 A. B. R. 346, 130 Fed. 879 (C. C. A. N. Y.).

Contra, *In re Mertens*, 12 A. B. R. 698, 131 Fed. 507 (D. C. N. Y.), in which case there was a claim, however, that the party suing had twice submitted himself to the jurisdiction of the bankruptcy court.

6. *In re Gutman & Wenk*, 8 A. B. R. 252, 114 Fed. 1009 (D. C. N. Y.).

7. Impliedly, *Skilton v. Codington*, 15 A. B. R. 810, 185 N. Y. 80.

may enjoin an action in replevin in the State Court against the receiver or trustee to recover the property. Why may it not enjoin an action in trespass, or for conversion brought against the receiver or trustee in bankruptcy in the State Courts to recover the proceeds of a sale of the property or its value as damages for a conversion, based on the claim that the title was in the vendor? Does the one action interfere with the property or the proceedings in the court of bankruptcy any more or less than the other? If so, wherein?"

And may revoke a leave if improvidently granted.⁸

§ 1783. **May Be Sued without Leave of Bankruptcy Court.**—The receiver may be sued without leave of the bankruptcy court being first obtained.⁹

In re Kelley Dry Goods Co., 4 A. B. R. 528 (102 Fed. 747) (D. C. Wis.): "No leave to sue the receiver in such case is necessary under the recent legislation of Congress."

§ 1784. **Need Not Be Sued in Official Capacity, but Merely as Individual.**—The receiver or trustee, it appears, need not be sued in his official capacity, but merely as an individual.¹⁰

§ 1785. **Execution against Receivers and Trustees.**—Levy of execution upon a judgment obtained in such suit against the receiver or trustee doubtless may be made out of the receiver's or trustee's individual estate, the bankruptcy court determining whether reimbursement be proper out of the estate.

Compare, obiter, Treat v. Woodin, 14 A. B. R. 737, 138 Fed. 934 (C. C. Mass.): "How far the Court of Appeals would permit the action of trover to proceed, and upon what property it would permit a levy of execution, does not appear. To levy execution upon the individual estate of a trustee in bankruptcy in order to satisfy a judgment for damages arising from his compliance with an order for the sale of specific property made by a court of competent jurisdiction seems to bear hardly upon the trustee. Even the Court of Appeals, however, expressly refused to disturb the control of the court of bankruptcy over the bankrupt estate."

§ 1786. **Orders by Bankruptcy Court to Pay Judgments Out of Funds of Estate.**—The bankruptcy court may by order require the receiver or trustee to comply with the judgment or decree against him, if there are funds in the bankrupt estate. But the bankruptcy court may not so order where there are no funds.

In re Howard, 12 A. B. R. 462, 130 Fed. 1004 (D. C. Calif.): "The judgment of the Circuit Court, in so far as it relates to costs, can only be enforced by execution or action. It cannot be enforced in this summary proceeding, as

8. In re Schermerhorn, 16 A. B. R. 509, 145 Fed. 341 (C. C. A.).

9. In re Smith, 9 A. B. R. 603, 121 Fed. 1014 (D. C. N. Y.); 25 U. S. 436 Stats. at Large.

10. In re Gutman & Wenk, 8 A. B. R. 252, 114 Fed. 1009 (D. C. N. Y.). Inferentially, McLean v. Mayo, 7 A. B. R. 115, 113 Fed. 106 (D. C. N. Car.).

it is conceded that there are not now, and never have been any funds in the hands of the trustee belonging to the petitioner or to the estate of the bankrupt with which to satisfy the same. The motion that the trustee be directed to pay such costs is denied, without prejudice to the right of the petitioner to enforce judgment for the same by action or execution as he may be advised."

§ 1787. Garnishees, etc., as Bankrupts—Trustee to Respond:—

Where a garnishee goes into bankruptcy his trustee may be required to respond.¹¹ But no judgment can be rendered that can be enforced against the trustee except in the bankruptcy court itself. And the garnishment proceedings will be stayed until the dividend sought to be subjected can be ascertained.¹²

§ 1788. Dissatisfied Litigants in Bankruptcy Proceedings Attempting to Obtain Indirect Review by Bringing Independent Suit against Trustee.—Dissatisfied litigants cannot obtain an indirect review of orders made in the proceedings in bankruptcy by instituting plenary action against the trustee.

Thus, the U. S. Circuit Court will not entertain an action to restrain the trustee from complying with an order to pay dividends.¹³

11. In re St. Albans Fdy. Co., 4 A. B. R. 594 (D. C. Vt.).

12. In re St. Albans Fdy. Co., 4 A. B. R. 594 (D. C. Vt.).

13. Hatch v. Curtin, 16 A. B. R. 629, 146 Fed. 200 (C. C. Mass.). Ante, §§ 1693, 1700.

CHAPTER XXXV.

LIMITATIONS OF PLENARY ACTIONS BY AND AGAINST TRUSTEES. •

Synopsis of Chapter.

§ 1789. Limitation of Plenary Actions by and against Trustees.

§ 1790. No Suit to Recover Property after Two Years from Closing of Estate.

§ 1791. Not Barred by Expiration of State Limitation after Bankruptcy and before End of Two Years.

§ 1792. Otherwise, State Limitations Prevail.

§ 1793. Nondiscovery of Fraud as Tolling Bar.

§ 1789. **Limitation of Plenary Actions by and against Trustees.**—The trustee may not bring action nor be sued subsequently to two years after the closing of the estate, but within that period state statutes of limitation are suspended, except as to causes of action barred thereby before the bankruptcy.

§ 1790. **No Suit to Recover Property after Two Years from Closing of Estate.**—The trustee may not institute legal proceedings subsequently to two years after the estate is closed.¹

§ 1791. **Not Barred by Expiration of State Limitation after Bankruptcy and before End of Two Years.**—Suit may be commenced by the trustee upon any action that was not barred by limitation at the beginning of the bankruptcy, and may be so commenced at any time within the two years after the closing of the estate, notwithstanding the State statute of limitations may bar the action before the two years have expired.² In short, the Act creates a new statute of limitations, except as to actions already barred when the bankruptcy proceedings were instituted.

§ 1792. **Otherwise, State Limitations Prevail.**—Otherwise than as above described, the State statute of limitations will prevail.³

1. Bankr. Act, § 11 (d): "Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed." *Grunsfeld v. Brownell*, 11 A. B. R. 601 (New Mex. Sup. Ct.); *Obiter, Sheldon v. Parker*, 11 A. B. R. 152, 66 Neb. 610. But compare, *Evans v. Staale*, 11 A. B. R. 182, 92 N. W. 951 (Minn.).

2. *Sheldon v. Parker*, 11 A. B. R. 152, 66 Neb. 610.

Query, if Estate Reopened after the Two Years, Is Bar of Statute of Limitations Tolled?—An estate once closed may be reopened after two years because it is not a "suit" within the meaning of the statute. *In re Paine*, 11 A. B. R. 351, 127 Fed. 246 (D. C. Ky.).

The question then arises whether, on the estate being again closed, the statute of limitations is again tolled for a further period of two years. There appears to be no case decided on the point.

The trustee's bond remains liable for two years after the closing of the estate. *Obiter, In re Kajita*, 13 A. B. R. 19 (D. C. Hawaii).

3. Instance, *Lehman v. Crosby*, 3 A. B. R. 662 (D. C. N. Y.).

§ 1793. **Nondiscovery of Fraud as Tolling Bar.**—Where the bar of the statute of limitations is tolled by the nondiscovery of the fraud, the pleader need not set forth the particulars of, nor reasons for, the nondiscovery.⁴

Lehman v. Crosby, 3 A. B. R. 662 (D. C. N. Y.).

CHAPTER XXXVI.

SUMMARY JURISDICTION OVER THE BANKRUPT, HIS AGENTS AND PERSONS NOT ADVERSE CLAIMANTS; ALSO OVER PROPERTY IN CUSTODY.

Synopsis of Chapter.

§ 1796. Possession of Res, Test of Summary Jurisdiction.

DIVISION 1.

§ 1797. Jurisdiction Once Attaching, Complete for All Purposes.

§ 1798. All Action to Be Taken in Bankruptcy Court.

§ 1799. Thus, Landlord's Forcible Detainer Suits Not Maintainable.

§ 1800. Property Taken Out of Custody, etc., after Bankruptcy, Summarily Ordered Returned.

§ 1801. Even Property Voluntarily Surrendered by Bankruptcy Receiver Recoverable.

§ 1802. Whether Recovery Be Plenary or Summary.

§ 1803. But Persons in Possession Where Property Surrendered by Trustee, Not Subject to Summary Order.

§ 1804. Purchasers at Sales by Trustees or Receivers Subject to Summary Jurisdiction.

§ 1805. Obstructive Suits Brought after Bankruptcy Court Acquires Custody.

§ 1806. Thus, Foreclosure Suits, Where Bankruptcy Court Already Has Custody.

§ 1807. What Constitutes "Custodia Legis" and "Assumption of Jurisdiction."

§ 1808. As to Adjudication in Bankruptcy "Ipso Facto" Passing Bankrupt's Property into Custodia Legis.

§ 1809. Real Estate Generally Considered in Bankrupt's Possession.

§ 1810. Mere Rights of Action in Personam, Not Property "in Possession" of Bankrupt.

§ 1811. Whether Action to Be in Bankruptcy Proceedings Themselves, or Separate Plenary Action Not Maintainable in U. S. Dist. Court.

§ 1812. Nor in State Court, Nor in U. S. Circuit Court.

§ 1813. Bankruptcy Court Permitting Controversies over Property in Its Possession to Be Carried on Elsewhere.

§ 1814. Suits in Personam against Trustees and Receivers.

DIVISION 2.

§ 1815. Where Summary Orders Will Lie on Bankrupts, and Persons Not Adverse Claimants—In General.

§ 1816. Outstanding Claims by Third Parties on Property in Hands of Bankrupt or Agent, Summary Jurisdiction Not Divested.

§ 1817. But Beneficial Interest in Trustee Must Exist.

§ 1818. Order of Surrender before Appointment of Trustee and Even before Adjudication.

§ 1819. Summary Orders on Bankrupt.

§ 1820. No Matter in What Capacity Bankrupt Holds.

§ 1821. Officers of Bankrupt Corporation, Subject.

§ 1822. Summary Orders on Agents and Others.

§ 1823. Corporation Agent of Bankrupt, Subject Thereto.

- § 1824. Part Adversely Held, Part Held as Agent or Not under Claim of Beneficial Interest.
- § 1825. Lienholder in Possession after Satisfaction of Lien.
- § 1826. Whether Filing of Petition to Redeem from Undisputed Liens Gives Summary Jurisdiction to Order Surrender on Tender of Amount Due.
- § 1827. Custodians and Court Officers in Possession under Nullified Legal Proceedings, Not "Adverse Claimants."
- § 1828. But until Liens Nullified, Custodians and Court Officers "Adverse Claimants."
- § 1829. Court Officers Holding under Nullified Legal Proceedings Subject to Summary Order.
- § 1830. Order May Not Require Surrender of More than Is in Officer's Hands.

SUBDIVISION "A."

- § 1831. Procedure on Summary Petitions, in General.
- § 1832. What Is Summary Process.
- § 1833. Summary Orders to Surrender Assets Not New Function.
- § 1834. Right of Trial by Jury Not Violated Thereby.
- § 1835. Bankrupt Ordered to Execute Necessary Papers.
- § 1836. Referee Has Jurisdiction to Make Summary Order.
- § 1837. Written Petition Requisite.
- § 1838. Reasonable Notice on Respondent Requisite.
- § 1839. Due Hearing Requisite.
- § 1840. Courts Proceed with Great Caution in Granting Summary Orders.
- § 1841. Punishment for Disobedience of Summary Order, Not Imprisonment for Debt.
- § 1842. Clear, Certain, Convincing and Satisfactory Proof, or Proof beyond Reasonable Doubt, Requisite.
- § 1843. Bankrupt's Sworn Denial Not Conclusive.
- § 1844. But Almost Incontestable Evidence Requisite to Overcome It.
- § 1845. Proof of Present Possession or Control Requisite.
- § 1846. Similarly, Agents and Court Officers Not Subject to Summary Orders as to Disbursements Already Made.
- § 1847. Likewise, No Interest to Be Included.
- § 1848. Whether Possession at Time of Filing Summary Petition or of Granting Order, Requisite.
- § 1849. Circumstantial Evidence Sufficient.
- § 1850. Presumption of Continued Possession When Property Once Traced and Shortage Unexplained.
- § 1851. Rejecting Improbable Explanations.
- § 1852. No Presumption of Continued Possession if Circumstances Raise Counter Presumption.
- § 1853. Order to Describe Property—Orders to Pay Value of Goods, Alternative Orders, etc.
- § 1854. Review of Summary Orders—Set Aside Only for Manifest Error.
- § 1855. Whether "Review" or "Appeal."
- § 1856. Contempt for Disobedience of Summary Orders.
- § 1857. Quære, Whether Evidence on Which Order for Surrender Based, May Be Re-Examined.
- § 1858. Opportunity Must Be Given to Defend on Contempt.
- § 1859. Evidence on Contempt to Be beyond Reasonable Doubt.
- § 1860. Procedure on Obtaining Surrender from Court Officers.
- § 1861. If Application Be to State Court Whose Officer in Control, Procedure Follows That of Such Court.

- § 1862. If Application Be to Bankruptcy Court, Procedure Follows Ordinary Rules as to Summary Orders on Bankrupts and Agents.
- § 1863. Jurisdiction Exists to Determine Facts Requisite to Give Summary Jurisdiction.
- § 1864. But Will Only Examine Far Enough to Ascertain if Facts Alleged in Good Faith and if True Would Constitute "Adverse" Party.
- § 1865. Not Concluded by Pleadings.
- § 1866. But Notice Served Outside District Not Sufficient to Confer Jurisdiction to Make Inquiry.
- § 1867. No Ancillary Jurisdiction in Bankruptcy Court of Another District to Make Summary Order.

DIVISION 3.

- § 1868. Jurisdiction to Redeem Property from Liens.
- § 1869. Procedure Petition to Redeem and Notice.
- § 1870. Gives Jurisdiction to Order Cancellation, Assignment or Release, on Tender of Amount Due.
- § 1871. May Not, under Guise of Petition to Redeem, Gain Jurisdiction over Adverse Claimants in Possession.

DIVISION 4.

- § 1872. Summary Jurisdiction to Order Trustee to Surrender Property to Rightful owner.
- § 1873. Thus, to Order Surrender of Property Belonging to Third Parties.
- § 1874. Referee Has Jurisdiction.
- § 1875. Replevin Suits Not Maintainable against Trustee or Receiver.
- § 1876. Petitions for Reclamation, Surrender or Redelivery.
- § 1877. Reclamation of Property Left for Repairs, Storage or Other Bailment.
- § 1878. Of Property, Bought on Conditional Sale.
- § 1879. Of Goods Bought under Misrepresentations or While Grossly Insolvent.
- § 1880. Reclaiming Part Still in Trustee's Hands, Proving Claim for Balance.
- § 1881. Goods Stopped in Transitu.
- § 1882. Converted Property or Its Traced Proceeds, Reclaimable.
- § 1883. "Tracing Trust Funds."
- § 1884. Commingling of Trust Funds or Trust Property.

DIVISION 5.

- § 1885. Jurisdiction to Marshal Liens.
- § 1886. Consent of Lienholder Not Necessary.
- § 1887. Incidental Power to Compel Execution of Papers by Third Parties.
- § 1888. Referee Has Jurisdiction.
- § 1889. Reasonable Notice to Lienors or Other Parties in Interest Requisite.
- § 1890. "Ten Days Notice by Mail" Insufficient Service of "Order to Show Cause," Proper Method.
- § 1891. Notice on Nonresidents, if Court Has Actual Possession.
- § 1892. But Mere Possession of Res and Service of Notice Insufficient to Render Judgment in Personam.
- § 1893. Third Parties May Intervene.
- § 1894. Pleadings and Practice in Marshaling Liens and Interests.
- § 1895. Whether Proceedings to Marshal Liens on Property in Custody, on Notice, Strictly "Summary" Proceedings.
- § 1896. What Law Governs Validity.

- § 1897. Where Rights under State Statute Dependent on Resort to Special Remedies.
- § 1898. Rights of Priority under State Statutes as Related to Marshaling of Liens on Property.
- § 1899. "Surrender of Preference" on Distinct Transaction Not to Be Required as Prerequisite to Validity of Lien Which Itself Is Not a Preference.
- § 1900. Summary Jurisdiction to Prevent Trustee Interfering with Others' Rightful Custody.

DIVISION 7.

- § 1901. Jurisdiction to Issue Injunctions in Aid of Bankruptcy Proceedings.
- § 1902. Restraining Sale or Distribution under Levy Made within Four Months.
- § 1903. But no Injunction Where Levy Not Made within Four Months.
- § 1904. And Injunction May Be Refused on Ground of Comity.
- § 1905. Adverse Claimants Restrained until Appropriate Action Can Be Taken.
- § 1906. Adverse Claimants Restrained from Interfering with Assets in Custody of Bankruptcy Court.
- § 1907. Court Proceedings Restrained until Trustee Elected and Appropriate Action Taken.
- § 1908. Court Proceedings Enjoined Where Property in Custody of Bankruptcy Court Sought to Be Seized or Levied on.
- § 1909. Injunction Refused Where Legal Proceedings Not Nullified by Bankruptcy, and State Court Prior in Custody.
- § 1910. Whether May Restrain Levy on Exempt Property for Other Purposes than to Interpose Discharge.
- § 1911. Suits in Personam against Receiver, Trustee or Marshal for Wrongful Seizure Not Restrained.
- § 1912. No Ancillary Injunction in Aid of Bankruptcy Proceedings in Another District.
- § 1913. No Enjoining of Pledgee's Sale, unless Fraud or Oppression Exist.
- § 1914. Injunction Where Legal Action Requisite to Fix Liability of Sureties.
- § 1915. No Restraining Order to Prevent Proceeding with Levy on Exempt Property after Same Set Apart.
- § 1916. Bankruptcy Petition "Caveat to All the World" and "Attachment and Injunction."
- § 1917. No Injunction before Filing of Bankruptcy Petition to Preserve Status Quo.
- § 1918. Referee Has Jurisdiction to Issue Restraining Order, Except upon Courts or Court Officers.
- § 1919. Petition Requisite and to Be Filed in Bankruptcy Proceedings Themselves.
- § 1920. Petition to Be Verified.
- § 1921. Notice to Be Given, unless for Good Cause Dispensed with.

DIVISION 8.

- § 1922. Jurisdiction to Punish for Contempts for Interference with Custody
- § 1923. Restraining Order Not Prerequisite.

§ 1796. **Possession of Res, Test of Summary Jurisdiction.**—The determination of the questions, first, as to whether the property exists in specie or is merely a debt, and second, if existing in specie, as to who has possession or control of the tangible property involved, determines the forum to which the parties must resort

to work out their rights and the manner of procedure, as to whether summary or plenary.

If the possession, actual or constructive, of the property is in the bankrupt, or in his agent, or in someone not claiming a beneficial interest in it, or is in the receiver, marshal or trustee in bankruptcy, the bankruptcy court has summary jurisdiction over it by orders made in the bankruptcy proceedings themselves, and may summarily order its surrender or delivery; may bring all parties claiming interests in it into court; may determine all rights to it; if, on the other hand, some third party claiming some beneficial interest in the property has possession (except in certain instances where court officers are in possession), or if the property does not exist in specie, but is a mere debt owed by the third party, then such third party need not come into the bankruptcy proceedings for his rights, and the trustee cannot bring him into the proceedings; and he is entitled to be heard in plenary action.¹

Bank v. Title & Trust Co., 14 A. B. R. 102, 198 U. S. 280 (reversing 11 A. B. R. 79): "The distinction between steps in bankruptcy proceedings proper and controversies arising out of the settlement of the estates of bankrupts is recognized in §§ 23, 24 and 25 of the present Act, and the provisions as to revision in matter of law and appeals were framed and must be construed in view of that distinction. *Holden v. Stratton*, 191 U. S. 115, 10 Am. B. R. 786; *Denver First National Bank v. Klug*, 186 U. S. 202, 8 Am. B. R. 12; *Elliott v. Toepfner*, 187 U. S. 327, 333, 334, 9 Am. B. R. 50.

"This distinction existed under the prior bankruptcy law, and the then decisions in respect of a proceeding in bankruptcy and an independent suit are applicable. It was settled that the bankruptcy court was without jurisdiction to determine adverse claims to property, not in the possession of the assignee in bankruptcy, by summary proceedings, whether absolute title or only a lien was asserted. *Smith v. Mason*, 14 Wall. 419; *Marshall v. Knox*, 16 Wall. 551; *In re Bonesteel*, 7 Blatch. 175, Mr. Justice Nelson; *Knight v. Cheney*, 14 Fed. Cas. 760, Mr. Justice Clifford; *In re Ballow*, 4 Ben. 135, Mr.

1. *In re Teschmacher & Mrazay*, 11 A. B. R. 549, 550, 127 Fed. 728 (D. C. Penn.); quoted ante, § 1652.

In re Briskman, 13 A. B. R. 57, 132 Fed. 201 (D. C. N. Y.); *In re Schermehorn*, 16 A. B. R. 509, 145 Fed. 341 (C. C. A.), quoted post, § 1795 and § 1807. Inferentially, *In re Rochford*, 10 A. B. R. 608, 124 Fed. 182 (C. C. A. S. Dak.); *Pub. Co. v. Hutchinson Co.*, 17 A. B. R. 427 (Sup. Ct. Mich.); *In re Buntrock Clothing Co.*, 1 A. B. R. 454, 92 Fed. 886 (D. C. Iowa); *In re New England Piano Co.*, 9 A. B. R. 772, 122 Fed. 937 (C. C. A. Mass.); *In re McBride & Co.*, 12 A. B. R. 83, 132 Fed. 285 (Ref. N. Y.); inferentially, *In re Cohn*, 3 A. B. R. 421 (D. C. N. Y.).

But see an apparent disregard of this principle in *In re Pratesi*, 11 A. B. R. 319, 126 Fed. 588 (D. C. Del.), where a liveryman in possession at the time of bankruptcy under his lien was held subject to the summary jurisdiction of the bankruptcy court.

Also see, for an apparent confusion of ideas on this point, *In re Young*, 7 A. B. R. 14, 111 Fed. 158 (C. C. A. Ark.), a case rightly decided (for the bankrupt clearly had the actual custody at the time of bankruptcy) but wrongly reasoned. *In re Wells*, 8 A. B. R. 76, 114 Fed. 222 (D. C. Mo.).

Justice Blatchford, the district Judge; In re Marter, 16 Fed. Cas. 857, Mr. Justice Brown, then district judge.

"The present Act was plainly framed in recognition of the principle of these cases."

In re McMahon, 17 A. B. R. 531, 147 Fed. 685 (C. C. A. Ohio): "The controlling fact in the matter of the jurisdiction of the bankrupt court is that the actual possession of the premises upon which Enos asserts an adverse lien was in Enos, the trustee in bankruptcy of Campbell, the bankrupt mortgagor. * * * Sec. 2 * * * confers jurisdiction 'to cause the estate of the bankrupt to be collected * * * and determine the controversies in relation thereto, except as herein otherwise provided. This exception refers to § 23 [as to suits brought by trustees]. By the Amendment of February, 1903, this jurisdiction is extended. * * * But we are now dealing with the jurisdiction of the District Court which had possession through its trustee of the property of the bankrupt, against which the protesting petitioner asserts a mortgage lien. If the District Court, having possession of the res, did not have jurisdiction to hear and determine claims to or against the res, unless the claimant should consent, what court did? Could the petitioner go into the State court and there assert his lien, and then obtain a decree for its enforcement, and thus deprive the court of primary jurisdiction of the control and custody of the controverted property?"

"The possession of the res draws to the court jurisdiction of all questions in respect to title or liens, irrespective of citizenship.

"What is said in *Bardes v. Hawarden Bank* about the absence of intention of Congress to give under § 2, clauses 6 and 7, jurisdiction to the District Court to entertain independent actions and suits to determine the title to property or liens thereon, refers to **property not held by the bankrupt or some one for him at the date of adjudication.**"

In re Noel, 14 A. B. R. 720, 137 Fed. 694 (D. C. Md.): "I think the distinction between the controversies arising in bankruptcy which must be determined by plenary independent suits and those which may be heard on summary petition depends upon who has possession of the subject matter of the controversy. If the bankruptcy court has possession, then, as a rule, the matter may be heard upon petition and answer. If a stranger has possession, and is holding by adverse claim, then an independent plenary suit is in most cases proper. In this case, the property was in the possession of the bankrupt, and upon his adjudication his title and possession passed to the trustees. The possession of the trustees could not be disturbed by any form of adverse legal proceedings without the concurrent sanction of the court of bankruptcy. That court, having possession of the property, had jurisdiction, upon notice to those claiming to have liens and incumbrances upon it, to order the property to be sold by the trustees free of all incumbrances, if the court, in its discretion, should determine that such a sale was for the benefit of the unsecured creditors; and after such a sale, having in its control the fund arising from the sale, it would have jurisdiction to determine the conflicting claims of the parties whose liens had been displaced as to the property sold, and transferred to the fund in the court. *Ray v. Norseworthy*, 23 Wall. 128, 23 L. Ed. 116."

In re Baudouine, 3 A. B. R. 651, 191 Fed. 574 (C. C. A. N. Y.): "Standing alone, the language of clause 7 would seem to be sufficiently comprehensive to authorize the determination by Courts of Bankruptcy of every controversy relating to the estates of bankrupts. * * * Nevertheless, it is capable of a narrower construction, and can be read as extending only to controversies

about property which actually belongs to the bankrupt's estate, or which arise strictly in the bankruptcy proceeding, such as those in reference to the marshaling of assets, or the extent and priority of conflicting liens."

In re Brooks, 1 A. B. R. 531, 91 Fed. 508 (D. C. Vt.): In this case the court held in substance that the mortgagee of chattels has no right to foreclose a mortgage upon the chattels of a bankrupt unless he obtains permission of the Court of Bankruptcy in which the petition is filed, or unless some action is commenced to make such foreclosure in a State court and such court gets jurisdiction over such chattels, or unless the mortgagee or the officer making such sale gets exclusive possession of the chattels before the adjudication in bankruptcy.

Inferentially, *Whitney v. Wenman*, 14 A. B. R. 49, 198 U. S. 555: "We think the result of these cases is in view of the broad powers conferred in § 2 of the Bankrupt Act, authorizing the bankruptcy court to cause the estate of the bankrupt to be collected, reduced to money and distributed, and to determine controversies in relation thereto, and bring in and substitute additional parties when necessary for the complete determination of a matter in controversy, that when the property has become subject to the jurisdiction of the bankruptcy court as that of the bankrupt, whether held by him or for him, jurisdiction exists to determine controversies in relation to the disposition of the same and the extent and character of liens thereon or rights therein."

Odell v. Boyden, 17 A. B. R. 756, 150 Fed. 731 (C. C. A. Ohio) "* * * there exists no ground for entertaining jurisdiction to adjudicate his claim or lien unless we shall agree with the court below in holding that the "membership" or "seat" was an asset which passed to the trustee and was in custodia legis when the petition was filed."

In re Kellogg, 10 A. B. R. 7, 121 Fed. 333 (C. C. A. N. Y., affirming 7 A. B. R. 623): "It would seem that the controversies in relation to the bankrupt estate, which, by reason of the limitations referred to in the clause 'except as herein otherwise provided,' do not come within the jurisdiction of the bankruptcy courts, are those where the trustee must bring an independent suit to assert title to money or property not in the possession or control of the trustee."

In re Leeds Woolen Mills, 12 A. B. R. 136 (D. C. Tenn., reversed, on the facts, in *Hinds v. Moore*, 14 A. B. R. 1): "The facts pertinent to the element of jurisdiction are that at the time of the bankruptcy the goods in controversy were in the actual manual possession of the bankrupt corporation and passed from it into the manual possession of the referee as custodian, upon the surrender of these and all the other goods to him. In my judgment, the simple fact of this possession by the referee in bankruptcy is conclusive in favor of our jurisdiction. By that possession the goods were in custodia legis—whether rightfully or wrongfully is another question. But that question may be rightfully decided by us. Whether it might also be rightfully decided by any other jurisdiction it is not necessary to determine. The bare possession by the court, through its officers, of the property, was sufficient to give us jurisdiction to determine to whom the goods properly belonged. The case belongs to the category of those controlled by the decision of the Supreme Court of the United States in the case of *White v. Schloerb*, 178 U. S. 542, 4 Am. B. R. 178, and not to that of those controlled by the decision of that court in *Bardes v. Hawarden Bank*, 178 U. S. 524, 4 Am. B. R. 163."

In re Lemmon & Gale, 7 A. B. R. 291, 112 Fed. 296 (C. C. A. Tenn.): "This property was, consequently in the possession of the court when undertaken

to be levied upon by the sheriff executing process issued upon the judgments rendered in the State court. In view of this situation the bankruptcy court undoubtedly had jurisdiction to determine the rights of others asserting a lien upon or interest in the property, and the property could not be taken from the control of the bankruptcy court by the process of the State court.

* * *

"The United States Court having lawful possession of the res, might retain it until it had disposed of the property."

In re Andre, 13 A. B. R. 132 (C. C. A. N. Y.): "We conclude that it is only in cases in which the property of the bankrupt is in the possession of a party not an adverse claimant that the courts of bankruptcy have authority under these sections to interfere with it unless the adverse claimant chooses to consent, but that these courts have jurisdiction to entertain proceedings to ascertain whether there is an adverse claimant and that the mere refusal of a person in possession to surrender the property does not constitute him an adverse claimant."

In re Lines, 13 A. B. R. 318, 133 Fed. 803 (D. C. Pa.): "It is undisputed that after the distress had been made, title to the goods, which was then in Mrs. Fannie Dryden, was transferred by her to her father, John M. Lines, the present bankrupt, and that he immediately filed a voluntary petition and was adjudged a bankrupt. The necessary effect of this was to put the property under the control of this court, and compel the landlord to seek redress here."

Obiter, impliedly, In re Hadden-Rodee Co., 13 A. B. R. 605, 135 Fed. 886 (D. C. Wis.): "Questions of the power to entertain summary proceedings against adverse claimants of property have frequently arisen, and the doctrine is settled that such proceedings are authorized only when the property is in the possession of the court, or in cases wherein the statute so provides in express terms."

DIVISION 1.

SUMMARY JURISDICTION OF BANKRUPTCY COURT, IN GENERAL.

§ 1797. Jurisdiction Once Attaching, Complete for All Purposes.—
After the bankruptcy court has once assumed jurisdiction over the property, it has jurisdiction to determine all rights therein.²

White v. Schloerb, 4 A. B. R. 178, 178 U. S. 542: "At the date of this adjudication in bankruptcy by the District Court of the United States, the goods were in the store of the bankrupts, and in their actual possession, and were

² Compare, ante, "Restraining Orders before Adjudication," § 359, and post, "Restraining Orders and Injunctions in Aid of Bankruptcy Proceedings," § 1901.

Bankr. Act, § 2 (7): "Cause the estates of bankrupts to be collected reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided."

Obiter, In re Baudouine, 3 A. B. R. 651, 91 Fed. 574 (C. C. A. N. Y.); In re Emslie, 4 A. B. R. 126, 102 Fed. 291 (C. C. A. N. Y.); In re Noel, 14 A. B. R. 720, 137 Fed. 694 (D. C. Md.); In re Huddleston, 1 A. B. R. 572 (Ref. Ala.); In re Granite City Bk., 14 A. B. R. 494, 137 Fed. 818 (C. C. A. Iowa); [1867] Freeman v. Howe, 24 How. 450; [1867] Bank v. Sherman, 101 U. S. 406; [1841] Buck v. Calbath, 3 Wall. 341; Treat v. Wooden, 14 A. B. R. 736 (C. C. Mass.); In re Schloerb, 3 A. B. R. 224 (D. C. Wis., affirmed sub nom. White v. Schloerb, 4 A. B. R. 178, 178 U. S. 542); inferentially, Havens &

claimed by them as their property. On the same date, that court referred the case to a referee in bankruptcy, and by his direction the entrance to the store was locked. The goods were then in the lawful possession and custody of the referee in bankruptcy, and of the bankruptcy court, whose representative and substitute he was. Being thus in the custody of a court of the United States, they could not be taken out of that custody upon any process from a State court. * * * 'After an adjudication in bankruptcy, an action in replevin in a State court cannot be commenced and maintained against the bankrupt to recover property in the possession of and claimed by the bankrupt at the time of that adjudication, and in the possession of a referee in bankruptcy at the time when the action of replevin is begun.' * * *

"Not going beyond what the decision of the case before us requires, we are of the opinion that the judge of the court of bankruptcy was authorized to compel persons, who had forcibly and unlawfully seized and taken out of the judicial custody of that court property which had lawfully come into its possession as part of the bankrupt's property, to restore that property to its custody; and therefore our answer to the first question must be: "The District Court sitting in bankruptcy had jurisdiction by summary proceedings to compel the return of the property seized.'"

In *re McCallum*, 7 A. B. R. 596, 113 Fed. 393 (D. C. Penn.): "It seems to me, that the present application is the ordinary case of a claim against a fund in the hands of a court, and such claims the court in possession of the fund has the right to hear and determine. It is an incident to the power to distribute, and, except where this power is expressly so limited by competent authority that a claim to a share of the fund must be sent to some other court for determination, the court that has possession of the fund is the proper tribunal to decide all controversies concerning its ownership."

In *re Whitener*, 5 A. B. R. 198, 105 Fed. 180 (C. C. A. Tex.): "As the property, the ownership of which is in dispute, was in the possession of the trustee in bankruptcy as a part of the bankrupt's property to be duly administered, the District Court had jurisdiction to issue an injunction restraining the proceedings under a sequestration issued from the District Court of Bowie County, Texas, at the suit of Ramseur, plaintiff, against Rodgers, trustee, and to

Geddes Co. v. Pierek, 9 A. B. R. 569, 120 Fed. 244 (C. C. A. Ills.); In *re J. C. Winship Co.*, 9 A. B. R. 641, 120 Fed. 93 (C. C. A. Ills.); In *re Russell & Birkett*, 3 A. B. R. 658, 101 Fed. 248 (C. C. A. N. Y., distinguished in *In re Spitzer*, 12 A. B. R. 346, 130 Fed. 879, and in *In re Kantor & Cohen*, 9 A. B. R. 372, 121 Fed. 984); inferentially, In *re New England Piano Co.*, 9 A. B. R. 767, 122 Fed. 937 (C. C. A. Mass.); In *re Lemmon & Gale Co.*, 7 A. B. R. 291, 112 Fed. 96 (C. C. A. Tenn.), quoted previously, § 1794; In *re Kellogg*, 7 A. B. R. 631, 113 Fed. 190 (D. C. N. Y., affirmed in 10 A. B. R. 7); In *re Renda*, 17 A. B. R. 522, 149 Fed. 614 (D. C. Penn.); *Carriage Co. v. Solanas*, 6 A. B. R. 221, 108 Fed. 532 (D. C. La.); In *re Chambers, Calder & Co.*, 3 A. B. R. 537, 98 Fed. 865 (D. C. R. I.); *Odell v. Boyden*, 17 A. B. R. 756, 150 Fed. 731 (C. C. A. Ohio); impliedly, In *re Kleinhans*, 7 A. B. R. 607, 113 Fed. 107 (D. C. N. Y.); impliedly, In *re Hymes Buggy & Implement Co.*, 12 A. B. R. 477, 130 Fed. 977 (D. C. Mo.); In *re Leeds Woolen Mills Co.*, 12 A. B. R. 136 (reversed, on facts, in *Hinds v. Moore*, 14 A. B. R. 1, C. C. A. Tenn.); In *re Lumber Co. (Franklin)*, 17 A. B. R. 446, 147 Fed. 852 (D. C. N. J.); In *re Ludowici Roofing Tile Co. v. Penn. Inst.*, 8 A. B. R. 742 (D. C. Penn.); obiter, *Hinds v. Moore*, 14 A. B. R. 1 (C. C. A. Tenn., reversing, on facts, In *re Leeds Woolen Mills Co.*, 12 A. B. R. 136); obiter, In *re Corbett*, 5 A. B. R. 224, 104 Fed. 872 (D. C. Wis.); obiter, In *re Wells*, 8 A. B. R. 76, 114 Fed. 222 (D. C. Mo.); *Traders' Ins. Co. v. Mann*, 11 A. B. R. 269 (Sup. Ct. Ga.).

Chism v. Bank, 5 A. B. R. 56, 77 Miss. 599, wherein the court held it to be incident to the trustee's rights and duties.

compel the return of the property to the trustee. * * * The property being in the custody of the District Court sitting in bankruptcy, that court had jurisdiction to entertain the intervention filed by Ramseur, claiming the property, and to hear and determine the issues presented by the intervention, not only on general principles, * * * but under the specific provisions of § 2 of the Bankruptcy Act of 1898."

Turrentine v. Blackwood, 4 A. B. R. 338, 28 So. 95 (Sup. Ct. Ala.): "Conceding that the State and Federal courts have concurrent jurisdiction in certain instances over the bankrupt's property, another principle is universally acknowledged, 'that when two courts have concurrent jurisdiction, that which first takes cognizance of the case, has the right to retain it, to the exclusion of the other; that if a trust estate is being administered by a court of competent jurisdiction, or when property is in gremio legis of a court of rightful jurisdiction, no other court can interfere and wrest from it the possession and jurisdiction first obtained.'"

In re Drayton, 13 A. B. R. 602, 135 Fed. 883 (D. C. Wis.): "The property or proceeds in question in the present case is in the hands of the trustee, in custodia legis, and the Bankruptcy Court is necessarily vested with both power and duty to determine all rights therein, upon proper notice, as 'controversies in relation thereto.' * * *

"It would be anomalous indeed if the Act were interpreted to deprive the tribunal of such jurisdiction as a court of bankruptcy in possession of the res."

Chauncey v. Dyke Bros., 9 A. B. R. 447, 119 Fed. 1, 3 (C. C. A. Ark.): "A court which has lawfully acquired the custody of property or money must of necessity dispose of the same according to law; and, when conflicting claims are preferred, it is not bound to require the claimants to litigate their claims in some other forum, and to adopt the judgment of that tribunal, although it may do so, but it is at liberty to dispose of such controversies according to its own ideas of right and justice. This is one of those incidental powers which may be exercised by any court of record in the absence of an express prohibition."

Carter v. Hobbs, 1 A. B. R. 215, 92 Fed. 594 (D. C. Ind.): "The decree operates in rem and from the moment of the adjudication of bankruptcy the bankrupt's estate is in custodia legis and under the jurisdiction of this court. It is fundamental that no court or individual can interfere with such custody and possession. The assertion of any right against, or to participate in, the res so in custodia legis, must be sought in the court in whose custody it is. An attempt to assert such right elsewhere would be regarded as a contempt."

"The adjudication proceeds in rem, and all persons interested in the res are regarded as parties to the bankruptcy proceeding. These parties include not only the bankrupt and trustee, but also all the creditors of the bankrupt."

In re Cobb, 3 A. B. R. 130, 96 Fed. 821 (D. C. N. Car., reversed, on other grounds, in *Cobb v. Overman*, 6 A. B. R. 324, 109 Fed. 65): "After an adjudication in bankruptcy, the bankruptcy court takes jurisdiction of the estate and all matters pertaining thereto, and will administer the same to a final settlement. Parties having or claiming an interest in the bankrupt estate must submit them to the bankruptcy court. * * * The trustee is vested by law with the estate, and could, by a proper action, recover possession of the securities in possession of any one as collateral, subject to any valid lien such person might have on the proceeds of such securities."

In re Reynolds, 11 A. B. R. 758, 127 Fed. 760 (D. C. Mont.): "In virtue of the adjudication of bankruptcy, this court acquired jurisdiction over the

res. The jurisdiction thus acquired was both complete and exclusive. Being prior to that of the State court, it was permanent. The State court was without jurisdiction in the premises, and any judgment it may have rendered as a result of the litigation between Strain and said trustee, it was and is powerless to enforce, and is not binding upon this court; and such judgment cannot affect the right and power of this court to assert its jurisdiction over the property in question, and proceed to a determination of the right to its possession. * * *

"An adjudication of bankruptcy operates in rem, and from the moment of the adjudication the bankrupt's estate is under the jurisdiction of the bankruptcy court, which will not permit any interference with its possession, even though it be by an officer of a State court acting under its process. Being a proceeding in rem, all parties interested in the res are regarded as parties thereto, including the bankrupt and trustee, as well as the creditors, secured and unsecured. The adjudication vests in the trustee or temporary receiver the title of the bankrupt's property, and stays all seizures made within four months. An adjudication of bankruptcy has the force and effect of an attachment and an injunction. It is a caveat to all the world."

In re Brooks, 1 A. B. R. 531, 91 Fed. 508 (D. C. Vt.): In this case a chattel mortgagee sold chattels of the bankrupt through a constable who had levied on the same before the bankruptcy, but had left them locked up on the bankrupt's premises. The Court said: "But the assets of the bankrupt are brought by the proceedings within the reach and control, and subject to the orders, of the court, and no one has any right to remove or meddle with them, but for their preservation, without leave of the court, except the trustee."

Keegan v. King, 3 A. B. R. 79, 96 Fed. 758 (D. C. Ind.): "After this court has taken actual possession of property, through its receiver and trustee, as the property of the bankrupt, and has retained the actual and continuous possession of the same from a time long anterior to the commencement of the suit in the State court, is it competent for parties who claim to be the owners of the property so in the actual custody and possession of this court to maintain a suit in the State court for the purpose of settling the title and enjoining the officer of this court from the proceeding to the disposition of property so in the actual possession of this court? The statement of the question would seem to carry its own answer. This court, being in the actual possession of the property in controversy, has the exclusive right to determine all conflicting claims as to the title and right of possession of the property so in its custody. * * * From the time such property, by the adjudication of bankruptcy, comes into the custody of the Bankruptcy Court, it is in custodia legis; and that court will not permit any person, even though he be an officer of a State court, acting under its process, to interfere with the custody or possession by the Bankruptcy Court or its officers of the property thus in its custody."

In re Kellogg, 10 A. B. R. 7, 121 Fed. 333 (C. C. A. N. Y., affirming 7 A. B. R. 623, 113 Fed. 190): "The final question is whether the Supreme Court of the State of New York acquired jurisdiction of the property, to the exclusion of the United States District Court, by the filing of the summons, complaint, and notice of pendency of the foreclosure action, before the trustee was appointed; the bankruptcy court having previously acquired jurisdiction by the filing of the petition in bankruptcy and the appointment of a receiver, who had qualified and taken possession of the property prior to the commencement of said action and foreclosure. * * * The court in the foreclosure suit had not attempted to take possession. The adjudication was equivalent to the commencement of an action and the filing of a *lis pendens*. It must be held

that the bankruptcy court, upon such acquisition by the receiver of possession and undisputed legal title, had jurisdiction to determine the validity of the mortgage."

In *re Rochford*, 10 A. B. R. 615, 124 Fed. 182 (C. C. A. S. Dak.): "In the case in hand the court below lawfully acquired the possession of the mortgaged goods, and it lawfully converted them into money. The rightful custody of the property and its proceeds imposed upon that court the duty to distribute the latter to their true owners. This possession and this duty necessarily empowered it to call the petitioners by a notice or order to show cause to present their claims to the property or its proceeds to the court which held them within a reasonable time, or to be barred of any right to receive the property or the proceeds or any part of either."

Inferentially, In *re Moody*, 12 A. B. R. 724, 131 Fed. 525 (D. C. Iowa): "It is a familiar principle of equity jurisprudence that property in the custody of a court of equity is always held by it in trust for those to whom it rightly belongs; and the jurisdiction to inquire into and determine to whom it so belongs, and to that end to require all claimants thereto to present their claims within a stated time, or be barred of any interest in or right to the property, is inherent in every court of equity. In *re Rochford* (C. C.), 10 Am. B. R. 608, 124 Fed. 187, above. And this though the property may have been wrongfully seized, and so brought into the custody of the court."

In *re Antigo Screen & Door Co.*, 10 A. B. R. 359, 123 Fed. 249 (C. C. A. Wis): "We take it that any court, whether one of equity, common law, admiralty or bankruptcy, having in its treasury a fund touching which there is dispute, may, by virtue of its inherent powers, determine the right to the fund thus in its possession. Jurisdiction in that respect is an incident of every court. * * * A fund so possessed, is in custodia legis and right to it may only be asserted and determined in the court which possesses it."

In *Rodgers*, 11 A. B. R. 89, 125 Fed. 169 (C. C. A. Ills. reversed on facts sub nom. *First Nat'l Bk. v. Chic. Title & T. Co.*, 14 A. B. R. 102, 198 U. S. 280): "The court below properly ruled that it had jurisdiction of the subject matter. Its officers acquired possession of the property in dispute from the bankrupt. It is, indeed, claimed by the storage company that the writings and the facts embodied in the statement of the case show that it, and not the bankrupt, had possession prior to the bankruptcy; but the receiver had in fact acquired peaceable possession of the property, and subsequent proceedings in the bankruptcy court upon petition of the present objectors to the jurisdiction, by which the property was sold by the bank under stipulation that it should hold the fund subject to the order of the court, placed the property and its proceeds in custodia legis, and the court had the right to determine the ownership of the fund in its possession."

In *re Schermerhorn*, 16 A. B. R. 508, 145 Fed. 341 (C. C. A.): "Upon the filing of a petition in bankruptcy, followed by an adjudication, all property in the possession of the bankrupt of which he claims the ownership passes at once into the custody of the court of bankruptcy, and becomes subject to its jurisdiction to determine by plenary action or summary proceedings, as the nature of the case demands, all adverse or conflicting claims thereto whether of title or of lien, and that court may, by the process of injunction, protect its jurisdiction against interference. It may draw to itself the determination of all controversies over the property in its possession, and when it once lawfully attaches, its jurisdiction cannot be destroyed or impaired by the unauthorized surrender of possession of the property by the officers of the court, or though a seizure thereof by any adverse claimant."

Compare, *Whitney v. Wenman*, 14 A. B. R. 45, 198 U. S. 539: This case

holds, not that the action must be taken in the bankruptcy court, for that issue was not raised nor necessary to be determined, but rather that the bankruptcy court possessed jurisdiction. See the opinion of the court on page 51:

"We think the result of these cases is, in view of the broad powers conferred in § 2 of the Bankrupt Act, authorizing the bankruptcy court to cause the estate of the bankrupt to be collected, reduced to money and distributed, and to determine controversies in relation thereto, and bring in and substitute additional parties when necessary for the complete determination of a matter in controversy, that when the property has become subject to the jurisdiction of the bankruptcy court as that of the bankrupt, whether held by him or for him, jurisdiction exists to determine controversies in relation to the disposition of the same and the extent and character of liens thereon or rights therein."

Crosby v. Spear, 11 A. B. R. 613, 98 Me. 542: "When a court, State or Federal, has once taken into its jurisdiction a specific thing, no court, except one having a supervisory control or superior jurisdiction in the premises, has a right to interfere with and change that possession."

In re Porterfield, 15 A. B. R. 18, 138 Fed. 192 (D. C. W. Va., reversed sub nom. *Moore v. Green*, 16 A. B. R. 607, 145 Fed. 480, C. C. A., on question as to whether State laws regarding priorities on setting aside of transfers should control in bankruptcy): "The jurisdiction of the bankrupt court is exclusive, at least when fully and rightfully obtained over the property itself, as held in such cases as *In re Watts*, supra (10 A. B. R. 113, 190 U. S.); and all State laws for the administration of insolvent estates, and all actions and proceedings under such laws, under such circumstances, are suspended."

In re McBride & Co., 12 A. B. R. 83, 132 Fed. 285 (Ref. N. Y.): "The jurisdiction conferred on courts of bankruptcy by § 2, subdivision 7, of the Act over bankrupt estates, 'to determine all controversies in relation thereto,' is applicable to proceedings of this nature, where the property is actually in the possession of the court or its officer, and is subject to distribution under its directions."

In re Mertens, 12 A. B. R. 698, 131 Fed. 972 (D. C. N. Y.): "When property sold to the bankrupt prior to proceedings in bankruptcy is found in his possession, mingled with his stock in trade or other property, it is presumably his, and when the bankruptcy court has taken possession of it and assumed control through its duly appointed receiver before a rescission of the sale, the vendor who assumes thereafter to rescind the sale on the ground of fraud practiced by the vendee (now the bankrupt), and who seeks to recover the property, or its proceeds, or damages from such officer of the court who has held and sold it pursuant to the order of the court, should be compelled to come into the court having the possession and control of the property, and try the question of title thereto there, unless that court is without jurisdiction to try the question, or the law of the United States has expressly placed concurrent jurisdiction elsewhere. If the court should find that the sale was procured by fraud, then the rescission would be valid, and the title would be in the vendor, and he would be entitled to the property, or its value, from the estate of the bankrupt, and this court would so award; but should the court find that such sale was not procured by fraud, then the rescission would be of no avail, and the title would be in the trustee in bankruptcy when appointed."

In re Sentenne & Green Co., 9 A. B. R. 649, 120 Fed. 436 (D. C. N. Y.): "As the property has been taken by the court, and is now subject to its control and direction, it has, upon the alleged lienor's application, power to deter-

mine the question of the mortgage lien, notwithstanding the objection of the trustee."

In *re Lines*, 13 A. B. R. 319, 133 Fed. 803 (D. C. Pa.): "He immediately filed a voluntary petition and was adjudged a bankrupt. The necessary effect of this was to put the property under the control of this court and compel the landlord to seek redress here."

In *re Pittelkow*, 1 A. B. R. 473, 92 Fed. 901 (D. C. Wis.): "Upon the general question of jurisdiction, I am of opinion that the District Court is vested with exclusive jurisdiction over the property of the bankrupt, and with sufficient equity powers to have all claims by mortgagees brought in and administered; that sales may be authorized, under proper circumstances, free and clear from the mortgages, or other liens, by preserving and transferring the claims to the fund thus provided; and that the commencement of foreclosure proceedings can be restrained to that end."

§ 1798. All Action to Be Taken in Bankruptcy Court.—And all action in regard to property in its custody must be taken (unless the bankruptcy court permits otherwise) in the bankruptcy court.³

§ 1799. Thus, Landlord's Forcible Detainer Suits Not Maintainable.—Proceedings to oust the bankrupt or receiver or trustee or other person in possession of the premises for the bankruptcy court, must be brought in the bankruptcy proceedings themselves, and an independent suit by the

3. *White v. Schloerb*, 4 A. B. R. 178, 178 U. S. 542; In *re McCallum*, 7 A. B. R. 596, 113 Fed. 393 (D. C. Penn.); inferentially, In *re Briskman*, 13 A. B. R. 58, 132 Fed. 201 (D. C. N. Y.); In *re Whitener*, 5 A. B. R. 198, 105 Fed. 180 (C. C. A. Tex.); *Turrentine v. Blackwood*, 4 A. B. R. 338, 28 So. 95 (Sup. Ct. Ala.); In *re Emslie*, 4 A. B. R. 126, 102 Fed. 291 (C. C. A.); In *re Reynolds*, 11 A. B. R. 758, 127 Fed. 760 (D. C. Mont.); In *re Brooks*, 1 A. B. R. 531, 91 Fed. 508 (D. C. Vt.); inferentially, In *re Granite City Bank*, 14 A. B. R. 404, 137 Fed. 818 (C. C. A. Iowa); In *re Pittelkow*, 1 A. B. R. 473, 92 Fed. 901 (D. C. Wis.); *Keegan v. King*, 3 A. B. R. 79, 96 Fed. 758 (D. C. Ind.); In *re Antigo Screen & Door Co.*, 10 A. B. R. 359, 123 Fed. 249 (C. C. A. Wis.); In *re Russell & Birkett*, 3 A. B. R. 658, 101 Fed. 248 (C. C. A. N. Y., distinguished in In *re Spitzer*, 12 A. B. R. 346, 130 Fed. 879, and in In *re Kantor & Cohen*, 9 A. B. R. 372); *Crosby v. Spear*, 11 A. B. R. 18, 613, 98 Me. 542; In *re Porterfield*, 15 A. B. R. 18, 138 Fed. 192 (D. C. W. Va.); In *re Mertens*, 12 A. B. R. 698, 131 Fed. 972 (D. C. N. Y.); inferentially, In *re Lemmon & Gale Co.*, 7 A. B. R. 291, 112 Fed. 96 (C. C. A. Tenn.); In *re Chambers Calder & Co.*, 3 A. B. R. 537, 98 Fed. 865 (D. C. R. I.); In *re Kleinhans*, 7 A. B. R. 607, 113 Fed. 107 (D. C. N. Y.); In *re Lines*, 13 A. B. R. 319, 133 Fed. 803 (D. C. Penn.); In *re Cobb*, 3 A. B. R. 130, 96 Fed. 821 (D. C. N. Car., reversed, on other grounds, in *Cobb v. Overman*, 4 A. B. R. 324); In *re Lumber Co. (Franklin)*, 17 A. B. R. 446, 147 Fed. 852 (D. C. N. J.); In *re Renda*, 17 A. B. R. 522, 149 Fed. 614 (D. C. Penn.); In *re McMahon*, 17 A. B. R. 531, 147 Fed. 685 (C. C. A. Ohio); *O'Dell v. Boyden*, 17 A. B. R. 756, 150 Fed. 731 (C. C. A. Ohio); [1867] In *re Winter*, 1 Bank Reg. 481; [1867] In *re Vogel*, 3 B. Reg. 198 (affirming 2 B. Reg. 427).

Contra, *Cooke v. Scovil*, 10 A. B. R. 86, 53 Atl. 692 (N. J. Sup. Ct., criticised and rejected in *Crosby v. Spear*, 11 A. B. R. 613, 98 Me. 542, as apparently ignoring the decision of the Supreme Court in *White v. Schloerb*, 4 A. B. R. 178, 178 U. S. 542). In this case it is to be noted objection was not made to the jurisdiction until the case got into the reviewing court. Contra, instances, In *re Smith*, 9 A. B. R. 590, 121 Fed. 1014 (D. C. R. I.); In *re Freeman*, 9 A. B. R. 68 (D. C. N. Y.).

landlord will not be permitted;⁴ nor by the owner of such property, to settle questions of title to fixtures.⁵

§ 1800. **Property Taken Out of Custody, etc., after Bankruptcy, Summarily Ordered Returned.**—And property taken out of the custody of the bankruptcy court, or the possession of which was acquired after bankruptcy by persons not bona fide purchasers at judicial sale, may be summarily ordered returned.⁶

§ 1801. **Even Property Voluntarily Surrendered by Bankruptcy Receiver Recoverable.**—Even property voluntarily surrendered to adverse claimants by the bankruptcy receiver without order of court, may be recovered.⁷

Whitney v. Wenman, 14 A. B. R. 51, 198 U. S. 539: "It is insisted that in the present case the property was voluntarily turned over by the receiver, and thereby the jurisdiction of the District Court, upon the ground herein stated, is defeated, as the property is no longer in the possession or subject to the control of the court. But the receiver had no power or authority under the allegations of this bill to turn over the property. He was appointed a temporary custodian, and it was his duty to hold possession of the property until the termination of the proceedings or the appointment of a trustee for the bankrupt. The circumstances alleged in this bill tend to show that the transfer of this property was collusive, and certainly if the allegations be true, it was

4. In re Kleinhans, 7 A. B. R. 604, 113 Fed. 107 (D. C. N. Y.); inferentially, In re Adams, 14 A. B. R. 23, 134 Fed. 142 (D. C. Conn.); In re Chambers, Calder & Co., 3 A. B. R. 537, 98 Fed. 865 (D. C. R. I.); In re Duble, 9 A. B. R. 121, 117 Fed. 794 (D. C. Penn.).

5. *Keegan v. King*, 3 A. B. R. 79, 96 Fed. 758 (D. C. Ind.).

6. In re Endl, 3 A. B. R. 813 (D. C. Calif.); *Bryan v. Bernheimer*, 5 A. B. R. 623, 181 U. S. 188; In re Whitener, 5 A. B. R. 198, 105 Fed. 180 (C. C. A. Tenn.); In re Waterloo Organ Co., 9 A. B. R. 427 (D. C. N. Y.); In re Reynolds, 11 A. B. R. 758, 127 Fed. 760 (D. C. Mont.); compare, In re Knight, 11 A. B. R. 1, 125 Fed. 35 (D. C. Ky.); In re Huddleston, 1 A. B. R. 572 (Ref. Ala.); (1867) *Samson v. Blake*, 6 B. Reg. 410, 9 Blatchf. 379; *White v. Schloerb*, 4 A. B. R. 178, 178 U. S. 542; *Metcalf v. Parker*, 9 A. B. R. 36, 187 U. S. 165; inferentially, *Hinds v. Moore*, 14 A. B. R. 1 (C. C. A. Tenn.); obiter, In re Briskman, 13 A. B. R. 59, 132 Fed. 201 (D. C. N. Y.); inferentially, *Whitney v. Wenman*, 14 A. B. R. 49, 198 U. S. 539; compare, In re Schermerhorn, 16 A. B. R. 509, 145 Fed. 341 (C. C. A.).

Instance, In re Corbett, 5 A. B. R. 224, 104 Fed. 872 (D. C. Wis.), which was the case of a bankrupt prepaying his attorney, after the filing of an involuntary petition, by designating part of his stock as payment, but where the attorney failed to remove the same until after the adjudication, the court holding that the attorney may be ordered to return the same to the custody of the bankruptcy court.

Instance, In re Brooks, 1 A. B. R. 531, 91 Fed. 505 (D. C. Vt.), which was where a chattel mortgagee, by a constable, locked up goods on the mortgagor's premises; thereafter the mortgagor went into bankruptcy; then the mortgagee sold out under his mortgage: held, the bankruptcy court may order the return summarily.

7. But compare, apparently contra, *Hinds v. Moore*, 14 A. B. R. 1 (C. C. A. Tenn., reversing In re Leeds Woolen Mills, 12 A. B. R. 136).

But joinder of a prayer for an order on the third party to pay over the purchase price, is a waiver, and is an affirmance of the improper sale, or surrender. *Mason v. Wolkowich*, 17 A. B. R. 714, 150 Fed. 699 (C. C. A. Mass.).

made without authority of the court. The court had possession of the property and jurisdiction to hear and determine the interests of those claiming a lien therein or ownership thereof. We do not think this jurisdiction can be ousted by a surrender of the property by the receiver, without authority of the court. 'Whether the rights of the claimants to the property could be litigated by summary proceedings, we need not determine.'

§ 1802. **Whether Recovery Be Plenary or Summary.**—But it is a question whether such recovery may be by summary order or requires plenary action.⁸ Some courts have held that it cannot be summarily recovered;⁹ and that its value may not be summarily ordered paid.¹⁰

§ 1803. **But Persons in Possession, Where Property Surrendered by Trustee, Not Subject to Summary Order.**—But if the trustee voluntarily surrender property, it is not recoverable by summary order, for the trustee has title and power to alienate title.

§ 1804. **Purchasers at Sales by Trustees or Receivers Subject to Summary Jurisdiction.**—Purchasers at judicial sales by trustees and receivers are subject to the summary jurisdiction of the bankruptcy court.

Mason v. Wolkowich, 17 A. B. R. 714, 150 Fed. 699 (C. C. A. Mass.): "Aside from the power of the District Court with regard to the assets of bankrupts, which is especially given it by the statutes, it has all the authority which any court exercising equitable jurisdiction has to protect its receivers and the contracts made by them. Wherever a receiver, by direction of the court appointing him, makes a sale of assets in his possession, the parties concerned in the sale are bound to recognize him as an officer of the court; and consequently the court appointing the receiver, not only has power to enforce in a summary manner the completion of the contract of sale, but the parties involved are deemed to have consented to such a proceeding."

§ 1805. **Obstructive Suits Brought after Bankruptcy Court Acquires Custody.**—Obstructive suits brought after the bankruptcy court has obtained custody of the property involved, which interfere with the jurisdiction of the bankruptcy court over third parties, will be disregarded if brought in the same federal court, or be enjoined if brought in the State court.¹¹

8. *Whitney v. Wenman*, 14 A. B. R. 45, 198 U. S. 539. Compare, *In re Schermerhorn*, 16 A. B. R. 509, 145 Fed. 341 (C. C. A.).

9. *Hinds v. Moore*, 14 A. B. R. 1 (C. C. A. Tenn., reversing *In re Leeds Woolen Mills*, 12 A. B. R. 136).

10. *Hinds v. Moore*, 14 A. B. R. 1 (C. C. A. Tenn., reversing *In re Leeds Woolen Mills*, 12 A. B. R. 136).

11. *In re Kenney*, 3 A. B. R. 353, 97 Fed. 554 (D. C. N. Y., affirmed by C. C. A., 5 A. B. R. 355, 105 Fed. 897, and by Supreme Court sub nom. *Clark v. Larremore*, 9 A. B. R. 476). Inferentially, *In re Muncie Pulp Co.*, 18 A. B. R. 59, 151 Fed. 732 (C. C. A. N. Y.); *In re Schermerhorn*, 16 A. B. R. 509, 145 Fed. 341 (C. C. A.); *In re Emslie*, 4 A. B. R. 126, 102 Fed. 291 (C. C. A. N. Y.); *O'Dell v. Boyden*, 17 A. B. R. 755, 150 Fed. 731 (C. C. A. Ohio).

In re San Gabriel Sanatorium, 4 A. B. R. 197, 102 Fed. 310 (C. C. A. Calif.), which was a case of enjoining a foreclosure suit brought after the filing of the

§ 1806. **Thus, Foreclosure Suits, Where Bankruptcy Court Already Has Custody.**—Thus, foreclosure suits brought in the State courts, although instituted before the appointment and qualification of a trustee, are ineffectual to confer jurisdiction on the State courts where, previously, actual possession had been taken of the property by the receiver in bankruptcy.¹²

§ 1807. **What Constitutes "Custodia Legis" and "Assumption of Jurisdiction."**—Actual or constructive possession by the receiver, trustee, marshal or referee, or (after adjudication, at any rate) by the bankrupt, constitutes "custodia legis" for the purpose of "assumption of jurisdiction" by the bankruptcy court. And the bankruptcy court "assumes jurisdiction" over property, and the property comes into "custodia legis," if it is in the custody or control of the receiver in bankruptcy, or of the trustee, marshal, [referee], or (at and after adjudication) of the bankrupt or his agent.¹³

Crosby v. Spear, 11 A. B. R. 615, 98 Me. 542: "There (in *White v. Schloerb*) the property was in the possession of the referee, here it was in the possession of the trustee. The latter was as much the officer and agent of the District Court as the former. It matters not what particular officer of the court is holding the property or what may be his title. He holds it as the agent of the court whose representative he is. His possession is its possession. It brings it within the jurisdiction of that court, and from that jurisdiction it cannot be taken by any process issuing out of this court. An adverse claimant may bring suit in the State court and try the title to the property; but after the jurisdiction of the bankruptcy court has once attached he cannot take the property in specie out of the possession of that court or of any of its agents."

Carriage Co. v. Solanas, 6 A. B. R. 227, 108 Fed. 532 (U. S. C. C. La.): "A thing is in 'custodia legis' when it is shown that it has been and is subjected to the official custody of a judicial executive officer in pursuance of his execution of a legal writ. The officer holding such a thing cannot, after he has made his return on the writ, release it on his own motion to any one claiming title to the thing. The status of the thing so seized, as to third parties, is fixed by his return, and its status can be changed only by an order of the court. If a defendant on whom a marshal is executing an attachment writ turns over movables, the ownership of which he claims, to such officer, the marshal, after he has made his return to the court showing that such things were subjected to his custody in pursuance of his execution of the court's writ, is dispossessed of any power to treat with the parties to the suit in relation to

bankruptcy petition, where the trustee had begun suit in the District Court to set aside the mortgage as fraudulent.

But compare, *Crosby v. Miller*, 16 A. B. R. 805, 25 R. I. 172 (Ct. App. D. C.), wherein the lower court was reversed for dismissing a bill filed, after the election of a trustee, to declare an equitable trust upon property belonging to the bankrupt.

12. In re *Kellogg*, 7 A. B. R. 631, 113 Fed. 190 (D. C. N. Y., affirmed in 10 A. B. R. 7).

13. Instance, In re *McMahon*, 17 A. B. R. 532, 147 Fed. 685 (C. C. A. Ohio), a case of trustee's possession; *Abrahamson v. Bretstein*, 1 A. B. R. 44 (Ref. N. Y.); In re *Huddleston*, 1 A. B. R. 572 (Ref. Ala.); compare, In re *Schloerb*, 3 A. B. R. 224 (D. C. Wis.); In re *Kleinhans*, 7 A. B. R. 606, 113 Fed. 107 (D. C. N. Y.); In re *Duncan*, 17 A. B. R. 288, 148 Fed. 464 (D. C. S. Car.); contra, In re *Wells*, 8 A. B. R. 75, 114 Fed. 222 (D. C. Md.).

the thing being so held by him in any other than his official capacity. The thing so seized by him, without reference to the question as to whether or not the defendant turned over the property of another person, will remain, by operation of law, in custodia legis until it is withdrawn from such custody by the order of a competent court."

In *re Lumber Co.*, 17 A. B. R. 446, 147 Fed. 832 (D. C. N. J.): "But the judgment was against the bankrupt. The command of the writ of execution was to levy on the property of the bankrupt. This was not done. The property levied on was that of the trustee in bankruptcy. The title was in him and not in the bankrupt. Besides, he is an officer of the law. He took his title as such. The property is in custodia legis."

In *re Renda*, 17 A. B. R. 523, 149 Fed. 614 (D. C. Pa.): "The receiver is the officer of the court, and his possession is that of the court itself. The money in his hands is thus in custodia legis, against which no attachment lies."

Thus, it is broadly stated that the filing of the bankruptcy petition is itself an assumption of jurisdiction.

In *re Weinger, Bergman & Co.*, 11 A. B. R. 424, 126 Fed. 875 (D. C. N. Y.): "When a petition is filed before a State court acts, the State court cannot, by any subsequent action, claim to have first taken possession of the res. The fact that the bankruptcy court may not have yet made an adjudication, and that no receiver or trustee has yet been appointed, in my opinion, is immaterial."

In *re Briskman*, 13 A. B. R. 57, 132 Fed. 201 (D. C. N. Y.): "That the property of the bankrupt comes within the jurisdiction of the bankruptcy court upon the filing of either a voluntary or an involuntary petition is not controverted."

In *re Jersey Island Packing Co.*, 14 A. B. R. 691, 138 Fed. 625 (C. C. A. Calif.): "The filing of a petition in bankruptcy * * * places the property of the bankrupt constructively in the custody of the court of bankruptcy."

But this rule is to be taken with the qualification that the property involved is not in custodia legis of the bankruptcy court unless it is in the actual or constructive possession of the marshal or receiver or (after adjudication) of the bankrupt or his agent in accordance with the principles above stated, and none of the cases cited are, on their facts, contrary to this qualification. The case, *In re Wells*, states the doctrine correctly and ably.¹⁴

In *re Wells*, 8 A. B. R. 75, 114 Fed. 222 (D. C. Ind.): "All agree that the court, State or Federal, which first takes possession of the property, retains the possession and the jurisdiction. This is elementary, and cases need not be cited to emphasize the proposition. But the trustee, by counsel, argues that the 'possession' does not mean physical possession. This court by any of its officers, never has had physical possession of the property. And the decision of this question requires a construction of the bankrupt statute of 1898. Coun-

14. *Odell v. Boyden*, 17 A. B. R. 756, 150 Fed. 731 (C. C. A. Ohio); contra, *In re Weinger, Bergman & Co.*, 11 A. B. R. 424, 126 Fed. 875 (D. C. N. Y.); contra, *In re Duble*, 9 A. B. R. 121, 117 Fed. 794 (D. C. Penn.). For a case of disputed possession where goods were commingled, see *In re Hymes Buggy & Imple. Co.*, 12 A. B. R. 477, 130 Fed. 977 (D. C. Mo.).

sel for the trustee insists that the mere filing of the petition in involuntary bankruptcy is notice to the world, and no other court must interfere with any property then in the possession of the bankrupt, and that any subsequent interference by a State court is avoided and nullified by the subsequent adjudication of bankruptcy of the debtor. I decline to so hold, and for reasons which seem to me conclusive. Conflicts between courts over the same property should at all times be avoided, if possible, because at times such conflicts are unseemly. The mistake is constantly being repeated, and sometimes by lawyers, of asserting that the United States courts are greater and more commanding than the State courts. I cannot agree to this. The State courts are courts of general jurisdiction, while a Federal court is one of limited jurisdiction. Of course, when a Federal court once acquires jurisdiction, then such jurisdiction becomes complete. And it is true that on some questions the Federal courts have exclusive jurisdiction—such as in admiralty and other cases. Under some of the old bankruptcy statutes such has been the case. But it is not so under the act of 1898. But little is gained by reviewing the decisions of the different State Supreme Courts or of the Federal trial courts. Such decisions are not binding on this court, and are in conflict, and cannot be reconciled. And no great headway is made by reviewing the dicta of the writers of opinions of the cases in the Supreme Court. But light has been given us by six cases decided by the Supreme Court. *Bardes v. Bank*, 178 U. S. 524, 4 Am. B. R. 163. That case was a thoroughly considered one. The object sought in that case was, in one respect, just the same as in the case at bar, viz., the trustee wanted to reduce to physical possession property which was not in his hands, but to which, as he alleged, he was entitled. And the Supreme Court held that the trustee must litigate the matter in a State court; which State court would have exclusive jurisdiction unless the adversary to the trustee would consent to come into the Federal court. The language of the opinion in that case has been criticised, but the holding of the court in that case stands. *Mitchell v. McClure*, 178 U. S. 539, 4 Am. B. R. 177; *Hicks v. Knost*, 178 U. S. 541, 4 Am. B. R. 178. These two cases follow the *Bardes* decision. In *White v. Schloerb*, 178 U. S. 542, 4 Am. B. R. 178, the Supreme Court held that property in the possession of the bankrupt when he was adjudicated a bankrupt, and subsequently seized by replevin proceedings in a State court, could be recovered by a proceeding in the Federal court. *Bryan v. Bernheimer*, 181 U. S. 188, 5 Am. B. R. 623, shows this state of facts: The debtor made an assignment for the benefit of creditors. Then proceedings in bankruptcy were brought. After the filing of the petition in bankruptcy, the assignee in the State insolvent law proceedings sold some of the debtor's property. Subsequently, the adjudication in bankruptcy. Still later, proceedings were instituted in the Federal court to recover the property thus sold. And the purchaser appeared in the Federal court, and asserted his claim to the property, and it was held that the property belonged to the estate in bankruptcy. It will be observed that the purchaser surrendered himself, without protest, to the jurisdiction of the Federal court. That this is what gave the Federal court jurisdiction is apparent from the case, and is specifically stated in a paragraph on page 197, 181 U. S., and page 560, 21 Sup. Ct. 25. Of course, the Federal court in such a case has jurisdiction, and would have in the case at bar if the carriage company would consent. But it protests. *Mueller v. Nugent*, 7 Am. B. R. 224, 22 Sup. Ct. 269, was a case where the agent of the bankrupt had the property. He sold the property as the agent of the bankrupt, and did not hold it adversely to the bankrupt. And what the Supreme Court held was that where property passed into the hands of a party as agent

of the debtor, even before the petition in bankruptcy was filed, the Federal District Court could, by orders and contempt proceedings, coerce the surrender of such property to the trustee in bankruptcy. And this is emphasized by the record, wherein it is shown that after the case had been tried, and was about being decided, the claimant wanted to change his pleadings, and allege that, instead of holding the property as agent of the debtor, he held it adversely, and this was denied. And I have no doubt but that it was denied because, if he were an agent of the debtor, the court had jurisdiction, but if he held it adversely the court did not have jurisdiction, although this is my notion only. The foregoing is what has been held by the Supreme Court. And all of these holdings are consistent one with another, and inconsistent, in my judgment, with the contentions of the trustee in the case at bar.

"But as an independent question, without these holdings of the Supreme Court, I would regard it my duty to deny the injunction herein. The act of 1867 carried with it many evils, real or supposed. One of such evils was its oppressive and expensive features. The estates were eaten up by a most vicious fee system. The litigation was all, or practically all, in the Federal courts, generally sitting at a great distance from the debtor, the claimants, and the witnesses. It was the purpose of the present statute to correct this, and limit the fees and expenses, and have the greater part of the litigation where the parties resided. Under the former statute, the title to all property passed upon the mere filing of the petition. The judiciary committee of the house, in reporting the bill which became the present statute, called attention to this evil, and said that it was corrected by passing the title as of the date of adjudication. And such is the language of the statute. And if this is not so, see what we have: A petition is filed. The debtor can, and often does, deny the commission of the alleged act of bankruptcy. He can demand a trial by jury, and perhaps never be adjudicated a bankrupt. This takes months. The petitioning creditors can obtain an injunction and keep the property intact. But in this case the creditors kept quiet and avoided such expense and liability. Now in the meantime can it be possible that nothing can be done by the debtor or by any other court?"

Contra, *In re Duble*, 9 A. B. R. 121, 117 Fed. 794 (D. C. Penn.): "With such complete control over the property of the bankrupt as is thus given, it is difficult to see why it is not to be regarded as in the actual custody of the law. It is not necessary, as is argued, that the trustee should take possession in order to complete it. This is a mere matter of formal investiture which follows as of course when he has been chosen, his title according to the Act, relating back to the date of the adjudication. Where the property is widely scattered, as it may be in many instances, some time may elapse before actual possession is taken, and it can hardly have been the purpose of the Act to leave it open, in consequence, to seizure by distress or otherwise, meanwhile."

Apparently contra, *Frazier v. Southern Loan & Trust Co.*, 3 A. B. R. 710, 99 Fed. 707 (C. C. A. N. Car.): "The District Court seems to have been of the opinion, and it is the contention of counsel for the respondent in this court, that the receiver must be in the actual possession of the property in order to place it in the custody of the court. This position is erroneous. 'A court of equity, by its order appointing a receiver, takes the subject matter of the litigation out of the control of the parties and into its own hands, and ultimately disposes of all questions, legal or equitable, growing out of the proceeding.' High, Rec., § 4. As stated by the Supreme Court of Appeals of Virginia in *Beverley v. Brooke*, 4 Gratt. 187, 'A decree appointing receivers levies upon the property an equitable execution.' 'The possession of the re-

ceiver is that of the court, of which he is the ministerial officer. Thus it is that, inasmuch as the receiver is merely an officer of the court appointing him, property in his possession is said to be in the custody of the law. * * * And it is said to be immaterial in this respect that the receiver appointed declines to act, the property being, notwithstanding, in the custody of the law.' Beach, Rec. sec. 221. Nor is it necessary for a court of equity to take possession of the property in litigation, or to attempt to do so by the appointment of a receiver, where the object of the suit is to set aside a fraudulent conveyance and enforce judgment liens against the land of the debtor."

And possession by the bankrupt, or his agent, before adjudication is not *custodia legis*, although an involuntary petition be pending against him;¹⁵ until adjudication he may deal in the usual course of business, buy, sell and contract without let or hindrance, unless the bankruptcy court enjoins, or, by its marshal or receiver, seizes possession.

But possession by the bankrupt (at and after adjudication) is possession by the bankruptcy court.¹⁶

In re Granite City Bk., 14 A. B. R. 406, 137 Fed. 818 (C. C. A. Iowa): "The chief contention of the petitioner is based upon a misconception of the scheme and policy of the Bankrupt Act. The filing of the petition in bankruptcy 'was a caveat to all the world. It was in effect an attachment and injunction. Thereafter all the property rights of the debtor were ipso facto in abeyance until the final adjudication. If that were in his favor, they revived, and were

15. In re Wells, 8 A. B. R. 76, 114 Fed. 222 (D. C. Mo.); inferentially, In re Corbett, 5 A. B. R. 224, 104 Fed. 872 (D. C. Wis.). But compare, inferentially, contra, In re Duncan, 17 A. B. R. 288, 148 Fed. 464 (D. C. S. Car.).

16. In re Gutman & Wenk, 8 A. B. R. 252, 114 Fed. 1009 (D. C. N. Y.); In re Reynolds, 11 A. B. R. 758, 127 Fed. 760 (D. C. Mont.); Odell v. Boyden, 17 A. B. R. 509, 150 Fed. 731 (C. C. A. Ohio).

Carter v. Hobbs, 1 A. B. R. 215, 94 Fed. 108 (D. C. Ind.): This case of Carter v. Hobbs is to be rejected on the other point, however, that the bankruptcy court before the Amendment of 1903 could entertain suits by trustees.

In re Beals, 8 A. B. R. 644, 116 Fed. 530 (D. C. Ind.): This case is to be rejected, however, on the point that § 67 (f) annuls legal liens on exempt property.

On the facts, In re Briskman, 13 A. B. R. 57, 132 Fed. 201 (D. C. N. Y.); [1867] In re Rosenberg, 3 B. Reg. 130.

In re Lemmon & Gale, 7 A. B. R. 291, 112 Fed. 96 (C. C. A. Tenn.), wherein the referee directed the bankrupt to hold the property until the election of a trustee.

Inferentially, In re Emslie, 4 A. B. R. 126, 102 Fed. 291 (C. C. A. N. Y.); inferentially, and on the facts, Crosby v. Spear, 11 A. B. R. 613, 98 Me. 542; inferentially, In re Klienmans, 7 A. B. R. 606, 113 Fed. 107 (D. C. N. Y.): "Coincident with the filing of a petition in bankruptcy, either voluntary or involuntary, a court of bankruptcy acquires control over the estate of a bankrupt or person charged with acts of bankruptcy. It may immediately seize and lay claim to all property either in the actual possession of the bankrupt or such as may be reduced to possession. Power is conferred on the court to appoint marshals or receivers to take charge of the property of the bankrupts."

Inferentially, Whitney v. Wenman, 14 A. B. R. 51, 198 U. S. 539; In re Corbett, 5 A. B. R. 224, 104 Fed. 872 (D. C. Wis.); In re Noel, 14 A. B. R. 715, 137 Fed. 674 (D. C. Md.); In re Lines, 13 A. B. R. 318, 133 Fed. 803 (D. C. Penn.).

Inferentially, Carpenter Bros. v. O'Connor, 1 A. B. R. 381 (16 Ohio C. C. 526), the basis of the decision in this case really being that the bankrupt's possession was the bankruptcy court's possession and existed before the State Court's receiver was appointed.

again in full force. If it were against him, they were extinguished as to him, and vested in the assignee (trustee) for the purposes of the trust with which he was charged. The bankrupt became, as it were, for many purposes, *civili-ter mortuus*.' * * *

"In short, the adjudication operates as a seizure of the property of the bankrupt, by which it is taken in *custodia legis*. * * * The possession of the bankrupt without more, is transferred to the trustee. No demand for the surrender and possession of the bankrupt's property is necessary. Indeed he would stand in contempt of court were he to assert the right to hold and possess the property against the trustee. He could not maintain trespass or replevin respecting any personal property owned by him prior to the adjudication in bankruptcy."

In *re Schermerhorn*, 16 A. B. R. 509, 145 Fed. 341 (C. C. A.): "Upon the filing of a petition in bankruptcy, followed by an adjudication, all property in the possession of the bankrupt of which he claims the ownership passes at once into the custody of the court of bankruptcy, and becomes subject to its jurisdiction. * * * At the time the petition in bankruptcy was filed and at the time of the adjudication on the following day, it was the bankrupt, not the petitioner, who was in the possession of the buggies under a claim of ownership. The buggies were entered by the bankrupt in his schedules as part of his estate. They were in a building which he had rented of the petitioner, of which he had the customary keys, and over which he was exercising dominion and control as a tenant. He had within the building other property than that in controversy. All that the petitioner had in the nature of possession was a key to the back door of the building, and this he had reserved to himself without the knowledge or consent of the bankrupt, his tenant. There had been no declaration of forfeiture of the bankrupt's tenancy for nonpayment of rent or other reason, and no surrender of the possession of the building. The tenancy still subsisted. The bankrupt did not know that the petitioner claimed to have purchased the buggies, nor did he agree to hold them for him. Some time after the adjudication the petitioner gained access to the building by his rear door key, changed the locks, and then asserted exclusive adverse possession. But the buggies were then in the custody of the court, and the petitioner could gain nothing by an interference therewith. It was therefore proper for the court to repossess itself of them."

In *re Schloerb*, 3 A. B. R. 224 (D. C. Wis., affirmed sub nom. *White v. Schloerb*, 4 A. B. R. 178, 178 U. S. 542): "On this state of facts I am of opinion that this court obtained complete jurisdiction over the property in the possession of the bankrupts and scheduled as owned by them, from the date of adjudication on September 13th, if not from the filing of the petition, and that the property taken by the sheriff was, therefore, in *custodia legis*, and not subject to seizure on the replevin process."

In *re Duncan*, 17 A. B. R. 288, 148 Fed. 464 (D. C. S. Car.): "The filing of a petition against him is a caveat to all the world, and all persons dealing with him during the interval from that date to the date of final adjudication do so at their peril. The property of the bankrupt, after the filing of the petition against him and before adjudication thereon, is in *custodia legis*. It is subject to the prehensory power of the court, and the person against whom such petition has been filed cannot make any legal disposition of it. No creditor can lay hands on it, and no court, State or federal, can attach it. It is under the sole and exclusive jurisdiction and control of the bankruptcy court, and, if such court adjudges the party a bankrupt on the petition, the title to his property vests in the trustee as of the date of the filing of the petition; that date being the point of cleavage."

Possession of the bankrupt may give jurisdiction to the bankruptcy court even if the possession is not exclusive;¹⁷ and regardless of the capacity in which he holds, whether in his own right or as agent for another.¹⁸

Compare, *In re Mundle*, 14 A. B. R. 680, 139 Fed. 961 (D. C. N. Y.): "In view of the fact that the bankrupt was in possession of the property, and the only claim of the moving parties is, that he was so as their agent, it seems to me that it is incumbent upon them to prove their claims, and that the property in the meantime, or the proceeds thereof, should remain in the possession of the representative of the court."

The possession may be constructive; thus a "seat" or "membership" in a stock exchange is held to be in the bankrupt's possession and hence to be in custodia legis, even though the approval of a board of directors is necessary.

O'Dell v. Boyden, 17 A. B. R. 756, 150 Fed. 731 (C. C. A. Ohio): "Did the bankrupt court have such custody of the 'membership' or 'seat' as to give it jurisdiction to bring in adverse claimants and adjudicate their rights? The New Stock Exchange is an unincorporated association having a limited membership. No formal certificate of membership is issued, and aside from repute, Henrotin's only evidence of membership consists in a letter notifying him of his election and asking him to sign the constitution and by-laws. This letter is the document referred to as the 'certificate' assigned to O'Dell. Though the membership is personal it is transferable, subject to the conditions imposed by the articles of the association already referred to. But the transfer is not made except by the acceptance of a candidate for membership who is elected in the room and stead of the retiring member. When a 'transfer' of membership is made according to the terms which clog such transfers, the transferee becomes a member and the transferor ceases to be one. It follows, therefore, that the mere execution of a paper preparatory to transferring or assigning a membership works no change in membership whatever. Thus, in 1892, this same membership which was personal to Henrotin was transferred or assigned to a partnership of which he was a member. That did not deprive Henrotin of his 'seat' or 'membership'. He continued to be a member and to exercise all of the privileges of a member. In May, 1905, he again joined one of his partners in transferring or assigning this same membership to the appellant O'Dell. Nevertheless, he continued to be and act as a member, and O'Dell did not thereby become a member. What was then the effect of these transfers or assignments, made of this 'seat,' first to Holzman and Company and then to O'Dell? * * *

"The transfer and assignment preceding bankruptcy may have fastened liens upon the pecuniary results of a valid sale and transfer which may be effectually enforced in the bankruptcy court, but subject to such equitable liens as may result from such prior transfers or assignments. The 'seat' or 'membership' continued to be the 'seat' of Henrotin and was a pecuniary asset which passed to his trustee. It was as much in his custody and possession as such a species of property is capable of. To deny the trustee's possession would be to deny the capability of possession of a chose in action or other incorporeal right or equity. The possession may be constructive and

17. *In re Brooks*, 1 A. B. R. 531, 91 Fed. 508 (D. C. Vt.).

18. Compare, on the facts, *In re Emrich*, 4 A. B. R. 91, 101 Fed. 231 (D. C. Penn.).

not manual, but it is only so because such property is not capable of a more tangible custody. Only through a court of equity can the pecuniary value of such an asset be realized to creditors or assignees. Only by decree in personam compelling the bankrupt member, can such a transfer of membership be effectuated as will put the buyer in the place of Henrotin as a member. Over him for that purpose the bankrupt court has exclusive control, and, in this sense, also, may it be said, that the 'seat' or 'membership' was in custodia legis when the trustee sought the aid of the court to adjudicate the claims and liens asserted by O'Dell.

Thus, a receiver in a pending involuntary proceeding in New York has been held, impliedly at any rate, to have such constructive possession of timber in the State of Arkansas that a suit thereafter started in the Arkansas State court claiming the property has been enjoined.¹⁹

§ 1808. As to Adjudication in Bankruptcy "Ipso Facto" Passing Bankrupt's Property into Custodia Legis.—It is said, somewhat broadly, that the adjudication in bankruptcy ipso facto passes the bankrupt's property into the custody and under the protection of the Bankruptcy Court; and that from the time of the adjudication in bankruptcy, the bankrupt's property comes into the custody of the Bankruptcy Court and is in custodia legis.²⁰

In *re Reynolds*, 11 A. B. R. 760, 127 Fed. 760 (D. C. Mont.): "An adjudication of bankruptcy operates in rem, and from the moment of the adjudication the bankrupt's estate is under the jurisdiction of the bankruptcy court, which will not permit any interference with its possession, even though it be by an officer of a State court acting under its process. Being a proceeding in rem, all parties interested in the res are regarded as parties thereto, including the bankrupt and trustee, as well as the creditors, secured and unsecured. The adjudication vests in the trustee or temporary receiver the title of the bankrupt's property, and stays all seizure made within four months. An adjudication of bankruptcy has the force and effect of an attachment and an injunction. It is a caveat to all the world."

In *re Anderson*, 4 A. B. R. 640, 103 Fed. 854 (D. C. S. C., reversed, on other grounds, in 7 A. B. R. 641): "Upon an adjudication in bankruptcy, all the property of the bankrupt, of every kind and description whatsoever, falls at once in custodia legis. His estate belongs to the court and any withholding of the property of the bankrupt by himself or others is in derogation of the rights of the trustee, who is entitled to hold it for distribution among the creditors."

But this statement is to be taken with qualifications. The adjudication does bring it within the protection of the bankruptcy court, to be sure; but this is not the same as saying that, ipso facto, all controversies in relation

19. In *re Muncie Pulp Co.*, 18 A. B. R. 56 (C. C. A. N. Y.): However, the case seems to be based on wrong principles as to jurisdiction. The first court that obtained jurisdiction of the res appears to have been the Arkansas State Court.

20. *Keegan v. King*, 3 A. B. R. 79, 96 Fed. 758 (D. C. Ind.); In *re Granite City Bank*, 14 A. B. R. 407, 137 Fed. 818 (C. C. A. Iowa); *State Bk. v. Cox*, 16 A. B. R. 36, 143 Fed. 91 (C. C. A. Ills.).

to the property, title to which by operation of law passes on adjudication to creditors, may be determined in the forum of the bankruptcy court. On adjudication, ipso facto, all the property becomes a proper subject for the protection of the bankruptcy court, but the forum for action is not ipso facto the bankruptcy court. We have heretofore endeavored to explain the limitations upon the exercise of jurisdiction by the bankruptcy court, and to mark the boundaries of its "custodia legis," and those decisions which state the rule thus broadly are not to be considered as determining the forum for bankruptcy controversies. All the cases using the broad term mentioned will be found, on analysis, to resolve themselves into some one of the classes hereinbefore distinguished. Thus, the case *In re Reynolds*, supra, was a case of "possession by the bankrupt."

§ 1809. **Real Estate Generally Considered in Bankrupt's Possession.**—Real estate, unless it be actually adversely held by others, generally is to be presumed, from its nature, to be within the custody of the bankrupt; therefore, unless suit has already been started, actions in relation thereto are to be brought in the bankruptcy court.²¹ However, if the trustee consents that the foreclosure may occur outside the bankruptcy court, he will be bound, and cannot afterwards withdraw nor repudiate the jurisdiction in whole or in part.²²

§ 1810. **Mere Rights of Action in Personam, Not Property "in Possession" of Bankrupt.**—Mere rights of action for money judgments or decrees in personam, and for debts owing to the bankrupt, etc., where no tangible property is involved, cannot be said to constitute property in the bankrupt's possession at the time of bankruptcy, and therefore the bankruptcy does not necessarily draw litigation in relation thereto to the forum of the bankruptcy court.²³

§ 1811. **Whether Action to Be in Bankruptcy Proceedings Themselves, or Separate Plenary Action Maintainable in U. S. District Court.**—And such action, on reason, must be taken in the bankruptcy proceedings themselves; and a separate plenary action may not be begun in the United States District Court concerning property already in the custody of the bankruptcy court in the bankruptcy proceedings proper.²⁴

Nevertheless, the U. S. District Court in bankruptcy occasionally have entertained proceedings in the nature of plenary actions concerning prop-

21. Impliedly, *In re Granite City Bk.*, 14 A. B. R. 408, 137 Fed. 818 (C. C. A. Iowa); instance, *In re Noel*, 14 A. B. R. 715, 137 Fed. 694 (D. C. Md.); instance, *In re Baughman*, 15 A. B. R. 23, 138 Fed. 742 (D. C. Penn.).

22. *Furth v. Stahl*, 10 A. B. R. 442, 205 Penn. 439.

23. Yet compare, *In re Emslie*, 4 A. B. R. 126, 102 Fed. 291 (C. C. A. N. Y.), where the bankruptcy court stayed a suit to foreclose a subcontractor's lien which had been commenced after the bankruptcy, the bankrupt being the head contractor, although obviously the only property involved was the mere right in action of the bankrupt for a money judgment, to recover a debt from the owner.

24. *In re Noel*, 14 A. B. R. 719, 137 Fed. 694 (D. C. Md.); *Real Estate Trust Co. v. Thompson*, 7 A. B. R. 520, 112 Fed. 945 (D. C. Penn.); *In re McMahon*, 17 A. B. R. 532, 147 Fed. 685 (C. C. A. Ohio); compare, contra instance, *Car-*

erty in its custody, this jurisdiction always existing and not being dependent on the Amendment of 1903. The possession by the bankruptcy court of the res gives it jurisdiction to determine all controversies in relation thereto, and such controversies may be and occasionally have been carried on by separate proceedings, in the nature of plenary actions in the District Court itself, or by summary proceedings in the referee's court, in either event the proceedings being in the District Court and in the bankruptcy court and properly entitled in the bankruptcy case. Possession of the res confers the jurisdiction whether it be before the District Judge or before the referee, and it is not dependent on the Amendment of 1903. The right to begin plenary actions in the federal courts, conferred by the Amendment of 1903, relates merely to property not in the possession of the bankruptcy court, but sought to be recovered from adverse claimants.²⁵ Likewise, the right to prosecute suits in the federal courts by the defendants' consent, conferred by the original Act itself in § 23, refers only to cases where either property is sought to be recovered or a judgment in personam obtained against a third party.²⁶ But such plenary jurisdiction over adverse claimants in possession is different from the jurisdiction here being considered, which is dependent wholly on the possession of the res and which is exercisable either by the referee or by the District Judge by proceedings which, in their nature, are neither strictly summary nor yet fully plenary. So that, unless relegated to the summary proceedings before the referee by general reference to the referee or otherwise, the trustee may institute, and occasionally has instituted, proceedings to marshal liens directly in the District Court; and adverse claimants likewise may resort there although such practice is not to be favored so long as the res is already in the custody of the referee. These actions perhaps, strictly speaking, are neither "plenary" nor "summary." They do not follow any of the established forms of plenary actions, yet they are on due notice and hearing, subject to appeal or review and on that account are not perhaps, to be termed, strictly, "summary," either.²⁷

§ 1812. Nor in State Court, nor in U. S. Circuit Court.—Nor, on reason, may a separate plenary action be begun in the state court or in

riage Co. *v.* Solanas, 6 A. B. R. 221, 108 Fed. 532 (D. C. La.); *Chattanooga Nat'l Bk. v. Rome Iron Co.*, 3 A. B. R. 582 (D. C. Ga.). But compare, apparently contra, *Rytenberg v. Schefer*, 11 A. B. R. 658, 131 Fed. 313 (D. C. N. Y.).

But compare, apparently contra practice, *In re Mundle*, 14 A. B. R. 680, 139 Fed. 691 (D. C. N. Y.), in which case, however, perhaps, the court did not mean that an independent action should be instituted, but only that a hearing upon original testimony and not affidavits was proper.

²⁵ *In re McMahon*, 17 A. B. R. 531, 147 Fed. 685 (C. C. A. Ohio). Compare, *Carriage Co. v. Solanas*, 6 A. B. R. 221, 108 Fed. 532 (D. C. La.).

²⁶ Compare, *In re Steuer*, 5 A. B. R. 209, 104 Fed. 976 (D. C. Mass.), in which case a bond had been given to answer for the property.

²⁷ *In re Noel*, 14 A. B. R. 719, 137 Fed. 694 (D. C. Md.); *In re McMahon*, 17 A. B. R. 531, 147 Fed. 685 (C. C. A. Ohio); *Whitney v. Wenman*, 14 A. B. R. 45, 198 U. S. 539.

a federal court other than the bankruptcy court, while the property is in the custody of the bankruptcy court.²⁸

§ 1813. **Bankruptcy Court Permitting Controversies over Property in Its Possession to Be Carried on Elsewhere.**—But it has been held that the bankruptcy court may permit controversies over property in its possession to be carried on elsewhere, and to this end may authorize suits in State Courts to be instituted or maintained by or against trustees; thus, as to suits concerning mechanics' liens;²⁹ likewise, it has been held, that the bankruptcy court may permit its own trustee to be sued in the State Court in a suit started by a chattel mortgagee after the bankruptcy, in order to determine the validity of his chattel mortgage, but will retain custody of the property involved, or sell it and retain its proceeds, to await the outcome of the decision; and that the State Court has jurisdiction unless enjoined.³⁰ Again, it has been held that under order of the bankruptcy court, property in controversy may be deposited with a third party, or may be sold and its proceeds be thus deposited, to await the outcome of an independent suit to determine ownership or rights of parties therein;³¹ but these cases are exceptional and do not seem to be founded on any very consistent rule. On analysis, some of them will be found to be based on a misconception or doubt as to the scope of the rule laid down by the Supreme Court in *Bardes v. Bank*, 4 A. B. R. 171, 174 U. S. 524.

And, of course, where the bankruptcy court relinquishes possession, or declines to take actual possession, or has only constructive possession, it may permit controversies over it to be litigated in independent suits in

28. See inferentially, cases cited ante, § 1797—"After the Bankruptcy Court Has Once Assumed Jurisdiction, etc."

In re McMahon, 17 A. B. R. 532, 147 Fed. 685 (C. C. A. Ohio); *Odell v. Boyden*, 17 A. B. R. 755, 150 Fed. 731 (C. C. A. Ohio); In re Muncie Pulp Co., 18 A. B. R. 56, 151 Fed. 732 (C. C. A. N. Y.).

Contra, *Crosby v. Miller*, 16 A. B. R. 805, 25 R. I. 172 (Ct. App. D. C.), wherein the lower court was reversed for dismissing a bill in equity of a third party to declare a trust upon property evidently in the custody of the bankruptcy court and title to which was in the bankrupt.

29. In re Grissler, 13 A. B. R. 508, 136 Fed. 754 (C. C. A. N. Y.).

30. In re Johnson, 11 A. B. R. 544 (D. C. Nev.); *Skilton v. Codington*, 15 A. B. R. 810, 185 N. Y. 80; obiter, In re Foundry & Machine Co., 17 A. B. R. 295, 147 Fed. 828 (D. C. Wis.).

31. *Frank v. Volkommer*, 17 A. B. R. 806, 205 U. S. 521 (affirming *Volkommer v. Frank*, 14 A. B. R. 695); *Small v. Muller*, 8 A. B. R. 448 (Sup. Ct. N. Y. App. Div.).

Apparently, instance, In re Mundle, 14 A. B. R. 680, 139 Fed. 691 (D. C. N. Y.), in which case, however, it does not appear whether the plenary suit was to be in the State or in the Federal Court, nor for that matter whether it were to be an independent suit or merely a hearing on original evidence in the bankruptcy proceedings themselves.

See also, *Chauncey v. Dyke Bros.*, 9 A. B. R. 444, 19 Fed. 1 (C. C. A. Ark.). Compare what appears to have been the situation in the main case, as criticised in *Carriage Co. v. Solanas*, 6 A. B. R. 221, 108 Fed. 532 (D. C. La.). Compare, similarly, *Skilton v. Codington*, 15 A. B. R. 810, 185 N. Y. 80. Compare, also, the situation in *Crosby v. Miller*, 16 A. B. R. 805, 25 R. I. 172 (Ct. App. D. C.). Compare, similarly, In re Hudson River W. P. Co., 17 A. B. R. 778, 148 Fed. 877 (D. C. N. Y.).

State courts. Thus, it has been held that the bankruptcy court may, in its discretion, refuse to enjoin the prosecution of a foreclosure suit although instituted after the mortgagor's adjudication, and may simply order the trustee to intervene in the State Court.³² Again, a trustee consenting to the sale of real estate under foreclosure of mortgage in the State Court is estopped from objecting to the jurisdiction of the State Court.³³

§ 1814. **Suits in Personam against Trustees and Receivers.**—But trustees and receivers in bankruptcy may be sued in the State Court for trover or conversion, where no seizure of property is made in the suit.³⁴

In *re Kanter & Cohen*, 9 A. B. R. 372, 121 Fed. 984 (C. C. A. N. Y.): "If the action had been in replevin a different question would arise, but as it is we entertain no doubt that the court below properly refused the receiver's application."

In *re Mertens & Co.*, 16 A. B. R. 831, 147 Fed. 177 (C. C. A. N. Y.): "The order under review enjoins the American Woolen Company from prosecuting an action in the Supreme Court of the State of New York which it had brought against the trustee in bankruptcy to recover the value of certain personal property alleged to belong to the woolen company, and which the trustee took into his possession as the property of the bankrupts, and sold as a part of the bankrupt's estate. The order restrains the plaintiff in an action of trover from recovering the value of the property which, if its contention is correct, never became part of the bankrupts' estate, and was converted by the trustee. In effect the order overrules several decisions of this court."

32. In *re Porter*, 6 A. B. R. 259, 109 Fed. 111 (D. C. Ky.). Compare, In *re Emslie*, 4 A. B. R. 126, 102 Fed. 291 (C. C. A. N. Y.).

33. *Obiter*, *Furth v. Stahl*, 10 A. B. R. 442, 205 Penn. 439 (Penn. Sup. Ct.). See, under subject of "Conflict of Jurisdiction," § 1584.

34. See ante, § 1780. *Obiter*, In *re Russell & Birkett*, 3 A. B. R. 658, 101 Fed. 248 (C. C. A. N. Y.); In *re Spitzer*, 12 A. B. R. 346, 130 Fed. 879 (C. C. A. N. Y.); instance, *Welch v. Polley*, 11 A. B. R. 215, 177 N. Y. 117; instance, *Skilton v. Codington*, 15 A. B. R. 810, 185 N. Y. 80.

Contra (but as to federal court), *Treat v. Wooden*, 14 A. B. R. 736 (C. C. Mass.).

Distinction Where Property in Original Possession of Bankrupts.—It had been held that the trustee could not be sued in the State Court for conversion where the bankrupt had had apparent possession, even if he might be sued there had he gone out and attempted to take possession "in of property not in the bankrupt's custody, In *re Mertens*, 12 A. B. R. 709 (D. C. N. Y., reversed 16 A. B. R. 831, 147 Fed. 177): "This court cannot assent to the doctrine that its trustee in bankruptcy is liable to an action in the State Court as for trespass, trover, or conversion, when he follows the order of the court in disposing of property in its possession. This is not a case where the receiver or trustee has taken and held and disposed of property which was outside of the possession and control and apparent ownership of the bankrupt at the time of the filing of the petition in bankruptcy, in which case this court should not and would not interfere. In such case the officer of this court would act on his own responsibility, and take his chances." To same effect, In *re Schermerhorn*, 16 A. B. R. 509, 145 Fed. 341 (C. C. A.).

Property Held Fraudulently on Secret Trust for Bankrupt's Benefit.—In one case it was held that property held fraudulently on secret trust for the bankrupt's benefit, never having been in his name or possession, could be subjected by suit in the State Court started after adjudication of bankruptcy, to the payment of a judgment creditor's claim, *Evans v. Staalle*, 11 A. B. R. 182 (Minn.). It would seem in this case that the trustee ought to have intervened: he certainly had title to the property.

And where mortgaged property has been sold by the trustee without notice to the mortgagee, and without his consent, the mortgagee may sue the trustee for conversion.³⁵

DIVISION 2.

SUMMARY JURISDICTION OVER BANKRUPTS, BANKRUPT'S AGENTS AND OTHERS NOT CLAIMING ADVERSE INTERESTS.

§ 1815. **When Summary Order Will Lie on Bankrupts, and Persons Not Adverse Claimants—In General.**—Property belonging to the bankrupt estate which is in the hands of the bankrupt himself or his agent, or some one who lays no claim to a beneficial interest in it, the trustee may seize, if he can do so peaceably. If he cannot peaceably obtain possession he is entitled to a summary order from the bankruptcy court, in the bankruptcy proceedings themselves, requiring the party in possession to surrender the property.³⁶

§ 1816. **Outstanding Claims by Third Parties on Property in Hands of Bankrupt or Agent, Summary Jurisdiction Not Divested.**—The trustee's right summarily to seize property found in the possession of the bankrupt or his agent or in the possession of one not claiming any beneficial interest in it, or to get an order from the bankruptcy court requiring the surrender, is not affected by the fact that liens in favor of third persons exist on the property, or that third persons, not themselves in possession, are laying claim to the property; for the property is brought into the bankruptcy court subject to all liens and claims, and the rights of the lienholders and claimants will be fully protected, and can be worked out through the machinery of the bankruptcy court.³⁷

Thus, even where a third party had attacked the sheriff by replevin and the sheriff had given a redelivery bond and was still in custody of the property, he was held still subject to the summary order of the bankruptcy court.

In *re Francis-Valentine Co.*, 2 A. B. R. 522, 526 (C. C. A. Calif., affirming 2 A. B. R. 188): "The pendency of the action of replevin against the sheriff on behalf of the American Type Founders' Company is not ground for holding that the portion of the property involved in that litigation shall not be delivered to the trustee. The possession which the sheriff had of that property was not for the benefit of the American Type Founders' Company, but was antagonistic to it. The intervention of bankruptcy divested the sheriff of his possession, just as it would have divested the possession of the bank-

35. In *re Foundry & Machine Co.*, 17 A. B. R. 291 (D. C. Wis.).

36. Documents and books, summary order for surrender, same as other property, instance, In *re Rosenblatt*, 16 A. B. R. 307, 143 Fed. 663 (D. C. Penn.).

37. See cases cited under main proposition, ante, § 1794, which, of course, implies this corollary.

In *re Rochford*, 10 A. B. R. 608, 124 Fed. 182 (C. C. A. S. Dak.); In *re Wiesen Bros.*, 15 A. B. R. 27 (D. C. Penn.); *obiter*, In *re Jersey Island Packing Co.*, 14 A. B. R. 692, 138 Fed. 625 (C. C. A. Calif.); In *re Noel*, 14 A. B. R. 720, 137 Fed. 694 (D. C. Md.).

rupt itself in case a like action had been commenced against the bankrupt by the same party plaintiff. The sheriff had no right to the possession of the printing press, except upon the theory that the title was in the bankrupt. The property having been once taken from his possession upon a proper bond furnished by the American Type Founders' Company, in again securing the possession by a counter bond the sheriff asserted and relied upon the bankrupt's title. The American Type Founders' Company is not a party to the proceeding in the Bankruptcy Court, and its rights are in no way affected by the order upon the sheriff. It is not represented in the present proceedings. The question is purely one of the respective rights of the sheriff and of the trustee of the estate of the bankrupt."

This doctrine has been held even in cases where a sheriff was about to sell real estate under an execution levy made more than four months prior to bankruptcy.

In *re* Baughman, 15 A. B. R. 23, 138 Fed. 742 (D. C. Pa.): "In the present instance, while the execution creditor by virtue of its judgment has a lien upon the real estate proposed to be sold, which, antedating the bankruptcy proceedings by over four months as it does, may not be affected thereby, yet, bankruptcy having intervened, the sale and distribution of the property as well as the establishment of the correct amount due to the judgment creditor which seems to be in dispute, belongs to this court, unless it seems best to let it go on elsewhere, as might be the case if the liens were more than enough to exhaust the property leaving nothing for general creditors, although this is not always controlling and is entirely optional."

Likewise where he was about to sell personal property.³⁸

§ 1817. But Beneficial Interest in Trustee Must Exist.—But a beneficial interest in the property must exist in the trustee. The bankruptcy court may not be used as a means to procure surrender from the bankrupt, of property belonging to a third party; thus, it has been held that it may not be used to procure surrender, where the vendor of the property rescinds the sale to the bankrupt and reclaims the property.³⁹

§ 1818. Order of Surrender before Appointment of Trustee and Even before Adjudication.—The order to turn over the property may be made even before the appointment of a trustee.⁴⁰

And even before adjudication such order may be made upon the bankrupt or a mere agent of the bankrupt not claiming adverse interest, where a receiver has been appointed.⁴¹

However, if the order be upon an officer holding under legal process, it may not, of course, be made before adjudication, for until then the officer

38. In *re* Vastbinder, 13 A. B. R. 148, 132 Fed. 718 (D. C. Penn.).

39. In *re* Eliowich, 17 A. B. R. 419 (D. C. N. Y.).

40. In *re* Muncie Pulp Co., 14 A. B. R. 70, 151 Fed. 732 (C. C. A. N. Y.); impliedly, In *re* Lebrecht, 14 A. B. R. 445 (D. C. Tex.); impliedly, In *re* Rosenblatt, 16 A. B. R. 306, 143 Fed. 663 (D. C. Penn.), the case of a summary order before adjudication to surrender corporate books to the receiver conducting the business.

41. Impliedly, In *re* Rosenblatt, 16 A. B. R. 306, 143 Fed. 663 (D. C. Penn.).

is an adverse claimant and not even constructively a mere agent of the bankrupt.⁴²

§ 1819. Summary Orders on Bankrupt.—If the bankrupt refuses to turn over property in his possession or under his control, belonging to the creditors, he may be summarily ordered to do so by the bankruptcy court, upon due notice and hearing, under penalty of contempt.⁴³

In *re Purvine*, 2 A. B. R. 787, 96 Fed. 192 (C. C. A. Tex.): "It is the duty of the bankrupt to deliver to the trustee all property subject to his debts. Upon his failure to make such delivery he may be ordered by the court to do so. Unquestionably, the court has this power."

In *re Davis*, 9 A. B. R. 674 (D. C. Tex.): "That jurisdiction exists generally to require, in a summary manner, the bankrupt or a third person to pay over money or to surrender other property in his possession belonging to the bankrupt's estate, to which no adverse title is asserted, seems to be well settled by recent adjudications; and the payment or surrender, in the one case or the other, may be required, notwithstanding the person against whom the order is directed may not consent to the jurisdiction of the court."

In *re Smith*, 3 A. B. R. 95, 100 Fed. 795 (D. C. Ga.): "It is clear to my mind that the property having been found in the possession of the bankrupt, the court is authorized to direct the trustee to take charge of it. This is, of course, not a final decision, and if Mrs. Smith can in the progress of the case demonstrate her title to the property she is permitted to do so."

Ripon Knitting Works v. Schreiber, 4 A. B. R. 299, 101 Fed. 810 (D. C. Wash., affirmed, on review, in 104 Fed. 1006): "To the merely formal ob-

42. See ante, § 1662.

43. *Mueller v. Nugent*, 7 A. B. R. 224, 184 U. S. 1; In *re DeGottardi*, 7 A. B. R. 723, 114 Fed. 328 (D. C. Calif.); In *re Deuell*, 4 A. B. R. 60, 100 Fed. 633 (D. C. Mo.); In *re Miller*, 5 A. B. R. 184, 105 Fed. 57 (D. C. Iowa); In *re Levin*, 6 A. B. R. 743 (D. C. N. Y.); In *re Goldfarb*, 12 A. B. R. 386, 131 Fed. 643 (D. C. Ga.); In *re Oliver*, 2 A. B. R. 783, 96 Fed. 85 (D. C. Calif.); In *re Schlesinger*, 4 A. B. R. 361, 102 Fed. 117 (C. C. A. N. Y., affirming 3 A. B. R. 342, 97 Fed. 930); In *re McCormick*, 3 A. B. R. 340, 99 Fed. 56 (D. C. N. Y.); In *re Mayer*, 3 A. B. R. 533, 98 Fed. 839 (D. C. Wis.); *Schweer v. Brown*, 12 A. B. R. 178, 102 Fed. 117 (C. C. A. Ark.); In *re Gerstel*, 10 A. B. R. 411, 123 Fed. 166 (D. C. Ills.); In *re Wilson*, 8 A. B. R. 612, 116 Fed. 419 (D. C. Ark.); In *re Leinweber*, 12 A. B. R. 175, 128 Fed. 641 (D. C. Conn.); In *re Anderson*, 4 A. B. R. 640 (D. C. S. C., reversed, on other grounds, *McGahan v. Anderson*, 7 A. B. R. 641, 113 Fed. 115); *Samel v. Dodd*, 16 A. B. R. 166, 142 Fed. 68 (C. C. A. Ga.); *obiter*, *Trust Co. v. Wallis*, 11 A. B. R. 360, 126 Fed. 464 (C. C. A. Penn.); In *re Schachter*, 9 A. B. R. 499, 109 Fed. 1010-1015 (D. C. Ga.); In *re Tudor*, 2 A. B. R. 808, 96 Fed. 942 (D. C. Colo.); In *re Tudor*, 4 A. B. R. 78, 100 Fed. 796 (D. C. Colo.); *impliedly*, *Boyd v. Glucklich*, 8 A. B. R. 393, 116 Fed. 131 (C. C. A. Iowa); *impliedly*, In *re Frankfort*, 15 A. B. R. 210 (D. C. N. Y.); *impliedly*, In *re Henderson*, 12 A. B. R. 351, 130 Fed. 385 (D. C. Pa.); *obiter*, In *re Adler*, 12 A. B. R. 19, 129 Fed. 502 (D. C. Tenn.); *inferentially*, In *re Lasch*, 12 A. B. R. 158 (D. C. Penn.); *obiter*, *inferentially*, In *re Felson*, 10 A. B. R. 716, 124 Fed. 288 (D. C. N. Y.); *instance*, In *re Weinreb*, 16 A. B. R. 702, 146 Fed. 243 (C. C. A. N. Y.); *instance*, In *re Friedman*, 2 A. B. R. 307 (Ref. N. Y.). *Instance*, bank deposit as "Manager" treated as individual, In *re Kurtz*, 11 A. B. R. 129, 125 Fed. 992 (D. C. Penn.); [1867] In *re Salkey*, 21 Fed. Cas. No. 12,253; 11 N. B. Reg. 423; [1867] In *re Dresser*, Fed. Cas. 4,077; [1867] In *re Peltasohn*, Fed. Cas. 10,912; [1867] In *re Kempner*, Fed. Cas., 7,689; [1867] In *re Speyer*, Fed. Cas. 13,239.

Contra, In *re Ogles*, 2 A. B. R. 514 (Ref. Tenn.).

jection that the bankruptcy law does not confer power upon the court to compel a bankrupt to surrender his estate to a trustee, there are two sufficient answers. In the first place, the act does give the power specifically. The seventh section requires the bankrupt to 'submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate.' Subdivision 7 of § 2 expressly confers power upon the court to 'cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto;' and subdivision 13 of the same section also expressly confers power upon the court to 'enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment, or fine and imprisonment.'"

In *re Rosser*, 4 A. B. R. 153, 101 Fed. 562 (C. C. A. Mo., in lower court, 2 A. B. R. 746, 96 Fed. 308): "There can be no doubt that under the general rules of law and under these specific provisions of the Bankrupt Act, the court and the referee were vested with the right and subjected to the duty of making the necessary orders to require the bankrupt and all other persons who had the possession and control of the property of the bankrupt estate to surrender and deliver it to the trustee. Such orders constitute one of the essential means by which the court and the referee are empowered to collect the estate of the bankrupt. It is a broad and comprehensive power, and great caution should be exercised to observe its limits and to issue under it only lawful orders. But, without its lawful exercise, the administration of the estates of bankrupts would in many cases be so complicated and tedious that all the assets would be wasted in litigation, and the beneficent purpose of the bankrupt law would fail of accomplishment. Two essential facts limit this power and condition its lawful exercise. They are that the money or property directed to be delivered to the trustee or other officer of the court is a part of the bankrupt estate, and that the bankrupt or person ordered to deliver it has it in his possession or under his control at the time that the order of delivery is made. If the property is not a part of the estate, obviously no lawful order for its delivery to the trustee can be made. If the money or property in controversy was a part of the estate of the bankrupt, but before the order for its delivery is made he has squandered, disposed of, or lost it, so that it is not in his control or possession, and he cannot obtain and deliver it at the time the order of delivery is made, or within a reasonable time thereafter, it cannot be a lawful order, because the court may not order one to do an impossibility, and then punish him for refusal to perform it. The punishment of the bankrupt for such acts must be sought under the provisions of the bankrupt law relative to the fraudulent concealment of the property of the estate and the making of false oaths relative thereto. But, if it appears to the satisfaction of the referee or the court that property of the bankrupt estate is in control or possession of the bankrupt, a lawful order for its delivery to the trustee may be made, and a refusal to obey this order may be punished as a contempt of court, both under the general law relative to contempts and under the specific provisions of the Bankrupt Act."

Obiter, In *re Barton Bros.*, 18 A. B. R. 100, 149 Fed. 620 (D. C. Ark.): "Under the general rules of law, and under the specific provisions of the Bankruptcy Act, a court of bankruptcy has power and jurisdiction to make an order requiring the bankrupt to pay or deliver to his trustee in bankruptcy money or other property found to be in his possession or control, consti-

tuting a part of his estate in bankruptcy, and which he has not surrendered or accounted for, and to enforce his obedience to such order by commitment as for contempt.

"Two essential facts condition the lawful exercise of the power to require a bankrupt or other person to pay or deliver to the trustee money or property in his possession. They are that the money or property directed to be delivered to the trustee is a part of the bankrupt estate, and that the bankrupt or person ordered to deliver it has it in his possession or under his control at the time the order of delivery is made."

In *re Kane*, 10 A. B. R. 478, 125 Fed. 984 (D. C. Penn.): "It is not intended to punish the bankrupt for concealing assets from his trustee, for which the law otherwise provides; nor for frauds or delinquencies of which he may appear to be guilty."

In *re Cotton Co.*, 14 A. B. R. 194, 134 Fed. 477 (D. C. Ark.): "On behalf of the respondent it is urged that, to warrant a finding against respondent, the evidence must be beyond reasonable doubt; that in view of the fact that, if an order is made requiring the respondent to pay over the money, and he fails to comply with it, he will be imprisoned for contempt of court, it is urged that the proceeding must be treated as a criminal proceeding, and be governed by the same rules. This court cannot assent to this proposition. If the fact that a failure to comply with the order of the court may result in imprisonment of the respondent for contempt makes it a criminal case, many proceedings, and especially proceedings in courts of equity, would have to be treated as criminal proceedings. The failure on the part of a defendant to execute a conveyance decreed by a court of equity in a proceeding for specific performance may be enforced by imprisonment as for contempt. Refusal to answer interrogatories in a bill of discovery, refusal to pay alimony in a divorce suit, disobedience to a writ of mandamus, or violation of an injunction may result in such punishment; but no one will contend that for this reason such proceedings are in the nature of criminal actions. The punishment for contempt in bankruptcy proceedings is simply for disobedience of the judgment of the court after it is found that the respondent has money or property belonging to the bankrupt estate in his possession or under his control, and, although able to comply with the order of the court, willfully refuses to do so. These provisions in the Bankrupt Act, authorizing courts of bankruptcy to enforce obedience to their orders by punishment as for contempt are neither novel nor unusual. They were included in every Bankruptcy Act, and similar provisions have been enacted by almost every State in the Union, including the State of Arkansas. In proceedings supplemental to or in aid of execution, courts are authorized by these statutes to enforce the surrender of assets subject to execution, and for this purpose may commit to jail any person refusing to comply with such order."

§ 1820. **No Matter in What Capacity Bankrupt Holds.**—No matter in what capacity the bankrupt may be holding, if he have actual possession, custody or control, it is the bankruptcy court to which resort must be had.⁴⁴

44. In *re Moody*, 12 A. B. R. 718, 131 Fed. 525 (D. C. Iowa), where the bankrupt was in actual possession but was holding as "agent" for an adverse claimant.

Inferentially, In *re Mundle*, 14 A. B. R. 680, 139 Fed. 691 (D. C. N. Y.); In *re Reynolds*, 13 A. B. R. 245, 133 Fed. 584 (D. C. Mont.).

In *re Reynolds*, 11 A. B. R. 258, 127 Fed. 760 (D. C. Mont.), where the bank-

Even if his possession be not exclusive, yet the jurisdiction of the bankruptcy court may not necessarily be defeated;⁴⁵ and the trustee may enter the private residence of the bankrupt, or upon his exempt homestead, to gain possession, even though it be exempt from entrance for levy of execution.⁴⁶

§ 1821. Officers of Bankrupt Corporation, Subject.—Thus, the officers of a bankrupt corporation are subject to such summary jurisdiction, as being “the bankrupt.”⁴⁷

Obiter, In re Royce Dry Goods Co., 13 A. B. R. 267, 133 Fed. 100 (D. C. Mo.): “Is it any answer in law to say that such assets is the obligation of the legal entity, the corporation, and not of the active, managing officer? The artificial being, the corporation, breathes, lives, and acts by and through its managing officers. It has no hands to hold and no pockets to conceal property. The actual custody and control of its assets are in and by its manager and director. * * * So it should follow that, for the assets intrusted to the hands of the managing officers of the bankrupt concern, they are jointly and severally liable.”

Inferentially, In re Alphin & Lake Cotton Co., 12 A. B. R. 654, 131 Fed. 826 (D. C. Ark.): “Lake and Alphin, being officers of the bankrupt corporation, it was their duty, under the law, to prepare and make oath to the schedules of assets and liabilities of their corporation, as corporations can only act through their officers. In fact, for this purpose, and informing the trustee or referee as to the assets of their bankrupt concern, they are the real parties; the word ‘persons,’ as used in the Bankruptcy Act, including ‘officers of corporations.’”

In re Muncie Pulp Co., 14 A. B. R. 73, 139 Fed. 546 (C. C. A. N. Y.): “Surely, the bankrupt law is not so vitally defective that the court cannot direct the president of the bankrupt corporation to turn over property of the bankrupt in his hands or under his control.”

Likewise, it has been held, that an attorney for the bankrupt may be subject thereto;⁴⁸ although in this case the evidence was deemed insufficient.⁴⁹

§ 1822. Summary Orders on Agents and Others.—Also, if the property is in the hands of a mere agent of the bankrupt, or of one holding without claim of any beneficial interest therein (other, perhaps, than for his undisputed charges as bailee), and the agent

rapt was a chattel mortgagor in actual possession.

In re Smith, 3 A. B. R. 95, 100 Fed. 795 (D. C. Ga.), where the bankrupt was in actual possession as agent of wife.

In re Bender, 5 A. B. R. 632, 106 Fed. 873 (D. C. Ark.), in which case property was held by the bankrupt as agent of the mortgagee and peaceably delivered over by him to the marshal.

Compare, on the facts, In re Emrich, 4 A. B. R. 91, 101 Fed. 231 (D. C. Penn.).

45. Inferentially, In re Brooks, 1 A. B. R. 531, 91 Fed. 508 (D. C. Vt.).

46. *Obiter*, In re Coffman, 1 A. B. R. 530, 93 Fed. 432 (D. C. Tex.).

47. In re Alphin & Lake Cotton Co., 14 A. B. R. 194, 134 Fed. 477 (D. C. Ark.).

48. Impliedly, In re Gilroy v. Bloomfield, 14 A. B. R. 627, 140 Fed. 733 (D. C. N. Y.).

49. Apparently contra, but perhaps simply so on the facts, In re Davis Tailoring Co., 16 A. B. R. 486, 144 Fed. 285 (D. C. N. J.).

or person in possession refuses to surrender it to the trustee, the bankruptcy court may, upon due notice and hearing, summarily order the agent or person in possession to surrender it, under penalty of punishment for contempt; and a plenary suit is not necessary.⁵⁰

Mueller v. Nugent, 184 U. S. 1, 7 A. B. R. 224 (reversing *In re Nugent*, 5 A. B. R. 176, 105 Fed. 581, and affirming the lower court, 4 A. B. R. 747, 104 Fed. 530; for referee's decision, same case, see 2 N. B. N. & R. 714; distinguished and explained in *Jacquith v. Rowley*, 9 A. B. R. 529, 188 U. S. 620, and *In re Wells*, 8 A. B. R. 75, 114 Fed. 222): "The proposition was that, as matter of law, where property of the bankrupt has come into the hands of a third party before the filing of the petition in bankruptcy, as the agent of the bankrupt, and to which he asserts no adverse claim, the bankruptcy court has no power by summary proceedings to compel the surrender of the property to the trustee in bankruptcy duly appointed.

"In other words, the question reduces itself to this: Has the bankruptcy court the power to compel the bankrupt, or his agent, to deliver up money or other assets of the bankrupt, in his possession or that of some one for him, on petition and rule to show cause? Does a mere refusal by the bankrupt or his agent so to deliver up oblige the trustee to resort to a plenary suit in the Circuit Court or a State court, as the case may be?

"If it be so, the grant of jurisdiction to cause the estates of bankrupts to be collected, and to determine controversies relating thereto, would be seriously impaired, and, in many respects, rendered practically inefficient.

"The bankruptcy court would be helpless indeed if the bare refusal to turn over could conclusively operate to drive the trustee to an action to recover as for an indebtedness, or a conversion, or to proceedings in chancery, at the risk of the accompaniments of delay, complication, and expense, intended to be avoided by the simpler methods of the Bankrupt Law."

Thus, as to the bankrupt's bank deposit,

In re Kane, 12 A. B. R. 445, 131 Fed. 386 (D. C. N. Y.): "* * * the bankruptcy court had authority and jurisdiction in a summary proceeding to compel the delivery to the trustee of money or other property belonging to the bankrupt, where it appears that such property is merely held as agent or bailee, and where it is withheld from the possession of the trustee." This was the case of an order on a bank to turn over bankrupt's deposit.

Thus, as to the wife's possession without any claim of adverse interest.

In re Moore, 5 A. B. R. 151, 104 Fed. 896 (D. C. W. Va.): "While title to property or moneys claimed by the trustee to belong to the bankrupt are not ordinarily to be tried by the District Court, and the claims of ownership of adverse claimants summarily be passed upon and determined by this court,

^{50.} *In re Muncie Pulp Co.*, 14 A. B. R. 71, 139 Fed. 546 (C. C. A. N. Y.); *obiter*, *Trust Co. v. Wallis*, 11 A. B. R. 360, 126 Fed. 464 (C. C. A. Penn.); *impliedly*, *In re Feldser*, 14 A. B. R. 216, 134 Fed. 307 (D. C. Penn.); *obiter*, *Whitney v. Wenman*, 14 A. B. R. 49, 198 U. S. 539.

Instance, *In re Davis*, 9 A. B. R. 674 (D. C. Tex.), quoted *ante*, § 1819: Bank holding proceeds of sale, made within the four months period, of the entire stock of merchandise, as trustee to pro rate among all creditors cannot, by applying the same on its own claim after adjudication (or after the filing of the petition), become thereby an adverse claimant: it remains a mere agent.

yet, the ownership not being contested, the trustee should not be driven to his action to obtain possession of property of the bankrupts simply because such property is in the possession or custody of another not claiming ownership thereof. Were this the case, the trustee might be compelled to institute suit for every separate item of the bankrupt's estate not in the personal, physical possession of the bankrupt at the date of the adjudication; and the malice, caprice, or whim of the bankrupt, or the various parties who chanced to have physical control of portions of the bankrupt's estate at that date, could, on any pretext, or without pretext, nullify the entire purpose of the act."

Thus, as to assignees,⁵¹

Obiter, In re Knickerbocker, 10 A. B. R. 383, 121 Fed. 1004 (D. C. N. Y.): "When, however, such property is merely held in the capacity of agent or bailee, the person holding it has no adverse claim thereto. * * * In such case the referee has jurisdiction by summary procedure to compel the delivery to the trustee of property belonging to the bankrupt estate, and withheld from his possession and control."

Thus, as to a "seat" or "membership" in a stock exchange; the stock exchange holding the proceeds of sale of the seat, is not an adverse holder.⁵²

§ 1823. **Corporation Agent of Bankrupt, Subject Thereto.**—And it has such jurisdiction even where the agent is a corporation, the order being made upon the officer or officers of the agent corporation.⁵³

§ 1824. **Part Adversely Held, Part Held as Agent or Not under Claim of Beneficial Interest.**—And where part of the property is held as mere agent of the bankrupt, but the remainder is claimed by the agent as his own, summary jurisdiction exists to order the return of the property not claimed; but not of the property claimed.⁵⁴

Likewise, the right to proceed summarily is not divested because the assignee in possession happens to be also an adverse claimant of part of the property in his individual capacity.⁵⁵

Inferentially, In re Thompson, 11 A. B. R. 719, 128 Fed. 575 (C. C. A. N. Y.): In this case, however, it is to be noted that the assignee had voluntarily appeared in the first instance. The court says: "It is manifest that the court had jurisdiction to compel the assignee under the void state assignment to render an account. Bryan v. Bernheimer, 181 U. S. 188, 5 Am. B. R. 623, 45 L. Ed. 814. This proposition is not disputed. The petitioner, Murray, recognizing the authority of the court, appeared voluntarily before the referee, presented his account and gave testimony regarding it. Having once acquired

51. Compare, Louisville Trust Co. v. Comingor, 7 A. B. R. 421, 184 U. S. 25. In this case, however, it does not appear that the assignee still had possession. Indeed, the inference is to the contrary. See also, ante, § 1665.

52. Odell v. Boyden, 17 A. B. R. 755, 150 Fed. 731 (C. C. A. Ohio).

53. In re Muncie Pulp Co., 14 A. B. R. 71, 139 Fed. 546 (C. C. A. N. Y.); instance, In re Kane, 12 A. B. R. 445, 131 Fed. 386 (D. C. N. Y.); In re Davis, 9 A. B. R. 670 (D. C. Tex.).

54. In re Lebrecht, 14 A. B. R. 445, 135 Fed. 878 (D. C. Tex.).

55. Obiter, In re Muncie Pulp Co., 14 A. B. R. 73, 139 Fed. 546 (C. C. A. N. Y.).

jurisdiction of the proceeding, the court did not lose it because the investigation took a wider range than the assignee expected or intended. His present contention, carried to its logical conclusion, is that the court acquired jurisdiction of those items which he chose to admit, but not to those which he chose to dispute, and that this jurisdiction was lost the moment he asserted a claim of title in his individual capacity. If this contention were sustained an assignee for the benefit of creditors could, by the mere assertion of a colorable claim, paralyze the arm of the court of bankruptcy and defeat the intent and purpose of the law. It is asserted by the counsel for the trustee that since the amendments of 1903, the District Court has jurisdiction of any action or proceeding which the trustee may hereafter institute if the petitioner's present contention be upheld, and that a reversal of the order, while subjecting the parties to the expense and delay of retaking the testimony, will be absolutely inconsequential for the reason that the same result must inevitably be reached in the new proceeding. Whether this contention be well founded or not we do not decide, but the possibility that it may be furnished an additional reason why a decision reached after such careful consideration should not be overthrown. The petitioner was accorded the fullest opportunity to establish his defense, every fact bearing upon the controversy is now before the court and even though the question were involved in greater doubt than it is it would seem to be the duty of the court to resolve it in favor of jurisdiction."

§ 1825. **Lienholder in Possession after Satisfaction of Lien.**—And a lienholder in possession after satisfaction of his lien may be ordered summarily to surrender the surplus.⁵⁶

§ 1826. **Whether Filing of Petition to Redeem from Undisputed Liens Gives Summary Jurisdiction to Order Surrender on Tender of Amount Due.**—The filing of a petition to redeem property from undisputed liens perhaps gives jurisdiction summarily, upon due notice and hearing of course, to order the surrender of the property on tender to the lienholder of the amount due, such lien perhaps not existing as an adverse beneficial interest in the property. Nevertheless, this doctrine comes dangerously near to a claim of summary jurisdiction over adverse claimants in possession, and is of doubtful authority.

Under this doctrine, however, even bailees, although lienholders by virtue of the bailment, and in actual possession at the time of the bankruptcy, have been held subject to the summary jurisdiction of the bankruptcy court, their liens following the property into the bankruptcy court.⁵⁷

And a mortgagee of real estate probably may, upon tender to him of his mortgage debt, be required to execute an assignment or release of the mortgage, by summary order of the bankruptcy court.⁵⁸

56. *In re Wiesen Bros.*, 15 A. B. R. 27, 138 Fed. 164 (D. C. Pa.).

57. *In re Pratesi*, 11 A. B. R. 319, 126 Fed. 588 (D. C. Del.), where the bankruptcy court on summary proceedings ordered a liveryman holding possession under his lien to surrender possession to the bankruptcy court.

58. *In re Bacon*, 12 A. B. R. 730, 132 Fed. 157 (D. C. N. Y.). However, this was a case of real estate which usually is in the bankrupt's possession.

§ 1827. **Custodians and Court Officers in Possession under Nullified Legal Proceedings, Not Adverse Claimants.**—Custodians or court officers in possession, under void legal proceedings, as sheriffs, receivers, assignees, trustees, clerks of the court or other officers in possession of property seized under legal proceedings nullified by the bankruptcy, or in possession of the proceeds thereof, are not adverse claimants and have no beneficial interest in the property.⁵⁹

Bryan v. Bernheimer, 5 A. B. R. 623, 181 U. S. 188: "The general assignment * * * did not constitute Davidson an assignee for value, but simply made him an agent of Abraham for the distribution of the proceeds of the property among Abraham's creditors. * * * The present case, involves no question of jurisdiction over a suit by a trustee against a person claiming an adverse interest in himself."

Bear v. Chase, 3 A. B. R. 746, 99 Fed. 920 (C. C. A. S. C.): "These attaching creditors do not occupy the relation of third persons in possession of, or adverse claimants dealing with the property of the bankrupt. * * * They are but creditors of the bankrupt, who have, in their effort to collect their money, sought an advantage which the law does not give and they cannot gain any favored position by reason of an act of theirs which the law condemns."

Leidigh Carriage Co. v. Stengel, 2 A. B. R. 383, 95 Fed. 645 (C. C. A. Ohio.): "It is generally true that, as between courts of concurrent jurisdiction, the court which first obtains possession of the res must retain possession of it

59. See ante, "Conflict of Jurisdiction," § 1662.

In re *Thompson*, 11 A. B. R. 719, 128 Fed. 575 (C. C. A. N. Y., affirming 10 A. B. R. 242); *Clark v. Larremore*, 9 A. B. R. 476, 188 U. S. 486 (affirming In re *Kenney*, 5 A. B. R. 355, 105 Fed. 897 (C. C. A. N. Y.)); In re *Knickerbocker*, 10 A. B. R. 381, 121 Fed. 1004 (D. C. N. Y.).

In re *Knight*, 11 A. B. R. 1, 125 Fed. 35 (D. C. Ky.): The reasoning of this case is somewhat defective although its conclusions are correct. Had the receivership been confined merely to the custody of the property covered by the mortgage sought to be foreclosed it would not have been nullified. It was nullified because it sought to seize property by legal proceedings not covered by the lien.

In re *Lengert Wagon Co.*, 6 A. B. R. 355, 110 Fed. 927 (D. C. N. Y.). Instance, In re *Geiser*, 12 A. B. R. 208 (D. C. Mont.), in which case a constable turned back to the purchaser at execution sale the excess after satisfying a judgment for a labor claim and then denied receipt of excess.

Superseding Custody of Court Officers under Execution, Though Levy Made before the Four Months.—The same doctrine has been announced as to court officers in possession under valid execution (but not if in possession in equity where the court itself has direct custody of the res) even where the execution levy was made prior to the four month's period and is conceded to be valid. See ante, § 1582, footnote.

In re *Vastbinder*, 13 A. B. R. 148, 132 Fed. 718 (D. C. Penn.), quoted ante, § 1582, note.

In re *Baughman*, 15 A. B. R. 23, 138 Fed. 742 (D. C. Penn.), quoted ante, at § 1582, note. But in this case the property was real estate and was presumably in the actual custody of the bankrupt, thus differentiating the case slightly from In re *Vastbinder*, where the property involved was personal property.

In re *Booth*, 2 A. B. R. 770, 96 Fed. 943 (D. C. Ga.), quoted ante, at § 1582, note. This case, however, is somewhat out of harmony with the weight of authority. Thus it appears in this case that a special judgment was obtained against the particular property of which the execution creditor already held a deed as security. In effect the execution was simply the enforcement of a lien already existing, not the obtaining of a new lien within the four months period and according to the usual rules in such cases the court first obtaining possession of the res should have been permitted to retain it.

until the res has been finally disposed of, and any one else interested in the res must apply to that court if he desires relief with respect to the property in the possession of that court. But, as between district courts sitting in bankruptcy and State courts for the administration of insolvent estates, there is no concurrent jurisdiction. The constitution of the United States, by giving to Congress the power to pass uniform bankruptcy laws, gives to the courts in which Congress shall vest this power paramount jurisdiction in bankruptcy proceedings. The orders in bankruptcy are therefore superior to those of a State insolvency court. Section 720, which forbids a court of the United States from enjoining proceedings in a State court, expressly except bankruptcy proceedings. This is the plain intimation, by Federal and paramount law, that, where a Federal Bankruptcy Court shall take jurisdiction, there the State insolvency court must yield. Hence it is that the assignee for the benefit of creditors of the defendant company, the grantee in the deed which is by the Federal law an act of bankruptcy, may be made a party in the Bankruptcy Court, and may be required to hold the assets of the bankruptcy subject to the order of the District Court in bankruptcy."

Davis v. Bohle, 1 A. B. R. 415, 92 Fed. 325 (C. C. A. Mo., affirming, *In re Sievers*, 1 A. B. R. 117, 91 Fed. 366): "Inasmuch as an assignee under a voluntary deed of assignment is not a purchaser for value of the assigned property, but is merely an agent or trustee of the assignor and his creditors, and holds the assigned property solely for their benefit, Congress, when it provided that a general assignment should be regarded as an act of bankruptcy, did not deem it necessary to say further, and in so many words, that the assigned property might be taken from the custody of the assignee at the instance of creditors, if the assignor was subsequently adjudged a bankrupt."

In re Francis-Valentine Co., 2 A. B. R. 525, 94 Fed. 793 (C. C. A. Calif., affirming 2 A. B. R. 188): "In the present case the sheriff had possession, not in opposition to the right of the bankrupt, nor in antagonism to its title, but his possession was based entirely upon the assumption that the title was in the bankrupt. Upon the adjudication of bankruptcy the sheriff's right to the possession terminated, for the writs were dissolved, and upon the appointment of a trustee in bankruptcy the right to the immediate possession vested in the latter. There was no question of conflicting claims to be adjudicated by the District Court."

In re Kennedy, 5 A. B. R. 355, 105 Fed. 897 (C. C. A. N. Y., affirming 3 A. B. R. 353, and itself affirmed in 9 A. B. R. 476, 188 U. S. 486): "But, under the provisions of the Bankrupt Act, the judgment and the levy are to be held null and void. As a consequence, the goods have been forcibly removed, without right, from the bankrupt's possession by Clark and the sheriff, and are still to be considered a part of his estate, for the return of which the court (by explicit provision in the section) may provide summarily by order, except that the title of a bona fide purchaser for value shall not be interfered with. It makes no difference whether the creditor and sheriff, whose only title rests on 'null and void' proceedings, hold the goods themselves, or the money which represents them, nor whether, as soon as the sheriff sells under execution, it is his duty to turn over the proceeds to the judgment creditor, nor whether under the law of New York the sheriff holds the proceeds as the agent of the creditor, nor that ordinarily such proceeds would be the property of the judgment creditor. They cannot be his property in this case, because the only proceedings through which he can make out title to retain their possession are such as the bankruptcy courts must hold to be null and void.

"A further objection to the granting of the order, based on an alleged part-

nership between the bankrupt and a person who put some money in the business, is sufficiently discussed in the opinion of the district judge."

In *re* Tune, 8 A. B. R. 286, 115 Fed. 906 (D. C. Ala.): "When the only right of possession by a State court of attached property is based on an attachment lien, which is annulled by the adjudication in bankruptcy, the State court loses all jurisdiction of the rem, which is transferred into the exclusive jurisdiction of the court of bankruptcy. There is no longer any right of possession in the officer of the State court, who then holds as bailee for the person rightfully entitled to possession, and becomes a trespasser if he fails to deliver on proper demand."

In *re* Chase, 10 A. B. R. 681, 124 Fed. 753 (C. C. A. R. I.): "* * * even if assignments were strictly void as such, the assignees, until the intervention of proceedings in bankruptcy, would stand as the agents of the assignors, coupled with possession; and so, having acted innocently in their behalf, they would become entitled as such agents to receive their disbursements and a reasonable compensation, and to hold a lien therefor on the property in their hands. This was well stated by Mr. Justice Brown, then a district judge, in *Hunter v. Bing* (D. C.) 9 Fed. 277, 281, where, under a previous statute in bankruptcy, he said that the respondent in that case, who was an assignee under a common law assignment, might be regarded as a 'factor or agent' of the assignor; so that he might be held 'as having done what he did under an implied request to that effect, and to have acquired thereby an equitable lien upon the property in his possession for his necessary 'services and disbursements therein, which should be respected in bankruptcy so far as they have been necessary and beneficial to the general creditors, or such as the assignee in bankruptcy would otherwise have incurred.' Mr Justice Gray, in *Bryan v. Bernheimer*, 181 U. S. 188, 192, 193, 5 Am. B. R. '623, noticed the same fact when he said that an assignee under a general assignment is not one for value, but simply 'an agent' for the distribution of the proceeds of the debtor's property among his creditors.

"Indeed, this proposition of agency is well illustrated by the fact that, ordinarily, common law assignments contain a clause expressly making the assignee the agent of the assignor; but this clause, of course, is not necessary, because, if the assignment becomes ineffectual as an assignment and as creating a technical trust, the agency is implied by law. On the other hand, it is not to be inferred that the assignor and the assignee are at liberty to create the terms of this agency at their own option. From the time the assignor declares his insolvency by making an assignment, his property must be held equitably for the benefit of his creditors, and he can do nothing which will embarrass or prejudice them in realizing therefrom, whether the result is that they are administered under the common law assignment or ultimately go into the hands of a trustee in bankruptcy. Therefore, in no event can he impress on them a lien for any amount of compensation arbitrarily agreed on. Anything in this direction beyond what would be reasonable and equitable would be contrary to the policy of the law, and would be declared invalid by the court having jurisdiction of the trust if the assignment is worked out at common law, or by the court in bankruptcy if the property finally comes under its control."

§ 1828. **But, until Liens Nullified, Custodians and Court Officers, "Adverse Claimants."**—But, unless the legal liens are nullified, that is to say, until adjudication in bankruptcy takes place, such custodians and court

officers are adverse claimants, representing creditors in possession, and may not be proceeded against summarily, although, on subsequent adjudication, they may thus be proceeded against.⁶⁰

In *re Andre*, 13 A. B. R. 133 (C. C. A. N. Y.): "The attachment was process which the sheriff was bound to enforce for the benefit of the plaintiff in the action, and though it would be dissolved in the event of an adjudication of bankruptcy, it was his right and his duty to retain the property until the attachment should be dissolved, and even then until by competent authority he should be required to surrender it. Representing the party who had obtained the attachment, and as an officer whose duty it was to hold and dispose of the property in obedience to the process, he was in possession under a title paramount and adverse to that of the alleged bankrupt and he asserted his adverse title upon the application to require him to surrender the property by insisting that the application should be made to the court that had issued the process and by setting up his own lien for poundage."

Thus, a sheriff holding funds under an attachment and claiming a lien thereon for his poundage has been held an adverse claimant, not subject to summary order before adjudication.⁶¹

But, of course, where the proceeds of execution sale are turned over to the execution creditor, summary process will not lie, since the lien no longer exists and the creditor has become an adverse claimant in possession.⁶²

§ 1829. Court Officers Holding under Nullified Legal Proceedings Subject to Summary Order.—And such agent or person in possession, even if he be a court officer, may be ordered to surrender the property to the trustee in bankruptcy, without the necessity of a plenary suit: a simple motion with notice upon the person, or upon the sheriff or other officer, upon the receiver or assignee, to show cause why he should not be ordered to surrender the property, being all that is necessary.⁶³

§ 1830. Order May Not Require Surrender of More than Is in Officer's Hands.—The order on the assignee, receiver or other court officer cannot require him to turn over more than he actually has in his possession. He cannot be required, on summary order, to make good disbursements he already has made under the assignment or levy before the bankruptcy adjudication.⁶⁴

60. *Mather v. Coe*, 1 A. B. R. 504, 92 Fed. 333 (D. C. Ohio); obiter, in *Keegan v. King*, 3 A. B. R. 79, 84, 96 Fed. 758 (D. C. Ind.). See ante, § 1662 and § 1818.

61. In *re Andre*, 13 A. B. R. 132 (C. C. A. N. Y.).

62. In *re Knickerbocker*, 10 A. B. R. 382, 121 Fed. 1004 (D. C. N. Y.).

Also, see cases cited under subject of "Annulment of Legal Liens," under § 67 (f), ante, § 1461.

63. See, "Assignee May Be Ordered Summarily to Surrender the Assets," ante, § 1611.

See, "Bankruptcy Court May Issue Order to Surrender the Property Involved," ante, §§ 1794, 1795.

64. See, ante, "No Summary Order as to Sums Already Disbursed," § 1612.

SUBDIVISION "A."

PROCEDURE ON SUMMARY PETITIONS.

§ 1831. **Procedure on Summary Petitions, in General.**—Summary jurisdiction over bankrupts and agents and others in possession, not claiming adverse interest, is exercised without the usual formalities of recognized actions and without usual rule days, but, nevertheless, must be on due and reasonable notice and hearing, without impairment of constitutional rights.

§ 1832. **What is Summary Process.**—Summary process is process, either with or without notice to the party affected, not made in accordance with the established rule days of regular suits, the court proceeding usually by order and not by judgment and execution. The process may be either by order for surrender or injunction, or by notice to appear and set up rights or be debarred.⁶⁵

Inferentially, *Doroshov v. Ott*, 14 A. B. R. 37, 134 Fed. 740 (C. C. A. N. J., Gray, J.): "Summary proceedings by the bankrupt court for the determination of questions of title against adverse claimants, have not ordinarily been countenanced in bankrupt legislation, and the courts have been careful to avoid giving sanction to such proceedings in a bankrupt court, as would deprive outside parties and adverse claimants of their 'day in court in the regular way—that is, by pleadings, trial and judgment.'"

But compare, contra, obiter, *In re Connolly*, 3 A. B. R. 842, 100 Fed. 620 (Ref. Pa.): "Another objection made was that the proceedings deprived the respondent of his property by summary process. The referee cannot find that a proceeding by petition and answer is a summary process. A petition duly answered and followed by proof, has the full force and effect of a bill in equity. In the case of *Milner v. Meek*, 95 U. S. 252, 24 L. Ed. 444, the effect of pleadings by petition and answer in a bankrupt suit are discussed. Chief Justice Waite, in giving the opinion of the court, states: 'The pleading filed by the assignee was appropriate in form for a petition in the bankrupt suit, but it was equally good in substance as a bill in equity. It contains a complete statement of the cause of action cognizable in equity, and a sufficient prayer for relief.' * * *

"In *Stickney v. Wilt*, 23 Wall. 150, 23 L. Ed. 50, the petition was in all its essential features like the one in the case above—*Milner v. Meek*. It was filed by an assignee in bankruptcy against lien creditors entitled as of the bankrupt suit, and addressed to the district judge. Like that in the case above it contained no formal prayer for a subpœna, but there was a prayer for relief. 'The petition contained every requisite of a good bill in equity, whether

65. And compare note, *Shutts v. Bank*, 3 A. B. R. 505 (D. C. Ind.), wherein it is apparently contended that a proceedings before a referee requiring a claimant to appear at a time certain and set up his rights to a certain fund in the custody of the bankruptcy court, is a plenary and not a summary proceeding.

Compare, inferentially, *Eyster v. Gaff*, 91 U. S. 525, cited in *Bardes v. Bank*, 4 A. B. R. 171, 174 U. S. 524. Also, compare, *Boyd v. Glucklich*, 8 A. B. R. 397, 116 Fed. 131 (C. C. A. Iowa). Compare, *In re Rochford*, 10 A. B. R. 611, 124 Fed. 182 (C. C. A. S. Dak.).

the pleadings be tested by the statement of the cause of action, or of the charging part of the bill, or by the prayer for relief.' Opinion by Clifford, J.

"A proceeding is summary where an order is made on the petition alone, as was the case in *In re Abraham* (2 Am. B. R. 266), 35 C. C. A. 592, 93 Fed. 767, previously cited; but where an answer to a petition is filed, and proof taken, respondent is not deprived of any right that he would have had if more formal proceedings by bill of equity had been instituted." It must be noted in this case however that the court had jurisdiction over the rem as well as by consent, and so summary proceedings were proper.

Compare, impliedly, *In re Steuer*, 5 A. B. R. 213, 104 Fed. 976 (D. C. Mass.): "It remains to consider if, under the form of a petition in bankruptcy, the defendants' rights have been protected as substantially as if the suit had been plenary. In order that proceedings to recover property may be validly commenced by petition in bankruptcy, the petition must, as was suggested in *Milner v. Meek*, 95 U. S. 252, 257, 24 L. Ed. 444, contain a complete statement of the cause of action, and a sufficient prayer for relief. Upon such a petition process must be issued, and the parties must be given full opportunity to present evidence and arguments in their own behalf. In other words, though the formal requisites of a bill in equity may be wanting, yet the substantial requisites of equitable justice must be complied with as fully in a petition in bankruptcy as in a bill in equity. An injunction should not issue *ex parte*, unless in case of necessity. An order to show cause should precede the issuance unless the petitioner shows that delay will work irreparable injury. In this case it appears that all substantial requirements were met. Originally, it is true, an injunction was issued *ex parte*, but that may have been done because the referee deemed that irreparable injury would be wrought by delay. In any event, that preliminary injunction is not now in question. All parties were given full opportunity to introduce evidence and present arguments, and they seem to have availed themselves of the opportunity."

Compare, *In re McMahon*, 17 A. B. R. 534, 147 Fed. 685 (C. C. A. Ohio): "The proceeding to which the petitioner McMahon was made a party was not a summary one in the strict sense of that term. It did not differ in any essential from that sustained in *Whitney v. Wenman*. Nominally an application for an order to sell property of the bankrupt in possession of the assignee, it was in its essence a petition to bring in persons asserting liens for the purpose of determining the rights of such persons, and to sell the property free from all liens. The defendants were made such by subpoena, and required to appear and answer or defend. It was in substance a plenary suit. In *Whitney v. Wenman*, the court said of the jurisdiction to determine claims to or upon the property of the bankrupt in possession of the trustee under § 2, clause 7, that it did not perceive 'that it makes any difference that the jurisdiction is not sought to be asserted in a summary proceeding, but resort is had to an action in the nature of a plenary suit, wherein the parties can be fully heard after the due course of equitable procedure.'"

§ 1833. Summary Orders to Surrender Assets Not New Function.

—It is no new function for courts of equity to require surrender of property by bankrupts and others not claiming adversely: courts of equity have always had the power.⁶⁶

⁶⁶ *In re Purvine*, 2 A. B. R. 787, 96 Fed. 192 (C. C. A. Tex.). Impliedly, *In re Rosser*, 4 A. B. R. 156, 101 Fed. 653 (C. C. A. Mo.).

In re Cotton Co., 14 A. B. R. 197 (D. C. Ark.): "These provisions in the Bankruptcy Act, authorizing courts of bankruptcy to enforce obedience to their orders by punishment as for contempt are neither novel nor unusual. They were included in every Bankruptcy Act, and similar provisions have been enacted by almost every State in the Union, including the State of Arkansas. In proceedings supplemental to or in aid of executions, courts are authorized by these statutes to enforce the surrender of assets subject to execution, and for this purpose may commit to jail any person refusing to comply with such order."

§ 1834. Right of Trial by Jury Not Violated Thereby.—The right of trial by jury is not violated by summary process.

Ripon Knitting Wks. v. Schreiver, 4 A. B. R. 300, 101 Fed. 810 (D. C. Wash.): "As a court of bankruptcy, this court is a special tribunal, and when a case proceeds according to the usual practice in courts of bankruptcy a party against whom a decision is rendered has no more right to complain of being deprived of his rights without due process of law than have parties against whom judgments are rendered in equity or admiralty cases."

§ 1835. Bankrupt Ordered to Execute Necessary Papers.—The bankrupt may be ordered to execute assignments, applications and other papers necessary to obtain possession or title.

O'dell v. Boyden, 17 A. B. R. 759, 150 Fed. 731 (C. C. A. Ohio): "Only through a court of equity can the pecuniary value of such an asset be realized to creditors or assignees. Only by decree in personam compelling the bankrupt member, can such a transfer of membership be effectuated as will put the buyer in the place of Henrotin as a member. Over him for that purpose the bankrupt court has exclusive control, and, in this sense, also, may it be said, that the 'seat' or 'membership' was in custodia legis when the trustee sought the aid of the court to adjudicate the claims and liens asserted by O'Dell."

Obiter, In re Granite City Bk., 14 A. B. R. 407, 137 Fed. 818 (C. C. A. Iowa). "As to property without the domain of the National Act, § 7, subd. 5, requires the bankrupt to execute transfers thereof to the trustee in bankruptcy."

§ 1836. Referee Has Jurisdiction to Make Summary Order.—The referee has jurisdiction to make the summary order both on bankrupts,⁶⁸ and on others.

In re Miller, 5 A. B. R. 184, 105 Fed. 57 (D. C. Iowa): "Under the rule laid down in this case it is clear that the referee, upon whom is imposed the duty of collection through the trustee the property of the estate, had the right to enter an order directing the bankrupt to surrender to the trustee any money or property which the referee found to be in possession or under the control of the bankrupt, opportunity having been given to the bankrupt to be heard upon the question; and upon the refusal or neglect of the bankrupt to obey the order thus made the referee had the right to enter upon the record the

⁶⁸. In re Oliver, 2 A. B. R. 783 (D. C. Calif.); impliedly, In re Davis, 9 A. B. R. 670 (D. C. Tex.); impliedly, In re Purvine, 2 A. B. R. 787, 96 Fed. 192 (C. C. A. Tex.); In re Rosser, 4 A. B. R. 153, 101 Fed. 562 (C. C. A. Mo.); impliedly, In re Tudor, 2 A. B. R. 808, 96 Fed. 942 (D. C. Colo.).

fact that the bankrupt had refused obedience and therefore was in contempt of the court."

In *re* Mayer, 3 A. B. R. 533, 98 Fed. 839 (D. C. Wis.): "The jurisdiction of the referee to entertain the hearing in question and to enter the order thereon is undoubted."

Thus, the referee has like jurisdiction on agents and others not holding adversely.⁶⁹

Mueller v. Nugent, 7 A. B. R. 224; 184 U. S. 1 (reversing 5 A. B. R. 176 and affirming 4 A. B. R. 747): "It is now said that the only power the referee has to direct the taking possession of property is given by subsection 3 of § 38a, providing that the referee may exercise the powers of the judge in that respect on a certificate of the clerk that the judge is absent or unable to act. But that provision seems to refer only to the seizure of property by the marshal or a receiver prior to adjudication and the qualification of the trustee as provided by § 2, § 3e, and § 69, and it is at all events inapplicable here.

"We think the referee has the power to act in the first instance in matters such as this, when the case has been referred, and in aid of the court of bankruptcy, and exercises in such cases 'much of the judicial authority of that court.'"

In *re* Kane, 12 A. B. R. 445, 131 Fed. 386 (D. C. N. Y.): "If it be clearly a nullity, the referee has jurisdiction, and may by summary process require the surrender of the property so withheld to the trustee in bankruptcy."

And the referee has jurisdiction to make such summary order, even though it be an order upon a court officer.⁷⁰

The lack of power in the referee to enjoin courts or officers,⁷¹ is evidently construed not to be the same as lack of power to order the summary delivery of property by such officer.⁷²

§ 1837. Written Petition Requisite.—A written petition must be filed, making specific claim to certain described property in the possession or con-

69. In *re* Scherber, 12 A. B. R. 618, 131 Fed. 121 (D. C. Mass.); In *re* Alphin & Lake Cotton Co., 12 A. B. R. 654, 131 Fed. 824 (D. C. Ark.); impliedly, In *re* Feldser, 14 A. B. R. 216, 134 Fed. 307 (D. C. Penn.).

Impliedly, In *re* Northrop, 1 A. B. R. 427 (Ref. N. Y.), where the referee was held to have even power to issue injunctions upon court officers. This decision, however, in thus holding, goes too far. Instance, In *re* Cole, 14 A. B. R. 389 (D. C. Me., affirmed in 16 A. B. R. 302, 144 Fed. 392). But compare, *Smith v. Belford*, 5 A. B. R. 294, 106 Fed. 658 (C. C. A. Ohio).

70. Impliedly, upon the facts, In *re* Geiser, 12 A. B. R. 208 (D. C. Mont.); inferentially, In *re* Huddleston, 1 A. B. R. 572 (Ref. Ala.).

Compare, however, *Smith v. Belford*, 5 A. B. R. 294, 106 Fed. 658 (C. C. A. Ohio, affirming the doctrine of In *re* Nugent, 5 A. B. R. 176, afterwards reversed in *Mueller v. Nugent*, 184 U. S. 1).

Inferentially, In *re* Thompson, 11 A. B. R. 719, 128 Fed. 575 (C. C. A. N. Y.), in which case the Circuit Court of Appeals sustained a referee's summary order on an assignee who had voluntarily appeared in the first instance and later claimed to be an adverse party as to certain items.

Compare, also, as to the point that the taking of property out of one's possession and the restraining such one's use of it are but different acts of the exercise of the same jurisdiction, In *re* Ward, 5 A. B. R. 215, 104 Fed. 985 (D. C. Mass.).

71. See ante, "Functions of Referees." §§ 539, 540, et seq.

72. Contra, In *re* Ward, 5 A. B. R. 215, 104 Fed. 985 (D. C. Mass.).

trol of the bankrupt, agent, or other party and it must be so framed as to fairly apprise such party of what he is expected to meet;

Thus, as to the bankrupt.⁷³

Inferentially, *Boyd v. Glucklich*, 8 A. B. R. 393, 116 Fed. 131 (C. C. A. Iowa): "No petition had been filed by the trustee claiming that the bankrupt had money or property in his possession or under his control which he should turn over to the trustee."

In *re Lasch*, 12 A. B. R. 158 (Ref. Penn.): "* * * A distinct issue must be raised upon petition and answer and testimony must be taken thereunder."

Thus, as to a court officer.

Obiter and inferentially, *Louisville Trust Co. v. Cominger*, 7 A. B. R. 426, 184 U. S. 18: "Nor in this matter was any petition by the trustee, or by any other person, filed against Cominger to recover these sums, and the orders were entered by the referee on the record as it stood, so that there was no pretense whatever of a plenary suit in that court, in form or in substance."

"The proceeding was purely summary."

But the description of the property need be no more particular than the nature of the case permits of.

Ripon Knitting Works v. Schreiber, 4 A. B. R. 303, 101 Fed. 810 (D. C. Wash.): "The principles of reason and justice do not exact of those who have incurred losses by extending credit to a dishonest merchant the impossible thing of tracing the proceeds of merchandise which he has handled before compelling him to surrender money in his possession which rightfully should be applied to the payment of their accounts. In this case it is impossible for the trustee or the creditors to identify the pieces of money which have come to the bankrupt's hands, or to identify or describe the particular pairs of shoes which were sold for money which the bankrupt now conceals; and, being impossible, it is unnecessary."

The petition must be filed in the trustee's name.⁷⁴

In *re Rothschild*, 5 A. B. R. 587 (D. C. Ga.): "The nature of the proceedings does not change the rule. All proceedings must be brought by or against the trustee, except such proceedings as affect one individual creditor or one class of creditors only."

§ 1838. Reasonable Notice on Respondent, Requisite.—Reasonable notice must be served on the bankrupt or other party upon whom the order is requested, so that he may have reasonable time to prepare for his defense.⁷⁵

^{73.} In *re Pearson*, 2 A. B. R. 819, 95 Fed. 425 (Ref. Penn.); inferentially, In *re Oliver*, 2 A. B. R. 783 (D. C. Calif.); impliedly, In *re Schachter*, 9 A. B. R. 499 (D. C. Ga.).

^{74.} In *re Carter*, 1 N. B. N. 162 (Ref.); In *re Pearson*, 2 A. B. R. 819, 95 Fed. 425 (Ref. Penn.). See ante, "After Trustee Elected, All Objections, etc., to Be by Him or in His Name," § 824; post, "All Proceedings to Be Taken in Trustee's Name," § 2827.

^{75.} In *re Pearson*, 2 A. B. R. 819, 95 Fed. 425 (Ref. Penn.); In *re Miller*, 5 A. B. R. 184, 105 Fed. 57 (D. C. Iowa); In *re Oliver*, 2 A. B. R. 783, 96 Fed. 85 (D. C. Calif.); In *re Schachter*, 9 A. B. R. 499 (D. C. Ga.). Impliedly, In *re DeGottardi*, 7 A. B. R. 728, 114 Fed. 328 (D. C. Calif.).

In re Rosser, 4 A. B. R. 153, 101 Fed. 562 (C. C. A. Mo., reversing 2 A. B. R. 746): "A more serious question is presented by the contention of the bankrupt, that the proceedings in the court below did not give him such a notice of, and such an opportunity to be heard upon, the propriety of the order for the payment of his money as constitute due process of law. Chancellor Kent says: 'The better and larger definition of "due process of law" is that it means law in its regular administration through courts of justice.' 2 Kent, Comm. 13. While it is perhaps impossible, and is certainly unwise, to attempt to give a concise and comprehensive definition of the terms 'due process of law' and 'law of the land,' it is certain that notice to the party to be affected of the claim against him, and an opportunity to be heard upon it, are essential elements of every proceeding in a court of justice which can be said to constitute due process of law or to be in accord with the law of the land. 'Perhaps no definition,' says Judge Cooley, 'is more often quoted than that given by Mr. Webster in the Dartmouth College Case: "By 'law of the land' is most clearly intended the general law; a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society."' Cooley, Const. Lim. 431. The basic principle of English jurisprudence is that no man shall be deprived of life, liberty or property without due process of law, without a course of legal proceedings according to those rules and forms which have been established for the protection of private rights. Such a course must be appropriate to the case and just to the party affected. It must give him notice of the charge or claim against him, and an opportunity to be heard respecting the justice of the order or judgment sought. The notice must be such that he may be advised from it of the nature of the claim against him, and of the relief sought from the court if the claim is sustained. And the opportunity to be heard must be such that he may, if he chooses, cross-examine the witnesses produced to sustain the claim, and produce witnesses to refute it, if a question of fact is in issue, and, if a question of law is presented, the opportunity to be heard must be such that his counsel may, if they desire, argue the justice and propriety of the judgment or order proposed. Judicial orders or judgments affecting the lives or property of citizens in the absence of such a notice and opportunity to the party affected are violative of the fundamental principles of our laws, and cannot be sustained. * * * Under the principle to which reference has been made, he was entitled to a citation or notice of a hearing upon this claim and of the proposed order before it was made. * * * No order to show cause why he should not pay it was made or served upon him before the absolute order for its payment was presented to him. No opportunity was afforded him to be heard upon the questions it presents. He was cited to appear and be examined under § 21 of the Bankrupt Act, and his testimony and that of various other witnesses were taken before the referee upon that citation, but no notice was served upon him that the claim, which culminated in the order for the payment of the \$2,500, was made or was in issue at that examination, or that the testimony there elicited was taken for the purpose of establishing that claim, and no opportunity was presented to him to produce witnesses in his defense or to be heard upon the issues of fact or of law which the issue of the order involved. Such a proceeding lacks every element of due process of law. It contains no notice to the party affected of the claim against him, or of the proposed action upon it, no opportunity to contest the questions of fact which it presents by the cross-examination of the claimant's witnesses or the presentation of his own, and no chance to be heard upon the questions of law which

it involves. It considers without notice, condemns without hearing, and renders judgment without trial."

Boyd v. Glucklich, 8 A. B. R. 393, 116 Fed. 131 (C. C. A. Iowa): "Dispatch in judicial proceedings is commendable but in proceedings involving the liberty of a citizen, he has a right not only to be informed of the precise claim against him, but, after receiving that information, he has a right to a reasonable time to prepare his answer and present his proofs, and, lastly, to be heard by counsel on the law and facts of the case. While proceedings in bankruptcy may be summary, they should not be too summary; in other words, they should not be so summary as to deprive the bankrupt of those fundamental rights and privileges that belong to every citizen, among which are the right to be advised of the demand made upon him, and the right, after being so advised, to have a reasonable time to prepare his defense and produce his witnesses. The Bankrupt Act does not do away with these rights, and no citizen forfeits them by being adjudged a bankrupt. The Bankrupt Act contemplates that proceedings in bankruptcy shall go forward with all reasonable dispatch compatible with the due and orderly administration of justice and a proper regard for the fundamental rights of the citizen. Construing the proceedings before the referee as we do, we think they were too summary in their character, and that it was against this summary proceeding the bankrupt asked to be heard, and that there was not accorded to him, and not intended to be accorded to him, by the referee, a reasonable time to answer the trustee's application, or to be further examined or to introduce evidence after being advised of the specific claims made against him by the trustee. The referee did not advise him that he had these rights, and the record does not show that he waived them, or intended to do so. As we construe the record, this case is not, in this respect, different from that of *In re Rosser*, 4 Am. B. R. 153, 41 C. C. A. 497, 101 Fed. 562. It is true that in that case the referee made the order based on the bankrupt's general examination in his absence, but it is manifest from the opinion in the case that if the order had been made, as it was in this case, at the conclusion of a long and desultory examination, and the bankrupt heard only in a vain protest against such summary action, the result would have been the same."

Thus, notice must be served on an assignee from whom surrender is demanded.⁷⁶

§ 1839. Due Hearing Requisite.—Due hearing must be had, and reasonable opportunity therefor is requisite.⁷⁷

Boyd v. Glucklich, 8 A. B. R. 397, 116 Fed. 140 (C. C. A. Iowa): "The alleged contempt in this case was not committed in the presence of the court, and is therefore what the law denominates a 'constructive contempt.' It is a criminal offense for which the punishment may be imprisonment without limit of duration, and one charged with it has the same inalienable right to be heard in his defense that he would if charged with murder or any other crime. In *Ex parte Robinson*, 19 Wall. 505—a proceeding to punish for contempt—the Supreme Court said:

"There may be cases, undoubtedly, of such gross and outrageous conduct in open court on the part of the attorney as to justify very summary proceedings

76. *Smith v. Belford*, 5 A. B. R. 294, 106 Fed. 658 (C. C. A. Ohio).

77. *In re Rosser*, 4 A. B. R. 153, 101 Fed. 562 (C. C. A. Mo.); *In re Pearson*, 2 A. B. R. 819, 95 Fed. 425 (Ref. Penn.). *Obiter*, *Ripon Knitting Wks. v. Schreiber*, 4 A. B. R. 299, 101 Fed. 810 (D. C. Wash.).

for his suspension or removal from office; but even then he should be heard before he is condemned. The principle that there must be citation before hearing, and hearing or opportunity of being heard before judgment, is essential to the security of all private rights. Without its observance, no one would be safe from oppression wherever power may be lodged.⁷

"And this was said in a case where the alleged contempt was committed in the presence of the court."

Thus, a party's own testimony taken on general examination, whether reduced to writing or verbally testified to, is admissible (but admissible only), in proceedings directed against the particular bankrupt or witness who has given the testimony and against whom relief is sought.⁷⁸ This rule applies to the officers of a bankrupt corporation.⁷⁹

But the testimony of other witnesses, although taken on general examination, is not admissible against the bankrupt or other witness;⁸⁰ except so far, of course, as any witness may be confronted with former contradictory statements for the purpose of discrediting him.

In *re Alphin & Lake Cotton Co.*, 12 A. B. R. 655, 131 Fed. 824 (D. C. Ark.): "But does this rule apply to the deposition of Smith (a third party) * * *. We are therefore called upon to determine whether the testimony of a person other than the bankrupt, or, in case of a bankrupt corporation, not an officer or member thereof, taken and reduced to writing under the provisions of § 21a of the Bankruptcy Act, before any proceedings to require the parties against whom the testimony is to be used to show cause had been instituted, is admissible as evidence in a proceeding of this kind against the bankrupt, or, if the bankrupt is a corporation, against its officers. * * *. As a general rule, depositions of witnesses taken in a former suit pending between one of the parties and a party other than the opponent in the last-trying action, cannot be read in evidence at the trial of the latter suit, even if there has been cross-examination, nor, for that matter, if the parties to both actions were the same, but the issues involved or objects sought to be attained in the two suits were different—especially if the witness was competent to testify in the last action, and could have been used by the party as such."

The bankrupt, or other party proceeded against, may introduce evidence in his own behalf.⁸¹

It often occurs, that, during the midst or at the end of a general examina-

⁷⁸. See ante, "Discovery of Assets," § 1555. In *re Alphin & Lake Cotton Co.*, 12 A. B. R. 653, 131 Fed. 824 (D. C. Ark., affirmed by C. C. A., 14 A. B. R.); In *re Wiessen Bros.*, 14 A. B. R. 347, 135 Fed. 442 (D. C. Penn.); analogously, In *re Dow*, 5 A. B. R. 400, 105 Fed. 889 (D. C. Iowa); analogously, In *re Gaylord*, 7 A. B. R. 1, 111 Fed. 717 (C. C. A. N. Y., affirming 5 A. B. R. 410).

⁷⁹. In *re Alphin & Lake Cotton Co.*, 12 A. B. R. 653, 131 Fed. 824 (D. C. Ark.).

⁸⁰. See ante, "Discovery of Assets," § 1555. In *re Wiesen Bros.*, 14 A. B. R. 347, 135 Fed. 442 (D. C. Penn.). Contra, In *re Wilcox*, 6 A. B. R. 362, 102 Fed. 628 (C. C. A. N. Y., reversed on rehearing; see 14 A. B. R. 347); contra, In *re Cooke*, 5 A. B. R. 434, 109 Fed. 631 (D. C. N. Y., following In *re Wilcox*, 6 A. B. R. 362); inferentially, contra, In *re Leinweber*, 12 A. B. R. 175, 128 Fed. 641 (D. C. Conn.); inferentially, contra, In *re Adler*, 12 A. B. R. 19, 129 Fed. 502 (D. C. Tenn.).

⁸¹. In *re Lasch*, 12 A. B. R. 158 (Ref. Penn.); inferentially, In *re Miller*, 5 A. B. R. 184, 105 Fed. 57 (D. C. Iowa); *Boyd v. Glucklich*, 8 A. B. R. 397, 116 Fed. 140 (C. C. A. Iowa).

tion of the bankrupt, and especially when some particularly flagrant and incredible statement, or some telling admission has been made by the bankrupt in his testimony, the trustee's attorney arises in indignation and demands that the court issue a peremptory order upon the bankrupt to turn over to the trustee at once the certain property then under discussion. This must not be done, however.

§ 1840. Courts Proceed with Great Caution in Granting Summary Orders.—Courts exercise this power of ordering the turning over of property with the greatest caution, lest the imprisonment for contempt which would follow a failure to comply with an order to turn over property might rather amount to imprisonment for debt.

Samel v. Dodd, 16 A. B. R. 167, 142 Fed. 68 (D. C. Ga.): "While bankruptcy courts are invested with power, as we have already shown, to require bankrupts to surrender their property and to enforce obedience to the order by attachment for contempt, yet 'the power is far-reaching and drastic and should be exercised with cautious discretion.' Indeed, it may be said that it should never be exercised, except in a plain case, and always with a due regard to the constitutional rights of the citizen. In this immediate connection the apt words of Mr. Justice Bradley may be appropriately employed: 'It is the duty of the courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon. Their motto should be "Obsta principiis,"' *Boyd v. U. S.*, 116 U. S. 635. It is objected, however, that the failure of courts to exercise with a firm hand the power to punish by contempt proceedings, designing and unscrupulous bankrupts would practically deprive the law of its efficacy and convert it into a mere shield for the protection of dishonest debtors. In doubtful cases the power should not be exerted; and in view of the stringent provisions of law punishing fraudulent conduct and other forms of dishonesty on the part of the bankrupt, the objection is untenable. The original act not only contains ample provisions for the punishment of the bankrupt in the regular mode of trial by jury, for false swearing and for the fraudulent disposition of assets (§ 29), but § 14, as amended by the act of February 5, 1903, renders it extremely difficult, if not impossible, for the contumacious or dishonest bankrupt to secure a discharge from his indebtedness."

No person may be imprisoned for debt on process issued from the courts of the United States in a State whose laws prohibit imprisonment for debt.⁸² Imprisonment for debt in most States has been abolished, and, at any rate, is conceded to be contrary to our policy, and courts will be exceedingly careful that an order upon a debtor to turn over assets does not degenerate into an order to pay when the debtor has not the means to pay, which would result in nothing less than imprisonment for debt were the order to be followed by commitment for contempt.⁸³

⁸². U. S. Rev. Stats., § 990; *In re Blanche Page*, 16 Blatchf. 1, Fed. Cas., No. 1,524; *Mfg. Co. v. Fox*, 20 Fed. 409.

⁸³. *In re McCormick*, 3 A. B. R. 340, 97 Fed. 566 (D. C. N. Y.); *Sinsheimer v. Simonson*, 5 A. B. R. 546, 107 Fed. 898 (C. C. A. Ky.), affirmed sub nom. *Louisv. Trust Co. v. Cominger*, 7 A. B. R. 421, 184 U. S. 18; impliedly, *In re Adler*, 12 A. B. R. 21, 129 Fed. 502 (D. C. Tenn.); *In re Ogles*, 2 A. B. R. 514 (Ref. Tenn.). Compare, to same effect, *In re Purvine*, 2 A. B. R. 787, 96 Fed. 192 (C. C. A. Tex.).

Boyd v. Glucklich, 8 A. B. R. 393, 116 Fed. 140 (C. C. A. Iowa): "A court of bankruptcy cannot sentence a bankrupt to imprisonment for debt, any more than any other court of the United States can do that thing; and what it cannot do directly it cannot do by indirection, under another name. It cannot, therefore, lawfully order a bankrupt to deliver to the trustee money or property he has not got in his possession or under his control, and imprison him if he does not comply with the order. Plainly, that would be imprisonment for debt, and the order is not relieved of that illegal and odious quality by calling it 'imprisonment for contempt.' The court that makes such an order is in contempt of the law and constitution, and not the bankrupt in contempt of the court."

Compare, to same effect, *Trust Co. v. Wallis*, 11 A. B. R. 364, 126 Fed. 464 (C. C. A. Pa.): "An order made under such circumstances would be as absurd as it is inconsistent with the principle of individual liberty."

§ 1841. Punishment for Disobedience of Summary Order, Not Imprisonment for Debt.—But such punishment for contempt does not violate the principles against imprisonment for debt.⁸⁴

In re Rosser, 4 A. B. R. 157, 158, 101 Fed. 562 (C. C. A. Mo.): "The contention that the commitment of a contumacious bankrupt to jail until he complies with such an order constitutes imprisonment for debt, and is prohibited by the constitution of Missouri, is untenable. Such an order is not an order for the payment of a debt. All the property of the bankrupt estate is placed in custodia legis by the adjudication in bankruptcy. Every part of the estate belongs to the court, and vests in the trustee when appointed, and the bankrupt and every other party who has the possession or control of any part of it holds that part as the agent and trustee of the court and its officer. The money or the property of the estate which a bankrupt thus holds is not a debt which he owes to the court or to the trustee, but it is the money or property of the court or of the trustee, which it is alike the duty of the court, of the referee, and of the bankrupt to place in the hands of the trustee in bankruptcy for distribution to the creditors pursuant to the provisions of the bankruptcy law. An order for the payment of money or the delivery of property, which is a part of the estate in bankruptcy, and which is in the control and possession of the party directed to pay or deliver it, at the time of the making of the order, is not an order for the payment of a debt, and a commitment to jail until such order is complied with is not imprisonment for debt, under section 16, article 2, of the constitution of Missouri, and section 8954 of the Revised Statutes of that State."

Schweer v. Brown, 12 A. B. R. 178, 130 Fed. 328 (C. C. Ark., affirmed in 12 A. B. R. 673, 195 U. S. 171): "The first contention of the bankrupt is that the enforcement of the order of the District Court would constitute imprisonment for debt, and would therefore be in contravention of the provision of the Constitution of Arkansas (Const., art. 3, § 16) that no person shall be imprisoned for debt in any civil action on mesne or final process unless in case of fraud. This is no longer a debatable question. Assuming the correctness of the finding of the referee and of the District Court that the bankrupt had in his pos-

⁸⁴. *In re Anderson*, 4 A. B. R. 640, 103 Fed. 854 (D. C. S. C., reversed, on other grounds, *McGahan v. Anderson*, 7 A. B. R. 64, 113 Fed. 115). Also, see *Ripon Knitting Works v. Schreiber*, 4 A. B. R. 299, 101 Fed. 810 (D. C. Wash.). Compare, inferentially, *In re Cotton Co.*, 14 A. B. R. 194, 134 Fed. 477 (D. C. Ark.).

session property belonging to his estate in bankruptcy, his obligation to comply with the order of the court by surrendering it to the trustee is not the obligation to pay a debt. The adjudication in bankruptcy operated to transfer to the trustee the title to all of the property of the bankrupt which was subject to distribution among his creditors. His obligation and his duty to surrender to the trustee property in his possession which belongs to the trustee, and not to him, cannot be converted into a debt, at his option, by his mere refusal to comply with the order of the court."

In *re Schlessinger*, 4 A. B. R. 361, 97 Fed. 930 (C. C. A. N. Y., affirming 3 A. B. R. 342): "The answer to this objection is that the order was not for the payment of a debt, but for the delivery by the bankrupt of the assets of his estate to his trustee in bankruptcy. He was not indebted to the trustee. The money was a part of his assets and estate, which had, by operation of law, become vested in the trustee; and, while the order in this class of cases is for the delivery of the bankrupt's property to the trustee, it is in no proper sense a judgment or decree for the payment of a debt. If the enforcement of an order for the delivery to the trustee in bankruptcy of the assets of an estate which had been converted into money could not be had except by an execution, the power of a bankruptcy court would be minimized, and the assets of estates in bankruptcy would be subject to great reduction."

Samel v. Dodd, 16 A. B. R. 167, 142 Fed. 68 (C. C. A. Ga.): "The order to pay over money or to surrender other property as the case may be, in the possession, of the bankrupt and forming part of his estate, is not an order for the payment of a debt, but an order for the surrender of assets placed in custodia legis by the adjudication; and his commitment upon refusing to comply with the order is not imprisonment for debt."

Imprisonment for contempt for failing to surrender property found to be in one's possession is not imprisonment for debt. The party proceeded against may be punished by commitment for contempt of court in thus disposing of assets which, by law, he was required to hold for creditors, but that is different from committing him for failure to turn them over. He should not be committed for contempt of court in failing to obey an order he no longer is able to obey, no matter how great may be his culpability in thus rendering himself incapable of complying with the order. This distinction is of importance, for his commitment in the one instance would probably be until he *turned over* the assets, no matter how long he might be in arriving at the point of surrender, whilst in the other instance the court would fix, probably, a definite period for the commitment.

The court, in *In re Taylor*, 7 A. B. R. 410, 114 Fed. 607 (D. C. Colo.), released a bankrupt who had been committed for failure to obey an order to turn over assets, after he had been imprisoned for a month, becoming convinced evidently that whilst the bankrupt ought to have assets he did not *in fact* have them, the court saying:

"In a proceeding of this kind the court is not authorized to imprison a bankrupt indefinitely, especially when it is not certainly known that he has the money which he is called upon to surrender, and upon the ground that the bankrupt has been kept a sufficient time, probably, to induce him to surrender the money if he has it. I suppose he must now be discharged. In making such an order

I would not have it understood that I am at all convinced that he has not this money in some place of concealment.”⁸⁵

The language of the Court just quoted would seem to indicate an incorrect conception of the rule. The court should not have ordered the imprisonment in the first place when it was *not certainly known that the bankrupt had the money*.

§ 1842. **Clear, Certain, Convincing or Satisfactory Proof, or Proof beyond Reasonable Doubt, Requisite.**—The evidence must, therefore, show with certainty and to the satisfaction of the court, and, perhaps, even beyond a reasonable doubt, that the bankrupt does still possess the means of complying with the order. Thus, the proof must at least be satisfying and certain.⁸⁶

Compare, analogously, similar rule as to punishment for contempt for failure to obey order, *In re Levy & Co.*, 15 A. B. R. 169, 142 Fed. 442 (C. C. A.): “We are not unmindful of the general rule that the power to imprison for contempt in such cases should be exercised with great caution and only upon proof which establishes the facts found beyond a reasonable doubt, or which must, in any event, be clear and convincing. But we are satisfied that upon the facts herein a jury would necessarily find the fact of possession or control upon an admitted receipt of goods and repeated refusals to explain or account for their disappearance. The question of the power and duty of the court in such cases has been so often passed upon that it is unnecessary to discuss it in this connection.”

Samel v. Dodd, 16 A. B. R. 167, 142 Fed. 68 (C. C. A. Ga.): “In such cases the order to deliver should be based upon clear and convincing proof that the party charged has possession and control of the property, since the penalty of disobedience is imprisonment for contempt. The order operates in personam, upon the person of the offender, by requiring him to do the thing commanded upon pain of punishment for refusal; and such an order is erroneous, as matter of law, unless it plainly and affirmatively appear from the record that he has the power to comply with its requirements. If, having the property, he fail to surrender it in obedience to the order of the court, he voluntarily submits himself to the consequences.”

Indeed, the almost overwhelming number of the decisions have laid down the rule (although not in cases where the distinction has been sought to be made, and in many instances in cases of contempt rather than of summary orders to surrender assets) that the court must be satisfied “beyond a rea-

⁸⁵. Also, see *In re Tudor*, 4 A. B. R. 78, 100 Fed. 796 (D. C. Colo.).

⁸⁶. *In re Purvine*, 2 A. B. R. 787, 96 Fed. 192 (C. C. A. Tex.); *In re Alphin & Lake Cotton Co.*, 12 A. B. R. 653, 131 Fed. 824 (D. C. Ark.); *quære*, *Scheer v. Brown*, 12 A. B. R. 178, 130 Fed. 328 (C. C. A. Ark., affirmed by Sup. Ct., 12 A. B. R. 674, 195 U. S. 171); *In re DeGottardi*, 7 A. B. R. 723, 114 Fed. 328 (D. C. Calif.); *In re Gilroy & Bloomfield*, 14 A. B. R. 627, 140 Fed. 733 (D. C. N. Y.); [1867] *In re Salkey*, 21 Fed. Cases, No. 12,253, 11 N. B. Reg. 423.

To same effect, *In re Sax*, 15 A. B. R. 455 (D. C. Penn.).

Compare, *In re Taylor*, 7 A. B. R. 410 (D. C. Colo.), where the court says “a bankrupt cannot be imprisoned indefinitely” (should not be imprisoned at all) “when it is not certainly known that he has the money he is called upon to surrender.”

sonable doubt" upon this point or that the evidence must be "practically incontestible."⁸⁷

In *re Feldser*, 14 A. B. R. 216, 134 Fed. 307 (D. C. Pa.): "It is necessary that it should be, as stated by the referee, found beyond a reasonable doubt that the person against whom the order is made has the funds or property in his possession or control."

In *re Walder*, 16 A. B. R. 41 (D. C. Conn.): "If the order shall be affirmed, and the bankrupt shall fail to comply with its terms, contempt proceedings will naturally follow, and no good purpose would be served by adopting a lower order of proof now than will be required when action shall be taken in the next step."

Ripon Knitting Works v. Schreiber, 4 A. B. R. 299, 101 Fed. 810 (D. C. Wash., affirmed, on review, in 104 Fed. 1006): "His answer is not conclusive, but, the rule in such cases requires that the denial be overcome by evidence proving beyond a reasonable doubt that the bankrupt actually has the present possession or control of money, or that any alleged transfer or other disposition of it is a mere subterfuge which does not prevent him from producing it."

In *re Adler*, 12 A. B. R. 19, 129 Fed. 502 (D. C. Tenn.): "The court has no doubt of the power of the court, where it reasonably appears that the bankrupt has the money in his possession or under his control, to compel him to pay it over; but that fact must appear by something more substantial than mere presumptions or inferences taken from such circumstances as those which have been proven in this case. To invoke that power requires something like incontestible proof as against the bankrupt's denial that he has the money. The fact that he accounts falsely for his dissipation of the money, the fact that he does not satisfactorily disclose his uses of it, the fact that he evades the exhibition of his conduct in the premises, may indicate that he has defrauded his creditors, that he has dealt falsely with them, that he has egregiously perjured himself and foresworn the truth, and may invoke other remedies under the statute; but not this of a peremptory order to pay the money to the trustee, and punishment by contempt for a failure to do so. That remedy applies only to a fund which can be designated and traced into his possession, so that it is, in a legal sense, a tangible fund on which the court can lay its hands; and it cannot be made to apply to some intangible money supposed to be kept in his possession which he can be forced to pay by raising or procuring the money to meet the orders of the court. No doubt many bankrupts could be made, under the coercion of imprisonment, to find the money with which to meet such a demand; but the law does not proceed upon the theory of thus compelling a bankrupt to pay his creditors that which he owes them. It would be in substance and in fact a mere revival of the discarded remedy of imprisonment for debt. Therefore, unless the court can see that the bankrupt is in possession of the money, and withholding it wrongfully, it will not make such an order as that which is applied for in this case. The bankrupt may be indicted under the criminal features of the act, his discharge may be refused, he may be compelled by contempt proceedings to answer questions which he evades and refuses to answer, and to disclose the rights of action that may belong to the trustee by reason of his dealings with others; and thus in many ways he may be com-

87. In *re Rosser*, 4 A. B. R. 153, 101 Fed. 562 (C. C. A. Mo.); inferentially, In *re Leinweber*, 12 A. B. R. 175 (D. C. Conn.); In *re Anderson*, 4 A. B. R. 640, 103 Fed. 854 (D. C., reversed, on other grounds, in *McGahan v. Anderson* 7 A. B. R. 64, 113 Fed. 115); In *re Friedman*, 2 A. B. R. 301 (Ref. N. Y.); *Trust Co. v. Wallis*, 11 A. B. R. 360, 126 Fed. 464 (C. C. A. Penn.). Compare same rule, contempt proceedings for failure to surrender assets, In *re Switzer*, 15 A. B. R. 470 (D. C. S. C.).

pelled to give the fullest statement of his affairs; but, no matter how fraudulent his conduct may be, the creditors cannot resort to this method of compelling him to pay his debts, when there is not sufficient proof that he is concealing money or other property in actual possession or control."

Boyd v. Glucklich, 8 A. B. R. 393, 116 Fed. 131 (C. C. A. Iowa): "And it must be made to appear by evidence which leaves no reasonable doubt in the mind of the court on the subject. Evidence which is merely persuasive will not suffice."

In re Goldfarb Bros., 12 A. B. R. 389, 131 Fed. 643 (D. C. Ga.): "The evidence in such a proceeding should satisfy the court beyond a reasonable doubt that the bankrupt has the money or goods in his possession and control, and is able to turn them over when so ordered. * * *

"While the evidence in the case at bar showed very strong probability, and even more than a probability, that the bankrupts in this case have not dealt fairly with their creditors or with the trustee, it is not, to my mind, sufficiently definite and convincing to justify me in saying from this evidence that they are withholding any definite amount, or anything like an approximate amount of money or goods from the trustee. Certainly it fails to show with any degree of satisfaction, that they have withheld the amount found by the referee as in their hands. If there was evidence in the record to show with some definiteness the amount of stock on hand in the bankrupts' stores on the first of June, 1903, and any evidence to show the amount of goods sold by them for cash which they did not deposit in bank; how much of this money was paid out, or if not paid out, with some degree of certainty, how much was retained, data would then be had from which to make some fair calculation. But in the absence of this, I do not think that any one can take this evidence, and this entire record, and say that the bankrupts have any amount of goods or money, fixing it even approximately, in their hands, which has not been turned over to the trustee."

In re Mayer, 3 A. B. R. 533, 98 Fed. 839 (D. C. Wis.): "An order requiring the bankrupt to turn over money or property withheld from the trustee, when the bankrupt denies possession or control, can be so enforced only on indubitable testimony which establishes either the fact of his present possession, or that a purported transfer or disposition is a mere subterfuge, by which the property manifestly remains within his control, and can be produced by him. And in a proceeding of this nature the order is sustainable only to the extent the testimony so establishes the fact of actual possession or control with all reasonable doubt resolved in favor of the bankrupt."

The better rule on reason would seem to be that the proof need not be beyond a reasonable doubt; that, because imprisonment for contempt may be the punishment for failure to comply with the order, does not make the proceedings criminal, and the rules of evidence of criminal cases do not apply.⁸⁸

In re Alphin & Lake Cotton Co., 14 A. B. R. 197, 134 Fed. 477 (D. C. Ark): "On behalf of the respondent it is urged that, to warrant a finding against respondent, the evidence must be beyond a reasonable doubt; that in view of the fact that, if an order is made requiring the respondent to pay over money,

⁸⁸. Compare, to similar effect, *Moody v. Cole*, 17 A. B. R. 818 (D. C. Me.). But compare, *In re Walder*, 16 A. B. R. 42 (D. C. Conn.), quoted *supra*, § 1842. And compare, *In re Lasch*, 12 A. B. R. 158 (D. C. Penn.), where it is held to be "in the nature of a criminal proceeding."

and he fails to comply with it, he will be imprisoned for contempt of court, it is urged that the proceedings must be treated as a criminal proceeding, and be governed by the same rules. This court cannot assent to this proposition. If the fact that a failure to comply with the order of the court may result in imprisonment of the respondent for contempt makes it a criminal case, many proceedings, and especially proceedings in courts of equity, would have to be treated as criminal proceedings. The failure on the part of a defendant to execute a conveyance decreed by a court of equity in a proceeding for specific performance may be enforced by imprisonment as for contempt. Refusal to answer interrogatories in a bill of discovery, refusal to pay alimony in a divorce suit, disobedience to a writ of mandamus, or violation of an injunction may result in such punishment; but no one will contend that for this reason such proceedings are in the nature of criminal actions. The punishment for contempt in bankruptcy proceedings is simply for disobedience of the judgment of the court after it is found that the respondent has money or property belonging to the bankrupt estate in his possession or under his control, and, although able to comply with the order of the court, willfully refuses to do so. These provisions in the Bankruptcy Act, authorizing courts of bankruptcy to enforce obedience to their orders by punishment as for contempt are neither novel nor unusual. They were included in every Bankruptcy Act, and similar provisions have been enacted by almost every State in the Union, including the State of Arkansas. In proceedings supplemental to or in aid of executions, courts are authorized by these statutes to enforce the surrender of assets subject to execution, and for this purpose may commit to jail any person refusing to comply with such order. In this State, section 3312, Kirby's Dig. St. Ark., contains such a provision. And by sections 61 and 62, Kirby's Dig., probate courts are authorized to enforce their orders for the surrender of property belonging to the estate of a deceased person by attachment. These statutes have been uniformly sustained as civil proceedings."

In *re Cole*, 16 A. B. R. 303, 144 Fed. 392 (C. C. A. Me.): "The issue whether an order should run against a bankrupt, requiring the bankrupt to make payment to the trustee, is purely of a civil character: and therefore that part of the order before us which directed payment may be supported by a mere preponderance of the evidence, presumptions or inferences."

However, the court should not make the order unless, on the same evidence, if the order be disobeyed, the court would punish for contempt.⁸⁹

§ 1843. Bankrupt's Sworn Denial, Not Conclusive.—The bankrupt's sworn denial is not conclusive.⁹⁰

Obiter, In *re Goldfarb*, 12 A. B. R. 386, 131 Fed. 643 (D. C. Ga.): "It will not do, of course, to say that the mere denial of the bankrupt that he has any

^{89.} In *re Walder*, 16 A. B. R. 42 (D. C. Conn.), quoted *supra*, this paragraph. In *re Ogles*, 2 A. B. R. 514 (Ref. Tenn.).

But compare, inferentially *contra*, In *re Hausman*, 10 A. B. R. 64, 121 Fed. 984 (C. C. A. N. Y.), where the inference is given that the matter of present possession may be relitigated upon the contempt proceedings.

Compare, also, In *re Mayer*, 3 A. B. R. 534, 98 Fed. 839 (D. C. N. Y.).

But that the proceedings for order of surrender differ in character from those for contempt, see In *re Davison*, 16 A. B. R. 338, 143 Fed. 673 (D. C. R. I.); In *re Cole*, 16 A. B. R. 303, 144 Fed. 392 (C. C. A. Me.).

^{90.} In *re Schlesinger*, 3 A. B. R. 342, 97 Fed. 930 (D. C. N. Y., on review, 4 A. B. R. 361, 102 Fed. 117); In *re McCormick*, 3 A. B. R. 340, 97 Fed. 566 (D. C. N. Y.); *Schweer v. Brown*, 12 A. B. R. 178, 130 Fed. 328 (C. C. A. Ark., af-

money or effects in his possession should be sufficient to exonerate him from a charge of this kind."

In *re Schachter*, 9 A. B. R. 497 (D. C. Ga.): "Otherwise the court would be powerless, in the face of the bankrupt's oath, to require the production of property, however conclusive might be the evidence that such property was in his possession or control."

§ 1844. But Almost Incontestible Evidence Requisite to Overcome It.—But it requires something like incontestable evidence, or evidence beyond a reasonable doubt, to overcome the denial.⁹¹

Trust Co. v. Wallis, 11 A. B. R. 360, 126 Fed. 464 (C. C. A. Pa.): "If the bankrupt denies that he has possession or control of the property, or, if a third person in possession thereof claims to hold it, not as the agent or representative of the bankrupt, but by title adverse to him, and there is no evidence to indisputably show that such denial or claim is false or fraudulent, and that the case is one of simple concealment or refusal on the part of the bankrupt, or the one in possession, to deliver up the property as ordered, it would be an unwarranted stretch of power on the part of the court to resort to summary proceedings for contempt for the enforcement of its order."

In *re Adler*, 12 A. B. R. 19, 129 Fed. 502 (D. C. Tenn.): "To invoke that power requires something like incontestible proof as against the bankrupt's sworn denial that he has the money."

Samel v. Dodd, 16 A. B. R. 170, 142 Fed. 68 (C. C. A. Ga., concurring opinion): "It follows unquestionably that an order imprisoning a bankrupt for contempt for failure to obey a decree to pay money or surrender goods into court is erroneous as matter of law, where the bankrupt by sworn answer denies that he has the money or the goods, and it does not appear clearly and affirmatively from the record, notwithstanding his denials, that he has the power to comply with the decree. The bankrupt is at least entitled to that much protection, if, indeed, the courts are to refuse to follow the wise rule of the common law which makes the sworn denials of the answer sufficient defense to the contempt proceedings, leaving the question of the truth of the answer to be contested in a prosecution for perjury. * * *

"The bankrupts, in their answers, have sworn that they have not in their possession or under their control the money or goods involved in this proceeding. It seems to me that any evidence that conclusively showed they presently had in possession and control either the money or the goods would necessarily show where the same was kept or deposited, so that it could be reached by the process of the bankruptcy court, or of some court in a suit by the trustee. But however that may be, the record in this cause, taken as a whole, fails to show

firmed in 12 A. B. R. 673, 195 U. S. 171); *Ripon Knitting Works v. Schreiber*, 4 A. B. R. 299, 101 Fed. 810 (D. C. Wash.); [1867] In *re Salkey*, 21 Fed. Cases, No. 12,263; In *re Gerstel*, 10 A. B. R. 411, 123 Fed. 166 (D. C. Ills.); In *re Kane*, 12 A. B. R. 445, 131 Fed. 386 (D. C. N. Y.); In *re Rosser*, 2 A. B. R. 746, 26 Fed. 192 (D. C. Mo., on review, 4 A. B. R. 153, 101 Fed. 562, C. C. A. Mo.); In *re Purvine*, 2 A. B. R. 787, 96 Fed. 192 (C. C. A. Tex.); In *re Epstein*, 15 A. B. R. 711 (D. C. Penn.); analogously (contempt), obiter, *Moody v. Cole*, 17 A. B. R. 818 (D. C. Me.).

91. In *re Ripon Knitting Wks. v. Schreiber*, 4 A. B. R. 299, 101 Fed. 810 (D. C. Wash.); In *re Friedman*, 2 A. B. R. 301 (Ref. N. Y.); In *re Mayer*, 3 A. B. R. 533, 98 Fed. 839 (D. C. Wis.); inferentially, In *re Gilroy & Bloomfield*, 14 A. B. R. 627, 140 Fed. 733 (D. C. N. Y.); analogously (contempt for failure to obey order), *Moody v. Cole*, 17 A. B. R. 818 (D. C. Me.).

that the bankrupts had in their possession at the date of the order committing them for contempt either the money or the goods referred to. If the bankrupts have sworn falsely in their pleadings or on their examination—and this proceeding is based solely on that hypothesis—the law provides for their punishment on indictment and conviction by a procedure which secures to them the right of trial by jury with all its constitutional safeguards.”

§ 1845. Proof of Present Possession or Control Requisite.—Present possession or control must be proved. It will not do simply to prove the bankrupt ought still to have the possession or control: it must be proved that he actually still has possession or control.⁹²

In *re* Mayer, 3 A. B. R. 534, 98 Fed. 839 (D. C. Wis.): “It is not applicable, however, to reach property beyond the present control of the bankrupt, and in the hands of third parties claiming title derived prior to the proceedings in bankruptcy, although the transaction is manifestly fraudulent. Nor can this means or provision be employed to punish for frauds committed by the bankrupt against the Bankruptcy Act, nor can it be used to coerce the bankrupt or transferees to make restitution of money or property previously transferred in fraud of the act. Frauds which are made criminal by the act are punishable only on conviction by the verdict of a jury, or on plea of guilty, and fraudulent transfers which have been consummated cannot be reached by this summary proceedings. * * *

“The finding of merchandise to the amount and value of \$20,392.39 in the hands of the bankrupt is predicated on a showing which raises strong suspicion of a large amount of goods unaccounted for during the half year preceding the failure, but the testimony is deemed insufficient to establish beyond reasonable doubt the fact of abstraction of goods from the stock. No surreptitious transactions are shown respecting the goods, notwithstanding inquiry and search to that end, which appear to have been diligently pursued. The discrepancy stated in the findings rests upon valuations taken of the stock on hand without the presence of the bankrupt, not in reference to the present inquiry, not based on the bills rendered for the purchases nor on the actual cost to the bankrupt, and offered for this issue after the goods have passed beyond reach for test-

92. *Boyd v. Glücklich*, 8 A. B. R. 393, 116 Fed. 131 (C. C. A. Iowa); impliedly, *In re* Adler, 12 A. B. R. 19, 129 Fed. 502 (D. C. Tenn.); *In re* Ogles, 2 A. B. R. 514 (Ref. Tenn.).

But compare, *In re* Wilson, 8 A. B. R. 612, 116 Fed. 419 (D. C. Ark.), and *In re* Tudor, 4 A. B. R. 78, 100 Fed. 796 (D. C. Colo.), where the courts seemed to think it proper to “allow” only for “legitimate” expenses in making the computation necessary to deduce present possession of assets. See, also, cases cited in these opinions.

Analogously (contempt proceedings), *In re* Davison, 16 A. B. R. 337, 143 Fed. 173 (D. C. R. I.).

Long Delay Fatal.—Long delay in filing the petition for surrender may be fatal to the trustee's claim. Thus, where discharge was refused on the ground of concealment of assets, a delay of four years in filing a petition to surrender the assets will nullify the effect as *res judicata* of the refusal of the discharge. *In re* Barton Bros., 18 A. B. R. 98, 149 Fed. 620 (D. C. Ark.).

Refusal of Discharge as Res Judicata.—As to the effect of a refusal of discharge on the ground of concealment of assets, see: *In re* Barton Bros., 18 A. B. R. 98, 149 Fed. 620 (D. C. Ark.): “It is *res adjudicata* that these bankrupts did not surrender all of their estate, and that their schedules were false, but there is a wide difference between denying a bankrupt his discharge on the ground that his schedules are false, and making an order four years after his bankruptcy compelling him to pay over the proceeds illegally withheld from his trustee.”

ing the valuation by the bills—a test which would otherwise be practicable for a large portion of the stock made up of recent purchases. The testimony of certain of the appraisers that such valuations would approximate the cost to the bankrupt is forcibly met by proof of numerous instances wherein the cost, as shown by the bills, materially exceed the appraisal; and, after extended enumerations from the inventory in comparison with the bills, an estimate of such excess is tendered which would cover the discrepancy. Whether the shortage is thus satisfactorily accounted for is not the test, but it is sufficient that the valuation which constitutes the sole basis of the charge is placed in doubt, both as to the definite amount and to the fact of the surreptitious taking of goods, and no ground is established for an order of this nature to turn over either certain goods or a definite amount on pain of imprisonment; and, so regarded, the order, to that extent, is not sustainable."

Amer. Trust Co. v. Wallis, 11 A. B. R. 360, 126 Fed. 464 (C. C. A. Penn.): "Has the referee, or the court in bankruptcy, power to order the bankrupt to deliver and turn over to the trustee in bankruptcy, money collected from his debtors after he had received notice or knowledge of the filing of the petition by creditors to have him adjudged a bankrupt, which money has since passed into the possession of others and is not under the control of the bankrupt? * * * In the absence of fraud or concealment, the bankrupt court can only order the delivery of property to the trustee which the bankrupt is physically able to deliver up, having the same in his possession or control. If it shall appear that he is not physically able to deliver the property required by the order, then, confessedly, proceedings for contempt, by fine and imprisonment, would result in nothing, certainly not in compliance with the order. The contempt in this case could only be purged by a reiteration of the physical impossibility to comply with the order whose disobedience is being thus punished. An order made under such circumstances would be as absurd as it is inconsistent with the principles of individual liberty. But it may be said that, to have collected this money from his debtors and distributed it to his creditors, with knowledge of the filing of the petition in bankruptcy, was in contempt of the Bankrupt Law and of the proceedings in bankruptcy, which were a caveat to all the world as to the effect of such proceedings upon the property of the bankrupt in case he should be so declared. This, however, would be but a constructive contempt, and not liable to the summary punishment by fine and imprisonment which may be inflicted for actual contempt, committed in the presence of the court or by open and defiant refusal to comply with its lawful commands, where compliance is physically possible."

Samel v. Dodd, 16 A. B. R. 169, 142 Fed. 68 (C. C. A. Ga., concurring opinion): "But, unless the person can perform the act commanded, the court has no authority to punish for a failure to perform it. Any other rule would be unreasonable and unjust. To imprison one for not doing what he cannot do is inconsistent with the principles of individual liberty. There is no statute or law which confers such authority. Imprisonment under such circumstances for failure to pay money may force the friends of the prisoner to raise and pay the required sum, but such imprisonment is unwarranted by law in a jurisdiction where imprisonment for debt is forbidden. Where the prisoner has the power to comply with the order, having the money or thing in question in his possession, he may, of course, be punished for his failure to surrender it, without conflict with any rule of law against imprisonment for debt."

In re Walder, 16 A. B. R. 42 (D. C. Conn.): "The real question, then, is whether or not the bankrupt has accounted for the disappearance of the goods which he has been ordered to return, or, to put it more definitely, whether his

explanation leaves the matter in such a shape that the court can find beyond a reasonable doubt that he now has possession or control of the goods, or of the money into which they have been converted."

In *re Sax*, 15 A. B. R. 456 (D. C. Pa.): "If it be clearly shown that a bankrupt has money or goods in his possession that belong to his trustee, he must take the consequences of a refusal to hand them over, but he should not be summarily directed to pay unless the court is morally certain that there has been concealment and that obedience to the order can be enforced. If the bankrupt has been guilty of fraudulent concealment, but no longer has the goods or the money, he should be prosecuted. He should not be imprisoned on a summary proceeding for contempt, unless he is disobeying an order with which he is able to comply."

In *re Barton Bros.*, 18 A. B. R. 100, 149 Fed. 620 (D. C. Ark.): "It is seen by an examination of the two decisions last quoted, unless they were in possession of the money at the time the order is made to pay over, the court has no power to make the order. If the court were to make the order for them to pay over when they were without the means of paying over, the court would then be requiring them to do an impossible thing, and the effect of such an order would be equivalent to imprisonment for debt."

In *re Goldfarb*, 12 A. B. R. 389, 131 Fed. 643 (D. C. Ga.): "A bankrupt cannot be required, under a proceeding for contempt, to do that which it is out of his power to do. The evidence in such a proceeding should satisfy the court beyond a reasonable doubt that the bankrupt has the money or goods in his possession and control and is able to turn them over when so ordered. If he has placed them out of his possession and control, no matter how foolishly or how wrongfully, he cannot be required by order to turn them over to a receiver or to a trustee."

In *re Milk Co.*, 16 A. B. R. 731 (D. C. Pa.): "It is now sought to make him personally answerable for this money; not by suit, upon the ground that it was unwarrantably paid out, with the ordinary incidents of execution, etc., in case a judgment should be recovered; but by summary order of court, for disobedience of which he may be attached and committed, for contempt. It is not pretended that the money sought to be reached is actually in his possession, or control, nor is any concealment or subterfuge alleged, or if it is, it has not been made out. All that is contended for is, that it shall be treated as constructively in his hands; that is to say, that he shall be held, as though it were, because it ought to be. But this is a misconception of the remedy invoked, and the power of the court under it. It is effective to lay hold of a specific fund or thing, under the dominion or control of the party ruled, but cannot legitimately go beyond that. Undoubtedly the court will not permit a colorable evasion, and that which is held by another, in his interest, or with his connivance, is the same as though held by the party himself. *Mueller v. Nugent*, 184 U. S. 1, 7 Am. B. R. 224. An adverse claim on the other hand made in good faith on what is apparently a sufficient basis, will be respected, and, subject always to the right to determine whether it is so made, the court will not undertake to override or pass upon it. It is true that there are cases where a party has been required to disgorge funds which are traced into his hands, notwithstanding his protest that he has spent them in payment of debts, or has otherwise disposed of them. In *re Gerstel*, 10 Am. B. R. 411; In *re Michael Kane*, Ib. 478; *Schweer v. Brown*, 12 Am. B. R. 178; In *re Henderson*, Ib. 351. But the orders there made proceed upon an entirely different basis, and are carefully to be distinguished. The statement of the bankrupt was simply not believed, and was therefore disregarded. They are not to be construed as undertaking to compel

him to turn over what he has not, but what the court finds, notwithstanding his denials, that he in fact has."

In *re Longbottom & Sons*, 15 A. B. R. 437, 142 Fed. 291 (D. C. Pa.): "He does not find as a fact that * * * the bankrupts have in their possession or control the sums of money. * * * Such payments may have been preferential but this fact is not sufficient to support an order on a bankrupt to pay over money which he has already parted with in good faith to one of his creditors."

But if the bankrupt or other person proceeded against have control, it is sufficient, though he have not actual possession.⁹³

In *re Cole*, 16 A. B. R. 304, 144 Fed. 392 (C. C. A. Me.): "It also cannot be denied that a bankrupt whose funds are deposited with an agent, cannot excuse himself from not delivering over the same to the trustee because so deposited, unless he shows as a matter of fact an inability to obtain the actual possession of what he ought to surrender."

§ 1846. Similarly, Agents and Court Officers Not Subject to Summary Orders as to Disbursements Already Made.—Similarly, agents and court officers are not subject to summary orders to surrender property or assets already out of their possession or disbursed.⁹⁴

§ 1847. Likewise, No Interest to Be Included.—Likewise, interest may not be included in the summary order to surrender;⁹⁵ unless of course interest actually has been received.

§ 1848. Whether Possession at Time of Filing Summary Petition or of Granting Order, Requisite.—Nor will it do, probably, simply to prove that he had the possession of the assets at the time of the filing of the trustee's petition and that he has since disposed of them, he no longer having control over them or their proceeds.⁹⁶

Inferentially, In *re Alphin & Lake Cotton Co.*, 14 A. B. R. 194 (D. C. Ark.): "If the money is once traced into the hands of a respondent, the burden is upon him to make some reasonable explanation of what became of it, or at least that it has ceased to be in his possession or under his control at the time the order to turn it over is made."

Inferentially, In *re Purvine*, 2 A. B. R. 787 (C. C. A. Tex.): "It is implied that the party has the ability to obey the order."

^{93.} But compare, on the facts, In *re Green*, 6 A. B. R. 270 (D. C. Penn.).

^{94.} See ante, "No Summary Order as to Sums Already Disbursed," §§ 1612, 1666, 1829.

^{95.} In *re Davis*, 9 A. B. R. 670 (D. C. Tex.).

^{96.} In *re Rosser*, 4 A. B. R. 153, 101 Fed. 562 (C. C. A. Mo.).

Inferentially, In *re Leinweber*, 12 A. B. R. 175 (D. C. Conn.), where the court finds he continued to have possession up to the time the order was made.

Impliedly, In *re Adler*, 12 A. B. R. 19, 129 Fed. 502 (D. C. Tenn.); In *re Friedman*, 2 A. B. R. 301 (Ref. N. Y.); also, inferentially, In *re Greenberg*, 5 A. B. R. 840 (D. C. N. Y.).

Contra, impliedly, In *re Kurtz*, 11 A. B. R. 129 (D. C. Penn.), in which case it distinctly appears that the bankrupt had actually spent the money after the bankruptcy, yet the court ordered him to refund it.

§ 1849. **Circumstantial Evidence Sufficient.**—It is not necessary that the possession of the concealed assets be proved by the direct evidence of those who actually saw—circumstantial evidence is sufficient, if strong enough.⁹⁷

Obiter, In re Felson, 10 A. B. R. 716, 124 Fed. 288 (D. C. N. Y.): "In order to justify an order that the bankrupt pay over money or deliver property, it is not necessary that the evidence show clearly and distinctly that the bankrupt has the money or the property in his possession in such shape, or in such a location, that witnesses have seen it, and may, therefore, testify that the bankrupt actually has the money or property in his possession at some particular place. It is sufficient if the evidence discloses the fact that at a certain date the bankrupt had the property or the money in his possession and has not lost the same by fire or other casualty, for which he is not responsible, or has not expended the same in gambling or in some other manner."

In re Cole, 16 A. B. R. 303, 144 Fed. 392 (C. C. A. Me.): "* * * may be supported by a mere preponderance of evidence, presumptions or inferences."

Indeed, the question most usually arises with regard to stocks of merchandise or their proceeds where it is next to impossible to prove by eye witnesses that the debtor still has possession or control of the proceeds. Proof of such possession or control most frequently is simply a deduction from a multitude of circumstances, usually derived largely from the statements of the debtor himself, upon cross-examination, in his efforts to explain the disappearance of assets.⁹⁸

§ 1850. **Presumption of Continued Possession When Property Once Traced and Shortage Unexplained.**—If it is proved that the debtor recently had the possession, then the presumption that he still has it will follow, unless he reasonably accounts for the disposition or disappearance of the assets.

Thus, where the court is satisfied that property has come into the hands of the bankrupt shortly before the adjudication, and the schedules give no account of the property or its proceeds, and the bankrupt fails to make any credible explanation showing what has become of such property, the court is authorized to consider the property or its proceeds still in the control of the bankrupt and to require that it be produced and surrendered to the trustee.⁹⁹

⁹⁷. Instance, alleged payment to mother, In re Feldser, 14 A. B. R. 217, 134 Fed. 307 (D. C. Penn.). [1867] In re Goodridge, Fed. Cas. 5,547.

⁹⁸. Compare, as to weakness of such deductions, cases cited at end of next section under "Limitations of Rule."

For instances where the present possession of assets has been decided by comparison of purchases, sales, financial statements, inventories, etc., and discrepancies unsatisfactorily explained, etc., see the cases cited under the next section following.

⁹⁹. Instance, In re Deuell, 4 A. B. R. 60, 100 Fed. 633 (D. C. Mo.); *obiter*, In re Felson, 10 A. B. R. 716, 124 Fed. 288 (D. C. N. Y.); In re Schlesinger, 3 A. B. R. 342, 97 Fed. 930 (D. C. N. Y., affirmed in 4 A. B. R. 361, 102 Fed. 117). Compare, to same effect, In re Finkelstein, 3 A. B. R. 800, 101 Fed. 418 (D. C. N. Y.).

In re Greenberg, 5 A. B. R. 840, 106 Fed. 496 (D. C. N. Y.), in which case the

In re Cotton Co. (Alphin & Lake Cotton Co.), 14 A. B. R. 194, 134 Fed. 477 (D. C. Ark.): "If the money is once traced into the hands of a respondent, the burden is upon him to make some reasonable explanation of what became of it, or at least that it has ceased to be in his possession or under his control at the time the order to turn it over is made."

In re McCormick, 3 A. B. R. 340, 97 Fed. 566 (D. C. N. Y.): "As respects the sum of \$1500 ordered to be paid to the trustee, the explanation given by the bankrupt that he carried that money in his trousers pocket for some two or three weeks until he lost it by having his pocket picked upon an Eighth avenue car, after a visit to Coney Island, though quite possible in itself, is accompanied by such improbable circumstances stated by him as occurring before and after that it is difficult to be credited."

In re Levy & Co., 15 A. B. R. 168 (C. C. A.): "It was open to them to explain the apparent discrepancy by proof that some of the property did not actually come into their hands or that it was sold at a price below the inventory value, especially as the firm was on the eve of bankruptcy, or that the statements were, for some other reason, inaccurate."

In re Royce Dry Goods Co., 13 A. B. R. 266, 133 Fed. 100 (D. C. Mo.): "Making every reasonable allowance based on the evidence, there was at the time the company made its assignment, the 4th day of January, 1904, a discrepancy between the property W. K. Royce stated in writing to have been on hand November 30, 1903, of at least \$25,000. What became of this difference? The presumption of law in such cases, in the absence of satisfactory explanation, is that the property traced to the hands of the bankrupt a short time prior to the suspension of business remains in his hands, and the bankrupt must answer therefor."

Ripon Knitting Wks. v. Schreiber, 4 A. B. R. 299, 101 Fed. 810 (D. C. Wash., affirmed in 101 Fed. 1006): "The decision of the court that the bankrupt has

court found so much false testimony that it was even in doubt whether there was as much assets in the bankrupt's hands as the necessary deductions from the testimony might warrant—the bankrupt evidently had perjured himself to such an extent that even his admissions against interest were discredited.

Obiter, In re Mayer, 3 A. B. R. 533, 98 Fed. 839 (D. C. Wis.); In re Anderson, 4 A. B. R. 640, 103 Fed. 854 (D. C. S. Car.); In re Goldfarb Bros., 12 A. B. R. 386 (D. C. Ga.); instance, In re Wilson, 8 A. B. R. 612, 116 Fed. 419 (D. C. Ark.); In re Rosser, 4 A. B. R. 153, 101 Fed. 562 (C. C. A. Mo.).

In re DeGottardi, 7 A. B. R. 723, 114 Fed. 328 (D. C. Calif.), where an alleged burglarizing of the bankrupt's store was the excuse, accompanied by unwillingness and refusal of the bankrupt to answer questions, etc.

Obiter, In re Milk Co., 16 A. B. R. 732 (D. C. Penn.), quoted ante, § 1845. Instance, alleged robbery, In re Herschkowitz, 14 A. B. R. 86 (D. C. N. Y.).

In re Frankfort, 15 A. B. R. 210 (D. C. N. Y.), in which pocketbook snatching on a street car was alleged.

In re Levin, 6 A. B. R. 743 (Ref. N. Y., affirmed in D. C.), wherein robbery of the bankrupt's store and loss of \$10,000 was alleged, but the statement to the police at the time was that practically nothing had been taken.

Instance, uncorroborated testimony of bankrupt as to losses by gambling and dissipation, In re Henderson, 12 A. B. R. 351, 130 Fed. 385 (D. C. Penn.).

Instance, alleged gambling, the explanation, In re Friedman, 2 A. B. R. 307 (Ref. N. Y.).

Instance, In re Weinreb, 16 A. B. R. 702, 146 Fed. 243 (C. C. A. N. Y.).

Instance, fictitious claim of payment of part of proceeds of sale to mother, In re Feldser, 14 A. B. R. 217, 134 Fed. 307 (D. C. Penn.).

Compare, on analogous proposition of concealment as a bar to discharge, the following cases: In re Leopold, 5 A. B. R. 279 (Ref. N. Y.); In re Meyers, 2 A. B. R. 707, 96 Fed. 408 (D. C. N. Y.); In re Crossman, 6 A. B. R. 510, 111 Fed. 507 (D. C. Mich.); In re Friedman, 2 A. B. R. 301 (Ref. N. Y.), alleged robbery; In re Leinweber, 12 A. B. R. 175, 128 Fed. 641 (D. C. Conn.).

at least \$3000 in his possession or under his control is based upon convincing evidence to the effect that a large amount of money actually came into his possession within a few months before the adjudication. Of the money so received, more than \$2000 remains entirely unaccounted for after giving full credit for all expenditures shown by the respondent's books of account, and after allowing in full the extravagant amount which he claims to have used for his personal expenses, and in dissolute practices, and losses in gambling. As to so much of the money, this is not a case of failure to give a satisfactory account, or to show in a satisfactory way how it has been disposed of, but it is a case of total failure to account in any way whatever, or to give any explanation. I am also convinced that the amount which the respondent claims to have lost in gambling is considerably in excess of the total amount of his actual losses. I am also convinced that, with a deliberately formed intention to defraud his creditors; the respondent proceeded methodically to make liberal purchases of merchandise on credit, and to dispose of his stock for cash as rapidly as possible. During the spring and summer months he conducted a slaughter sale, selling goods so much below the market value as to create a rush of business."

In *re Gerstel*, 10 A. B. R. 412, 413, 123 Fed. 166 (D. C. Ills.): "The rule in these cases is that the answer of the respondent is not conclusive on the court; that the court may proceed to inquire into the facts, and where it has been shown that property has come into the hands of the bankrupt shortly before the adjudication, that the schedules give no account either of this property or its proceeds, and that the bankrupt, by answer or by examination under oath, fails to make any credible explanation, showing what became of such property, the court, when so satisfied, is authorized to consider the property or its proceeds as being still in the possession or under the control of the bankrupt, and to require by order that it be produced and delivered to the trustee, and, upon failure to obey such order, to punish by imprisonment for contempt."

In *re Kane*, 10 A. B. R. 478, 125 Fed. 984 (D. C. Pa.): "Money having been traced directly into his hands, he cannot swear himself free from liability by any such general and sweeping statement."

But compare, In *re Adler*, 12 A. B. R. 19, 129 Fed. 502 (D. C. Tenn.): "The fact that he accounts falsely for his dissipation of the money, the fact that he does not satisfactorily disclose his uses of it, the fact that he evades the exhibition of his conduct in the premises, may indicate that he has defrauded his creditors, that he has dealt falsely with them, that he has egregiously perjured himself and forsworn the truth, and may invoke other remedies under the statute; but not this of a peremptory order to pay the money to the trustee, and punishment by contempt for failure to do so."

In *re Shachter*, 9 A. B. R. 499 (D. C. Ga.): "The present case measures up exactly to the rule stated by Judge Sanborn (in concurring opinion in *Boyd v. Glucklich*, 8 A. B. R. 393, 116 Fed. 131) as follows: 'The rule by which this issue is to be determined is that the property of the bankrupt estate traced to the recent possession or control of the bankrupt is presumed to remain there until he satisfactorily accounts to the court for its disposition or disappearance.'"

In *re Epstein*, 15 A. B. R. 711 (D. C. Penn.): "Where it is shown that the bankrupts have purchased goods to the extent of \$20,000 within three months of their bankruptcy and have no other explanation to give of the disappearance of large sums of money traced to their hands than a general denial, entirely unsupported by facts or credible circumstances, the referee is justified

in finding that property has been concealed and an order to pay will be sustained."

And see, limitations of rule.

In *re Idzall*, 2 A. B. R. 741, 96 Fed. 314 (D. C. Iowa): "The mere fact of inability to account for money or property in possession of the bankrupt shortly prior to his bankruptcy does not itself show concealment of it."

And In *re Sax*, 15 A. B. R. 456 (D. C. Pa.): "I do not deny that the bankrupt, who is certainly not a literate person has probably failed to account satisfactorily for some of the merchandise that went into his business during the year before his failure, but calculations and estimates based on such uncertain evidence as is now before the court are not reliable enough to justify an order that may send a man to jail for an indefinite period."

Also, In *re Switzer*, 15 A. B. R. 470, 140 Fed. 976 (D. C. S. Car.): "The very earnest and learned counsel for the creditors has pressed very strongly for said exercise of authority, claiming that, in the nature of things, it is impossible for him to offer direct testimony showing that the bankrupt is in possession of goods or money; and his case, briefly stated, is that, having shown that the bankrupt was in possession of a certain stock of merchandise at a time stated, and that at the time he was adjudged bankrupt his stock of merchandise was only of a certain value, and that he has only shown payments of a given amount, it should follow as a conclusion of law that he is in the actual possession of all that he has not accounted for. If this rule was generally applied, scarcely any bankrupt would escape a like proceeding, for it is very rare that a bankrupt can satisfactorily account for everything which he ought to have in his possession and which he has not, and the result would be that the judge, under the guise of proceedings for contempt, could be called upon to try without a jury nearly every man who passes through the court of bankruptcy."

But the court need not refuse to accept admissions against interest as proof, simply because the bankrupt is such an enormous liar that even his testimony, adverse to his own interest, is of doubtful reliability.⁹⁹

Compare, to this effect, *Murray v. Joseph*, 16 A. B. R. 717 (D. C. N. Y.): "A trustee in bankruptcy has to do the best he can, and it would not do in such cases if you formed an unfavorable opinion of any of the witnesses to simply say you cannot put any reliance in such evidence, and therefore won't decide anything. It is just this class of cases in which it is the duty of the jury to investigate the case carefully and see that justice is done."

§ 1851. **Rejecting Improbable Explanations.**—And the court is not debarred from using its own common sense in rejecting testimony that seems to it improbable.¹⁰⁰

* *Schweer v. Brown*, 12 A. B. R. 181, 130 Fed. 328 (C. C. A. Ark.): "In proceedings of this character no punishment can be inflicted for reprehensible and dishonest conduct, but, in a careful effort to avoid such result, a court, when called upon to pass upon the weight of testimony and the credibility of wit-

⁹⁹. But compare, *In re Lesser*, 8 A. B. R. 12, 114 Fed. 83 (C. C. A. N. Y.).

¹⁰⁰. *Obiter*, *In re Milk Co.*, 16 A. B. R. 732 (D. C. Penn.). Instance, *In re Frankfort*, 15 A. B. R. 210 (D. C. N. Y.).

nesses, is not to be deprived of those faculties of judgment and discrimination as to what is true or probable on the one hand, and untrue, improbable, or absurd, upon the other, which are permitted to be exercised by juries in similar cases."

In *re Deuell*, 4 A. B. R. 60, 100 Fed. 634 (D. C. Mo.): "When asked if she did not talk this matter over with her husband and son, who were assisting her in running the store, and ascertain what explanation they gave, or as to what theory they had to account therefor, her answer was equally uncertain and indefinite. As the goods were not on hand when she was declared a bankrupt and as she claims the goods had not been spirited away, and testifies that they had been received and sold, the conclusion is irresistible that she must have the money in her possession, or that she knows who did receive it, and who has it. The business was conducted in her name. She thus published to the world that she was capable of transacting business, and she obtained credit for these goods upon the faith of her credibility and business capacity. Shall she be permitted thus to obtain property of other people, secrete and appropriate it, without even so much as rendering any intelligent account thereof, and escape the pains and penalties imposed by the bankrupt law, simply because she is a woman, and under the naked assumption, or bare possibility, that the husband and son embezzled the proceeds of these goods? When she assumed the office of a tradesman she became amenable to its obligations and responsibilities."

In *re Kane*, 12 A. B. R. 444 (D. C. N. Y.): "Having regard to what is involved it is to be exercised with caution; but where a proper case is presented by the evidence, the court is not to allow itself to be deceived by evasions nor deterred by the consequences."

Instance, In *re Weinreb*, 16 A. B. R. 702, 146 Fed. 243 (C. C. A. N. Y.): "This story is extremely improbable (accounting for assets by saying had purchased \$18,200 smuggled diamonds from a stranger). Of course, smuggled goods may be purchased, and, if purchased, the acts of the parties engaged in such a business are frequently stealthy and furtive. But if that is the explanation of the circumstances of this purchase, it is not enough for the bankrupts to simply say so. Their story, if true, could be corroborated in various ways. But it is entirely uncorroborated. It is precisely the kind of a story which bankrupts would tell, who had been engaged in the diamond business, and had been planning a fraudulent bankruptcy and had drawn \$18,000 in cash just before their bankruptcy, for the purpose of concealing it from their creditors. I cannot avoid the conclusion that their story is an entire fabrication, and that the bankrupts have this money concealed from their creditors, and that they should be ordered to pay it to the trustee."

[1867] In *re Goodridge*, Fed. Cas. 5,547: "A fraud of this kind here alleged is one that can seldom be proved by other than circumstantial evidence. The parties to the transaction are generally, as in this case, the only witnesses, and if their stories are to be believed as told, no fraud can be established. External evidence is not to be had, and the truth must be reached by examining the evidence of the alleged parties to the fraud, and weighing its probabilities, and scrutinizing its general tenor and manner. * * * The determination of the question of fraud or no fraud must, under such circumstances, depend upon the impression made by the evidence of the parties concerned. Of course, those who would commit such a fraud, would swear falsely to carry it through. If their positive testimony to the honesty of the transaction is overborne by badges and indicia of fraud, deduced from their own testimony, the conclusion must be that there was fraud."

Thus, as to evasive answers, and repetitions of "I don't remember," or "I don't know," as to matters naturally within the witness' knowledge.¹⁰¹

Instance, where explanation accepted, *In re Walder*, 16 A. B. R. 42 (D. C. Conn.): "The referee defends the order by saying that he does not believe the bankrupt's explanation, because he has testified to some very bad things which he did, and that, uncorroborated, it is no explanation at all. * * *

"The referee, then, believes that the goods went back to New York, but disbelieves the rest of the story, and intimates that, if the others had sworn as the bankrupt did, he could not (although he might still have disbelieved the story) have found facts on which to base the order under review. The court cannot avoid the feeling that, when a bankrupt comes forward and deliberately tells a story so degrading, he is entitled to have it count for something as tending to show what has become of the goods which he owns up to having disposed of so wantonly."

The court, however (as noted in the preceding section), is not to refuse the order because the bankrupt's testimony is so unreliable that it is not to be believed in any particular—he should not escape through excessive falsehood.

Failure to produce important witnesses is an indication of falsehood.¹⁰²

§ 1852. **No Presumption of Continued Possession if Circumstances Raise Counter Presumption.**—If, from the nature of the circumstances, an equal presumption of loss or expenditure arises, the presumption of continued possession, of course, will not prevail. Thus, simply to prove that a business man received a consignment of goods would not raise a presumption that he still has them, for the circumstances would of themselves raise the offsetting presumption that these goods were sold. The presumption of continued possession is, then, only as strong as the nature of the circumstances permits. Thus, property in a wife's possession is not presumptively also in the bankrupt husband's control, and a summary order on the bankrupt is improper where the proof shows the bankrupt's wife still in possession of the assets, claiming to have received them from the bankrupt in repayment of a loan, even though the loan was fictitious, there being no presumption that the assets are still within the bankrupt's control from the mere fact that they are in the hands of his wife. The wife is also an adverse claimant and she cannot be denied the right to a plenary action to determine her right to the assets, by an order on her husband which she might feel she ought to aid him in obeying.¹⁰³

101. *In re Alphin & Lake Cotton Co.*, 14 A. B. R. 194, 134 Fed. 477 (D. C. Ark.); *In re Schlesinger*, 3 A. B. R. 342, 97 Fed. 930 (D. C. N. Y., affirmed in 4 A. B. R. 361, 102 Fed. 117); *In re Kurtz*, 11 A. B. R. 129 (D. C. Penn.), wherein a bank deposit as "Manager" was found to be the bankrupt's own money. *In re Epstein*, 15 A. B. R. 711 (D. C. Penn.). Instance, *Moody v. Cole*, 17 A. B. R. 825 (D. C. Me.).

For further instances, see cases cited under preceding section, and on the subject of discharge, post, §§ 2649, 2650.

102. Instance, *Moody v. Cole*, 17 A. B. R. 82 (D. C. Me.).

103. *In re Green*, 6 A. B. R. 270 (D. C. Penn.).

Statements to commercial agencies of assets are not necessarily to be taken as conclusive admissions against the bankrupt of the existence of the assets

§ 1853. Order to Describe Property—Orders to Pay Value of Goods, Alternative Orders, etc.—The order for surrender must describe definitely the property to be surrendered.

Samel v. Dodd, 16 A. B. R. 167, 142 Fed. 68 (C. C. A. Ga.): "The order should describe the property with reasonable certainty in order to assure its identity, and the command of the court to the bankrupt should be to surrender the very property sought to be recovered."

The order should follow the pleadings as to the description of the property.¹⁰⁴

It has been held, indeed, that the order should not be to pay the "value" of the goods: that the finding should not be so indefinite as not to show in what form the property exists at the present time.

Samel v. Dodd, 16 A. B. R. 167, 142 Fed. 68 (C. C. A. Ga.): "It is thus observed that the court found goods, wares and merchandise to be in possession of the bankrupts, and, in effect, rendered judgment for their value, and ordered the commitment of the bankrupts until the amount should be paid. We are of opinion that the order cannot be sustained. If the bankrupts had in their possession merchandise, which should have been delivered to the trustee, the appropriate order would have been for the delivery of merchandise. If they had money, which formed part of their estate, they should have been required to pay over money. * * *

"But it is not within the power of the court, in such a proceeding, to render judgment for the value of the property ascertained to be in the possession of, and contumaciously withheld by, a bankrupt, and attach for contempt upon his refusal to pay. Such procedure would approach dangerously near the line, if it did not overstep it, of imprisonment for debt. * * *

"It seems to me that any evidence that conclusively showed they presently had in possession and control either the money or the goods would neces-

if the evidence is unsatisfactory upon the point that the assets ever actually existed to the amount stated: Compare, *In re Lesser*, 8 A. B. R. 12, 114 Fed. 83 (C. C. A. N. Y.).

In re Adler, 12 A. B. R. 19, 129 Fed. 502 (D. C. Tenn.), where the bankrupt, however, himself said the statements "were untrue."

Refusal because of Incrimination.—The bankrupt may file a special plea to the petition for such an order, upon the ground that to require him to answer thereto would tend to subject him to criminal prosecution, *In re Glassner, et al.*, 8 A. B. R. 184 (Ref. Md.).

Likewise, the bankrupt may refuse to surrender "documents" although title thereto is vested in the trustee, because they might furnish incriminating evidence against himself. *In re Hess*, 14 A. B. R. 559, 134 Fed. 109 (D. C. Penn.).

But he must produce them for inspection in court for the court to ascertain whether incriminating evidence is contained therein and must not wholly refuse to produce the documents. *In re Hark*, 14 A. B. R. 624, 135 Fed. 603 (D. C. Penn.).

Withholding Discharge until Sufficient Accounting Made.—In several cases the courts have assumed the doubtful power of withholding a discharge until the bankrupt has made a sufficient accounting, even where the facts were not sufficient to bar discharge nor to warrant an order upon the bankrupt to turn over property. *In re Walther*, 2 A. B. R. 702, 95 Fed. 941 (D. C. N. Y.).

¹⁰⁴. *Samel v. Dodd*, 16 A. B. R. 169, 142 Fed. 68 (C. C. A. Ga.).

sarily show where the same was kept or deposited, so that it could be reached by the process of the bankruptcy court, or of some court in a suit by the trustee."

§ 1854. **Review of Summary Orders—Set Aside Only for Manifest Error**—On review of a referee's summary order, the District Court will not set aside the order except in cases of manifest error.¹⁰⁵

Impliedly, *In re Cole*, 14 A. B. R. 389, 133 Fed. 414 (D. C. Me., affirmed in 16 A. B. R. 303, 144 Fed. 392): "The referee has found affirmatively that the bankrupt has under her control the balance of the fund to the amount of \$2,425, and that she had possession or control of it at the date of the filing of the petition in bankruptcy; that she has withheld and concealed the same from her trustee, and is now withholding and concealing the same from him. The referee had the witness before him. He conducted the examination of the bankrupt herself, saw her appearance, and was the proper tribunal to decide the questions of fact submitted to him. After full examination of the testimony, I cannot say that I should have come to a different conclusion. In any event, the conclusion of a competent referee, who has seen the witnesses, is entitled to great weight."

But see, contra, *In re Mayer*, 3 A. B. R. 533, 98 Fed. 839 (D. C. Wis.): "On review of the order in such case, I am of opinion that the ordinary rule as to the force of the findings of fact is not applicable, for the reason that determination is not governed by the weight of testimony. Enforcement of the other devolves upon the reviewing court, and with it the duty to ascertain that cause exists, beyond reasonable doubt, for the exercise of the severe means thus intrusted to the court, where an error in judgment as to the credibility or force of testimony involves indeterminate imprisonment without just cause. Let this opinion be certified to the referee for modification of the order in accordance therewith, and further proceedings thereupon as advised."

Nor will the Circuit Court of Appeals set aside the District Court's order affirming the referee's summary order except for manifest error.

In re Cole, 16 A. B. R. 303, 144 Fed. 392 (C. C. A. Me., affirming 14 A. B. R. 389): "The question whether the money was in the possession or control of Mrs. Cole is, under the circumstances of this case, what the law designates a question of fact, over which we could, of course, have no jurisdiction on this petition, which raises only questions of law, unless the finding of the District Court against her was so wholly unjustified on the proofs as would require us, on a writ of error, to set aside a verdict of the jury for want of any evidence whatever to sustain it, or for some other reason kindred thereto."

§ 1855. **Whether "Review" or "Appeal."**—Summary orders upon bankrupts and others to surrender assets are reviewable by the Circuit Court of Appeals only under § 24 (b);¹⁰⁶ and at any rate as to others than bankrupts, only by petition in error to revise, not by appeal.¹⁰⁷

^{105.} *In re Tudor*, 2 A. B. R. 808, 96 Fed. 942 (D. C. Colo.). Compare, post, § 2861.

^{106.} See general subject of "Appeals and Errors," post, § 2938. *Schweer v. Brown*, 12 A. B. R. 673, 195 U. S. 171. Compare, *In re Rosser*, 4 A. B. R. 153, 101 Fed. 562 (C. C. A. Mo.).

^{107.} *In re D. Abraham (Bernheimer v. Bryan)*, 2 A. B. R. 266, 93 Fed. 767

In *re Levy & Co.*, 15 A. B. R. 166, 142 Fed. 443 (C. C. A.): "The referee has ruled, and the court has affirmed his ruling, that this failure of the petitioner to account sufficiently establishes that the goods are still in his possession. If it be assumed that there might otherwise have been a question as to the correctness of the view taken by the court, yet, as its order is based on the finding of the referee on all the evidence that the bankrupts have the property or its value in their possession, this order should not be reversed except upon clear proof of error."

§ 1856. **Contempt for Disobedience of Summary Orders.**—If the bankrupt or such other party thus found to have assets of the estate in his control and ordered to surrender the same, fails or refuses to surrender them, he may be punished for contempt.¹⁰⁸

Trust Co. v. Wallis, 11 A. B. R. 363, 126 Fed. 464 (C. C. A. Penn.): "For disobedience of such order, the court in bankruptcy undoubtedly has the power, by attachment for contempt, to enforce compliance with such order, and punish refusal to comply."

Obiter, In *re Rosser*, 4 A. B. R. 153, 101 Fed. 562 (C. C. A. Mo.): "The power of a court to punish for contempt of its proceedings, for disobedience of its lawful orders, is inherent in the being of every court of general jurisdiction. Without it the orders of a court would be without force or effect, would command neither respect nor obedience, and there would be neither warrant nor reason for its longer existence. From the earliest annals of our law this power has been exercised. It rests upon the fundamental principles of judicial establishments, and is inseparable from the existence, as well as from the usefulness, of a court of general jurisdiction."

In *re McCormick*, 3 A. B. R. 340, 97 Fed. 566 (D. C. N. Y.): "There can be no doubt of the authority of the court to enforce obedience to all lawful

(C. C. A. Ala., reversed, on other grounds, in *Bryan v. Bernheimer*, 5 A. B. R. 623, 181 U. S. 188); *Bank v. Title & Trust Co.*, 14 A. B. R. 102, 198 U. S. 288; *Schweer v. Brown*, 12 A. B. R. 673, 195 U. S. 171; In *re Mertens*, 15 A. B. R. 702, 142 Fed. 445 (C. C. A. N. Y.). Instance, In *re Cole*, 16 A. B. R. 303, 144 Fed. 392 (C. C. A. Me.).

Apparently contra, *obiter*, where questions of fact presented, *Ellis v. Krulwich*, 15 A. B. R. 615, 141 Fed. 954 (C. C. A.): "It is difficult to perceive how error of law could be predicated of it, because it is made upon evidence from which men of different minds might draw different conclusions, and a question of this nature is a question of fact, reviewable by appeal and not by error."

Samel v. Dodd, 16 A. B. R. 165, 142 Fed. 68 (C. C. A. Ga.).

Modification of referee's order. In *re Hershkowitz*, 14 A. B. R. 86, 136 Fed. 950 (D. C. N. Y.).

¹⁰⁸ *Samel v. Dodd*, 16 A. B. R. 166, 142 Fed. 68 (C. C. A. Ga.); In *re De-Gottardi*, 7 A. B. R. 728, 114 Fed. 328 (D. C. Calif.); In *re Wilson*, 8 A. B. R. 612, 116 Fed. 419 (D. C. Ark.); In *re Purvine*, 2 A. B. R. 787, 96 Fed. 192 (C. C. A. Tex.); In *re Henderson*, 13 A. B. R. 782 (D. C. Penn.); In *re Deuell*, 4 A. B. R. 60, 100 Fed. 633 (D. C. Mo.); In *re Alphin & Lake Cotton Co.*, 14 A. B. R. 194, 134 Fed. 477 (D. C. Ark.); In *re Gerstel*, 10 A. B. R. 413, 123 Fed. 166 (D. C. Ills.); *Ripon Knitting Wks. v. Schreiber*, 4 A. B. R. 299, 101 Fed. 810 (D. C. Wash., affirmed, on review, in 104 Fed. 1006); (1867) In *re Salkey*, 11 N. B. Reg. 423, Fed. Cases, No. 12,253; In *re Anderson*, 4 A. B. R. 640, 103 Fed. 854 (D. C. S. C.); In *re Schlesinger*, 4 A. B. R. 361, 102 Fed. 117 (C. C. A. N. Y., affirming 3 A. B. R. 342, 97 Fed. 930); In *re Levy & Co.*, 15 A. B. R. 166, 142 Fed. 442 (C. C. A.); In *re Schachter*, 9 A. B. R. 499 (D. C. Ga.); In *re Mayer*, 3 A. B. R. 534, 101 Fed. 695 (D. C. Wis.); *Moody v. Cole*, 17 A. B. R. 818 (D. C. Me.).

orders' and to punish contempts by virtue of the provisions above referred to. As such punishment may involve imprisonment, however, this power should be cautiously exercised, and in cases only where willful disobedience by the bankrupt is proved beyond reasonable doubt, as in a criminal case."

Thus, an officer of a State Court may be punished for such contempt.¹⁰⁹

§ 1857. Whether Evidence on Which Order for Surrender Based May Be Re-Examined.—On principle it would seem that, since the order to surrender assets may be granted only on convincing evidence or evidence beyond a reasonable doubt, the court, on contempt proceedings for failure to obey such order, ought not to go behind the order itself, if the order was not appealed from, and ought to take into consideration only facts arising subsequently thereto, leaving the propriety of the order itself remediable by appeal or petition for review, since otherwise the contempt proceedings would be diverted into an appeal from the order of surrender itself. However, the decisions that touch upon the point, although not directly deciding the proposition, seem to indicate that on contempt proceedings the evidence on which the original order was based may be re-examined.¹¹⁰

In *re Anderson*, 4 A. B. R. 641, 103 Fed. 854 (D. C. S. Car., reversed, on other grounds, in *McGahan v. Anderson*): "An order for the delivery of the property or for the payment of the money belonging to the estate is not in the nature of a judgment or execution for debt; for such money or property belongs to the court, and it is its duty to place it in the hands of the trustee for distribution pursuant to the law. The withholding of such money or property tends to obstruct the administration of justice, and it is a power inherent in all courts to enforce their orders against reculant parties. They could not effectually protect themselves against the assaults of the lawless, or enforce obedience to their orders, without a summary power to commit for contempt; for the power to make an order carries with it an equal power to punish for a disobedience of it. I have not, then, the slightest doubt of the power of the court to commit for contempt in any proper case, but this power should be most cautiously exercised. Where the bankrupt denies possession or control, the fact of such possession should be established by indisputable testimony; for it is only in cases where it is proved beyond a reasonable doubt that the bankrupt is willfully disobedient in refusing to obey its orders that the court

109. In *re Geiser*, 12 A. B. R. 208 (D. C. Mont.).

As to **practice in citations for contempt for failure to surrender**: In *re Purvine*, 2 A. B. R. 787, 96 Fed. 192 (C. C. A. Tex.); In *re McCormick*, 3 A. B. R. 340, 97 Fed. 566 (D. C. N. Y.); *Ripon Knitting Wks. v. Schreiber*, 4 A. B. R. 299, 101 Fed. 810 (D. C. Wash.); *Boyd v. Glucklich*, 8 A. B. R. 398 (C. C. A. Iowa).

Proceedings for contempt for failure to surrender assets dismissed without prejudice to later renewal where bankrupt under indictment for embezzlement of same funds, In *re Smelting Co.*, 17 A. B. R. 141 (D. C. Penn.).

110. In *re Davidson*, 16 A. B. R. 339 (D. C. R. I.); In *re Rosser*, 4 A. B. R. 153, 101 Fed. 562 (C. C. A. Mo.); *Samel v. Dodd*, 16 A. B. R. 166, 142 Fed. 68 (C. C. A. Ga.).

Proceedings for Contempt Different from Order of Surrender.—A proceeding for contempt is of a different character from one for surrender of property: In *re Davidson*, 16 A. B. R. 338, 143 Fed. 673 (D. C. R. I.); In *re Cole*, 16 A. B. R. 302, 144 Fed. 392 (C. C. A. Me.).

should feel itself compelled to punish such obedience. It follows that it is not sufficient to establish a probability, however strong, that the bankrupt is in the possession of the money, but there must be reasonable and moral certainty, and the circumstances tending to establish it must be such as to clearly exclude any reasonable supposition to the contrary. In a civil action to recover the money, it would suffice if there was a preponderance of the evidence that the bankrupt had it in his possession or under his control; and, though it might not be free from reasonable doubt, if it is more likely to be true than not there could be a judgment against him, and process issued for its recovery."

But compare, *In re Home Discount Co.*, 17 A. B. R. 175, 147 Fed. 538 (D. C. Ala.): "He cannot ignore the order until the referee under § 41 certifies his disobedience to the judge, and then bring forward again, in his defense, matter contested before the referee prior to the making of the order provided the order itself be not void. The method of correcting error is by appeal, and not by disobedience."

§ 1858. Opportunity Must Be Given to Defend on Contempt.—But the bankrupt or such other party should not be punished for contempt because of his failure to comply with an order of the court, before he is given an opportunity to prove his inability to do so.¹¹¹

In re Hausman, 10 A. B. R. 64, 121 Fed. 984 (C. C. A. N. Y.): "In affirming the order of the court below, we do not consider the question whether the bankrupt should be punished for contempt in the event of failing to comply with the order, as that question, although the one principally argued, is not here. If it should be sought to punish him for contempt the court below will doubtless give him an opportunity to prove his inability to comply with the order."

In re Cole, 16 A. B. R. 304, 144 Fed. 392 (C. C. A. Me., reversing, on this point, 14 A. B. R. 389): "We think, however, that there was error in that the District Court entered in substance a judgment for contempt, accompanying an alternative order for committal. It is plain that a proceeding for contempt is of a different character from one resulting in a mere order for the payment of money to a trustee in bankruptcy. It is claimed that it is criminal in its nature, while an order for the mere payment of money is purely civil; that it would be justified only by the proofs and the amount of proofs requisite on ordinary criminal issues; and that it is in effect an independent proceeding which can be initiated only after an order for payment of money has been disobeyed, and an order to show cause, or some other new notice, given to the person alleged to be in default. It is sufficient now to say that the record does not show that Mrs. Cole had any day in court on the issue involved in that part of the order in question. Without undertaking to say in what manner an issue may be so presented as to justify a proceeding for an alleged contempt, and entering a penal judgment on account thereof, we are of the opinion that the record should show that the issue had been made in some way, and that the person adjudged guilty of contempt had had an opportunity to be heard in reference thereto. *Rapalje on Contempts* (1887), 126, 127, 128. For this rea-

¹¹¹. *Boyd v. Glucklich*, 8 A. B. R. 398 (C. C. A. Iowa); *In re Davidson*, 16 A. B. R. 338, 143 Fed. 673 (D. C. R. I.).

son, the order to which this petition relates must be annulled, except only so far as it affirms the decision of the referee which directed that the money in question should be paid to the trustee."

And due notice must be given.¹¹²

§ 1859. Evidence on Contempt to Be beyond Reasonable Doubt.

—And the evidence of ability to comply with the order must appear beyond reasonable doubt;¹¹³ or, at any rate, must be clear and convincing.

In *re Switzer*, 15 A. B. R. 470, 140 Fed. 976 (D. C. S. Cal.): "The court, in making an order to commit a bankrupt to jail as for contempt for failure to account for goods and money, should be governed by the same considerations which would influence a jury in a criminal prosecution, giving to the bankrupt the benefit of any reasonable doubt."

In *re Davidson*, 16 A. B. R. 339, 143 Fed. 673 (D. C. R. I.): "The authorities seem to be agreed that no contempt order should be made unless the court is satisfied of the present ability of the bankrupt to comply with the decree for the payment of money. While the admitted receipt of goods or money, and repeated refusals to explain or account for their disappearance, may lead to a belief in a present possession or control, and be a sufficient basis for a contempt order (In *re Levy & Co.*, 15 A. B. R. 166, 142 Fed. 442), yet it does not seem to me that the question of the present ability of a bankrupt to comply with an order should be determined upon an artificial rule of proof to be applied irrespective of the circumstances of the particular case.

"That a person has been guilty of fraudulent appropriation of property, and has concealed it by falsehood or perjury, does not always lead to the belief that the failure to make restitution upon an order is contumacious and willful. Where the amount concealed is small, and such as might readily have been spent, or where the circumstances are such as to indicate that the bankrupt was merely the person in nominal control of the business, and merely the instrument of others in a scheme for defrauding creditors, it is quite reasonable, under such circumstances, to believe even a person who has been guilty of fraudulent appropriation, and of fraudulent statements, when she swears that she has not now the fruits of the fraud, nor any control over them. * * *

"If, having doubts of her present ability to pay, I should commit this bankrupt to confinement in jail upon a conjecture that her husband or other persons, actual principals in the fraud, may come to her relief with a sum of money equal to that which she has been ordered to pay over, I should, in my opinion, be abusing the power to punish for contempt. Creditors who sell to persons of doubtful or unknown financial standing, and of unknown or sus-

¹¹². In *re Smelting Co.*, 15 A. B. R. 834 (D. C. Penn.).

¹¹³. In *re Anderson*, 4 A. B. R. 641, 103 Fed. 854 (D. C. S. C.); In *re Mayer*, 3 A. B. R. 534, 98 Fed. 839 (D. C. Wis.); In *re Goldfarb Bros.*, 12 A. B. R. 386 (D. C. Ga.); *Moody v. Cole*, 17 A. B. R. 818 (D. C. Me.). But compare, inferentially contra, In *re Fellerman*, 17 A. B. R. 787, 149 Fed. 244 (D. C. N. Y.); In *re Levy & Co.*, 15 A. B. R. 169, 142 Fed. 442 (C. C. A.). Also, cases cited under similar proposition as to orders for surrender, ante, § 1842.

As to Whether Imprisonment for Contempt for Failure to Obey Order to Surrender Assets, Criminal Proceedings.—As to whether imprisonment for contempt for disobedience of an order to surrender assets is a criminal proceeding, see ante, § 1842.

Force and weight of sworn denial: *Moody v. Cole*, 17 A. B. R. 818 (D. C. Me.). See also, similar proposition under "Summary Order to Surrender," ante, §§ 1843 and 1844.

picious character for integrity, and who, by their own lack of ordinary diligence, have become the victims of fraud, should proceed for redress under the ordinary methods of legal procedure, and cannot expect to use, as an ordinary agent in the collection of debts, the power to imprison for contempt, which is to be applied only in cases of contumacious resistance to the orders of court. While there is no doubt of the power of the court to enforce its order for the surrender of property or money, when clearly satisfied that it is within the power of the bankrupt or other person to comply with such order, I am not so satisfied in this case."

§ 1860. Procedure on Obtaining Surrender from Court Officers.—Where surrender from a court officer is sought for, either the trustee makes direct application to the court whose officer has the custody for a summary order upon the officer to surrender the assets; or he applies to the bankruptcy court itself therefor, the comity of courts prescribing that the latter method be not resorted to until efforts have reasonably been exhausted to get the order from the court already in charge of the property.¹¹⁴

But the requirement that application should first be made to the State Court where the proceedings are pending, does not obtain where an emergency exists; and the bankruptcy court in such case has the right to proceed at once by direct order upon the court officer.

§ 1861. If Application Be to State Court Whose Officer in Control, Procedure Follows That of Such Court.—If the application be made to the State Court whose officer is in control of the property sought for, the procedure, of course, follows that of the State Court.

§ 1862. If Application Be to Bankruptcy Court, Procedure Follows Ordinary Rules as to Summary Orders on Bankrupts and Agents.—If the application be made in the bankruptcy court, however, for the order of surrender upon the State court's officer, it follows the ordinary rules as to summary orders on bankrupts and others.

§ 1863. Jurisdiction to Determine Facts Requisite to Summary Jurisdiction.—The bankruptcy court has jurisdiction in the summary

¹¹⁴ See "Procedure on Annulling of Liens Obtained by Legal Proceedings," § 1471, et seq. See summary orders on "Assignees and Receivers," ante, § 1827 and § 1830, et seq.

Advice of counsel protects State receiver, who has at one time voluntarily surrendered possession to the bankruptcy receiver without leave of the State Court, and thereafter has retaken possession without leave of the Federal Court, and he will not be punished for contempt, *In re Watts*, 10 A. B. R. 113, 190 U. S. 1.

Before applying to the State Court, the trustee should first get authority from the Bankruptcy Court, *Bear v. Chase*, 3 A. B. R. 746, 99 Fed. 920 (C. C. A. S. C.); such authority may require the trustee to make a limited request, *Bear v. Chase*, 3 A. B. R. 746, 99 Fed. 920 (C. C. A. S. C.).

Voluntary surrender by State receiver without first obtaining order permitting, *In re Watts*, 10 A. B. R. 113, 190 U. S. 1.

And application to the State Court first is not such an election of forum as to debar the Bankruptcy Court from subsequently issuing its restraining order, *Bear v. Chase*, 3 A. B. R. 746, 99 Fed. 920 (C. C. A. S. C.).

proceedings to determine the existence of the facts requisite to give it the jurisdiction thus to proceed summarily.¹¹⁵

In *re Baird*, 8 A. B. R. 649 (D. C. Penn.): "When a petition such as this is presented, asking the District Court to make a summary order directing a respondent to surrender the possession of certain property that is alleged by a trustee to belong to the bankrupt's estate, the court has the undoubted right—indeed, it lies under the duty—to examine the ground set up by the respondent for his refusal to deliver possession, and to determine whether a real, and not merely a pretended controversy exists upon this subject."

In *re Kane*, 12 A. B. R. 444, 131 Fed. 386 (D. C. N. Y.): "The referee is quite right where he says the bankruptcy court has jurisdiction to determine in the first instance whether an asserted adverse claim to property is colorable or actual. If it be clearly a nullity, the referee has jurisdiction, and may by summary process require the surrender of the property so withheld to the trustee in bankruptcy. On the other hand, should evidence of a claimant satisfy the referee that an adverse right to such possession and control is asserted in good faith, and there is reasonable cause for believing that the intention of the claimant is to protect an asserted right of ownership and control, then the petition of the trustee should be dismissed. The remedy of the trustee for the recovery of the property may then be found in a plenary suit instituted in the proper tribunal."

Bank v. Title & Trust Co., 14 A. B. R. 102, 107, 198 U. S. 280 (reversing 11 A. B. R. 79): "But, nevertheless, the District Court had jurisdiction to determine whether it could or could not proceed further."

And the referee has such jurisdiction.¹¹⁶

§ 1864. But Will Only Examine Far Enough to Ascertain if Facts Alleged in Good Faith and if True Would Constitute "Adverse" Party.—But it will only examine far enough to determine whether the facts are alleged in good faith (even though they be fraudulent), and whether, if true, they would constitute the adverse party an "adverse claimant" within the meaning of the law.¹¹⁷

In *re Baird*, 8 A. B. R. 649 (D. C. Penn.): "And when it appears, as I think it sufficiently appears in the present case, that in some of its aspects, at least, the controversy requires a court to decide upon the validity of a real claim to the property in question, in my opinion the District Court is obliged to decline

^{115.} In *re Breslauer*, 10 A. B. R. 33, 121 Fed. 910 (D. C. N. Y.); In *re Weininger, Bergman & Co.*, 11 A. B. R. 424, 126 Fed. 875 (D. C. N. Y.); *Mueller v. Nugent*, 7 A. B. R. 224, 184 U. S. 1; In *re Davis*, 9 A. B. R. 675 (D. C. Tex.); In *re Andre*, 13 A. B. R. 132 (C. C. A. N. Y.); In *re Teschmacher & Mrazay*, 11 A. B. R. 547, 127 Fed. 728 (D. C. Penn.); In *re Muncie Pulp Co.*, 14 A. B. R. 73, 139 Fed. 546 (C. C. A. N. Y.); *Louisville Trust Co. v. Comingor*, 7 A. B. R. 421, 184 U. S. 18; In *re Tune*, 8 A. B. R. 285, 115 Fed. 906 (D. C. Ala.); inferentially, In *re Adams*, 12 A. B. R. 367, 130 Fed. 788 (D. C. R. I.); *Schweer v. Brown*, 12 A. B. R. 673, 195 U. S. 171; obiter, In *re Waukesha Water Co.*, 8 A. B. R. 715, 116 Fed. 1009 (D. C. Wis.); obiter, In *re Milk Co.*, 16 A. B. R. 732 (D. C. Penn.); obiter, impliedly, In *re Sunseri*, 18 A. B. R. 235 (D. C. Penn.).

^{116.} In *re Scherber*, 12 A. B. R. 618, 131 Fed. 121 (D. C. Mass.); In *re Steuer*, 5 A. B. R. 209, 104 Fed. 323 (D. C. Mass.).

^{117.} In *re N. Y. Wheel Wks.*, 13 A. B. R. 60, 132 Fed. 203 (D. C. N. Y.); In *re Sheinbaum*, 5 A. B. R. 187, 107 Fed. 247 (D. C. N. Y.); In *re Sunseri*, 18 A. B. R. 235 (D. C. Penn.).

the jurisdiction, and to refer the matter to the appropriate tribunal of the State. To decide that the claim is unfounded would be to assume the jurisdiction that is denied by the act. The order I am about to make, however, must not be regarded as impairing in any respect the effect of the order heretofore entered upon the petition of the Juniata Limestone Company."

In *re Adams*, 12 A. B. R. 367, 130 Fed. 788 (D. C. R. I.): "The claim of Nass that, before the filing of the petition in bankruptcy, he had received the property in question as part payment of a debt, and that he had no reasonable cause to believe that it was intended thereby to give a preference, was clearly an adverse claim. * * * The referee, however, found as facts that the taking of possession by Nass was without authority from Adams; that Nass knew, or had reasonable cause to know, that the taking constituted a preference, and that the taking of the property was equivalent to trover and conversion, and carried no title; that, in consequence thereof, Nass had not even a colorable claim to title. This was not a decision that, upon the facts as claimed by Nass, he was not an adverse claimant, nor an inquiry into the existence of an adverse claim; but a decision of the merits of an adverse claim of right, and a finding that the claim was not adverse because, in the opinion of the referee it was not, as a matter of evidence, meritorious in point of fact. As it is clear from the report of the referee, and from his decree, that Nass was, properly speaking, an adverse claimant, the referee, upon objection, should have declined to finally adjudicated the merits of the case on summary petition."

In *re Kane*, 12 A. B. R. 444, 131 Fed. 386 (D. C. N. Y.): "If he is satisfied, either from personal knowledge of the facts or from testimony, that an order to show cause ought to be directed to a person charged with having in his possession property belonging to the bankrupt estate, the essential inquiry upon return of the order to show cause, if an adverse claim is made, is whether such claim is colorable or fictitious. In short, if it is a colorable claim, it should be set aside, and the claimant summarily directed to deliver the property to the trustee; but if, as already indicated, the claim is asserted in good faith, substantiated by verified pleadings or by oral testimony, then the objection to the jurisdiction of the court is controlling. In such an event the property is no longer constructively in the possession of the bankrupt and subject to the order of the bankruptcy court."

In *re Teschmacher & Mrazay*, 11 A. B. R. 547, 127 Fed. 728 (D. C. Pa.): "As I understand the decisions of the Supreme Court * * * a court of bankruptcy, before the amendments of 1903 were passed, had jurisdiction to inquire summarily upon petition and answer whether property alleged to belong to the bankrupt, but found in the possession of a third person when the petition was filed, was held by such person as the bankrupt's agent or mere representative; and in the exercise of this jurisdiction the court was of necessity empowered to inquire to some extent concerning the merits of the claim of title, or of a right to retain possession, that might be set up by the person in whose hands the property was found. If the result of the inquiry was to satisfy the court that a real adverse claim existed—no matter how ill-supported it might appear to be—the court had no power to go further in that form of proceeding and decide summarily the question whether or not the claimant was entitled to prevail. It then became necessary, because the Bankrupt Act so declared, to remit the contestants to a plenary suit, either in a State court or in a Circuit Court of the United States, whichever might prove to be the appropriate tribunal. In either forum, however, the dispute was to be conducted by a plenary suit, and not in a summary fashion. The amendments of 1903, as I understand their scope, have made at least one change in these rules. They have conferred

jurisdiction upon the District Court to entertain some of the plenary suits which theretofore could only have been brought in a State court or in the Circuit Court, but the other rules of procedure laid down by the Supreme Court are still to be followed. The District Court, sitting as a court of bankruptcy, may still inquire summarily concerning the ownership of property alleged to belong to the bankrupt, although it be found in the possession or custody of a third person. But, if the court should discover that such person is holding the property under a real claim of title or right of possession, and is not merely the alter ego of the bankrupt, it is still the duty of the court to desist from pursuing the summary remedy further, and to remit the contestants to a plenary suit, although the suit, instead of being brought in a State court or a Circuit Court of the United States, may now be brought in the District Court itself, and may there be pursued to final judgment."

In *re* Tune, 8 A. B. R. 285, 115 Fed. 906 (D. C. Ala.): "Summary jurisdiction is ousted if determination of the validity of the adverse claim involves the decision of matters in pais and the weighing of conflicting evidence and finding of facts, which, when presented leave room for fair doubt as to the invalidity of the claim, since such a claim is not merely colorable. Delivery must then be compelled by suit in plenary proceedings in a proper court."

§ 1865. Not Concluded by Pleadings.—The bankruptcy court, it appears, is not concluded by the pleadings, but may inquire into the facts to see if the claim is really adverse or merely colorably so; if really adverse, although fraudulent and voidable, or not sustainable by the weight of the evidence, jurisdiction will not be assumed.¹¹⁸

In *re* Kane, 12 A. B. R. 444, 131 Fed. 386 (D. C. N. Y.): "The referee is quite right when he says the bankruptcy court has jurisdiction to determine in the first instance whether an asserted adverse claim to property is colorable or actual. * * * The determination of the respective rights of the parties demands judicial investigation by the referee to ascertain the facts. Both sides are heard, and evidence may be taken though the conclusions of the court may be based upon the pleadings or affidavits presented to him. He must exercise a sound judicial discretion in the determination of questions of this character to the end that no injustice be done to either party."

Compare, In *re* Baird, 8 A. B. R. 650 (D. C. Pa.): "To decide that the claim is unfounded would be to assume the jurisdiction that is denied by the Act."

But the petition for the recovery must not fail to state that the adverse-ness of the claim is merely colorable, else the claim will be taken as really adverse.

In *re* Scherber, 12 A. B. R. 616, 131 Fed. 121 (D. C. Mass.): "But the respondent's claim in the case at bar is not alleged in the petition to be merely colorable, and must be taken to be really adverse. Where this is true, and where due objection to the form of proceeding is made, the decisions and language of the Supreme Court imply that a plenary suit must be resorted to."

¹¹⁸. In *re* Michie, 8 A. B. R. 734, 115 Fed. 906 (D. C. Mass.). Compare, In *re* Adams, 12 A. B. R. 867, 130 Fed. 788 (D. C. R. I.); In *re* N. Y. Wheel Wks., 13 A. B. R. 60, 132 Fed. 203 (D. C. N. Y.); In *re* Sheinbaum, 5 A. B. R. 187, 107 Fed. 247 (D. C. N. Y.).

And where the trustee's petition itself shows adverseness, evidence that such claim was merely colorable should be excluded.¹¹⁹

§ 1866. But Notice Served Outside District Not Sufficient to Confer Jurisdiction to Make Inquiry.—But notice served outside the district where the bankruptcy proceedings are pending, upon an "adverse claimant" in possession of the property, will not confer jurisdiction on the bankruptcy court to make the inquiry.¹²⁰

In *re Waukesha Water Co.*, 8 A. B. R. 715, 116 Fed. 1009 (D. C. Wis.): "Jurisdiction of the subject matter is undoubted under the recent decision in *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. —, 7 A. B. R. 224, and, if adverse claim to the property were asserted by the respondents, the court must ascertain whether it is of that character, and so takes cognizance to that extent at least. It determines for itself whether final jurisdiction exists.

"The questions raised, however, of jurisdiction to act in personam upon these respondents, who reside in another State and District, and are there served with the order to show cause in this matter, is not met by that decision, nor is such service authorized by any express provision of the Bankruptcy Act or ruling thereunder called to my attention. In the absence of statutory authority for the process of the court to run beyond the territorial limits of the District, the doctrine is well settled that no jurisdiction exists to that end."

§ 1867. No Ancillary Jurisdiction in Bankruptcy Court of Another District to Make Summary Order.—And no ancillary jurisdiction exists in the bankruptcy court of another district to make a summary order to surrender assets, in aid of a bankruptcy proceedings here.¹²¹

DIVISION 3.

REDEMPTION OF PROPERTY FROM LIENS.

§ 1868. Jurisdiction to Redeem Property from Liens.—The bankruptcy court has jurisdiction to redeem property from liens and charges.¹²²

§ 1869. Procedure—Petition to Redeem and Notice.—Redemption may be ordered upon petition and notice. Ten days' notice, it appears from the Supreme Court's Official Form No. 43, is to be sent to all creditors, although § 58 does not specifically mention such applications among those matters notices of which must be sent to all creditors. Likewise, notice

^{119.} In *re Michie*, 8 A. B. R. 734, 115 Fed. 906 (D. C. Mass.).

For form of such petition and notice, see In *re Scherber*, 12 A. B. R. 616 (D. C. Mass.).

^{120.} In *re Alphin & Lake Cotton Co.*, 12 A. B. R. 654, 131 Fed. 824 (D. C. Ark.). Contra, inferentially, In *re Peiser*, 7 A. B. R. 690, 115 Fed. 199 (D. C. Penn.).

^{121.} In *re Von Hartz*, 15 A. B. R. 747, 142 Fed. 726 (C. C. A. N. Y.). See ante, "Ancillary Proceedings," § 1705, et seq.

^{122.} In *re Bacon*, 12 A. B. R. 730, 132 Fed. 157 (D. C. N. Y.). Supreme Court's Official Form No. 43.

should be given to the lienholder, in similar manner to that given in cases of sales free from liens. The petition may be filed before the referee.

§ 1870. **Gives Jurisdiction to Order Cancellation, Assignment or Release, on Tender of Amount Due.**—In proceedings to redeem, the bankruptcy court has jurisdiction to order cancellation, release or assignment of the lien on tender of the amount due,¹²³ if there be no controversy over such amount and no colorable adverse interest.

§ 1871. **May Not, under Guise of Petition to Redeem, Gain Jurisdiction Over Adverse Claimants in Possession.**—But the filing of the petition to redeem, and service of notice upon the lienholder, will not give jurisdiction over adverse claimants in possession, nor may controversies with them be litigated in such proceedings. The petition to redeem is more in the nature of an application to the court of bankruptcy for leave to pay off an uncontroverted lien than it is a proceedings in the nature of the old equity action for redemption. In case the lien be paid and there is no colorably adverse interest in the lienholder, the bankruptcy court will have jurisdiction under the petition to redeem to summarily order surrender of the property, under its ordinary jurisdiction.

DIVISION 4.

SUMMARY JURISDICTION TO ORDER TRUSTEE, ETC., TO SURRENDER PROPERTY TO RIGHTFUL OWNERS.

§ 1872. **Summary Jurisdiction to Order Trustee to Surrender Property to Rightful Owner.**—The bankruptcy court has jurisdiction to determine the rights of third parties claiming property in its custody, and is bound to turn it over to the one entitled thereto.¹²⁴

§ 1873. **Thus, to Order Surrender of Property Belonging to Third Parties.**—And thus the bankruptcy court has jurisdiction to order the surrender or redelivery of property in its custody belonging to third parties.¹²⁵ And, as incident thereto, the bankruptcy court may compel the trustee to execute assignments of the property, or other instruments necessary or proper.¹²⁶

^{123.} *In re Bacon*, 12 A. B. R. 730, 132 Fed. 157 (D. C. N. Y.).

^{124.} See cases cited ante, as to jurisdiction of bankruptcy court over property in its custody, § 1795.

^{125.} *Havens v. Pierck*, 9 A. B. R. 569, 120 Fed. 244 (C. C. A. Ills.); *In re J. C. Winship Co.*, 9 A. B. R. 641, 120 Fed. 93 (C. C. A. Ills.); *In re Whitener*, 5 A. B. R. 198, 105 Fed. 180 (C. C. A. Tenn.); *In re Sentenne & Green Co.*, 9 A. B. R. 648, 120 Fed. 436 (D. C. N. Y.); *In re McCallum*, 7 A. B. R. 596, 113 Fed. 393 (D. C. Pa.); *In re Hadden-Rodee Co.*, 13 A. B. R. 604, 606, 135 Fed. 886 (D. C. Wis.); *obiter*, *In re Rochford*, 10 A. B. R. 608, 124 Fed. 184 (C. C. A. S. Dak.); *In re Moody*, 12 A. B. R. 725, 131 Fed. 525 (D. C. Iowa).

^{126.} *In re McBride & Co.*, 12 A. B. R. 81, 132 Fed. 285 (Ref. N. Y.), in which case the court ordered the trustee to execute an assignment of a copyright standing in the bankrupt's name but belonging to another.

§ 1874. **Referee Has Jurisdiction.**—A referee has jurisdiction to determine the ownership of property in the possession of a receiver or trustee appointed by the bankruptcy court, where a third party files a petition, or an intervening petition, claiming the ownership of such property.¹²⁷

§ 1875. **Replevin Suits Not Maintainable against Trustee or Receiver.**—Adverse claimants to any of the property must not resort to legal proceedings in other courts, or other methods of seizure or of taking possession of property in the custody of the bankruptcy court. They must come into the bankruptcy court and make application there for a return of the property.¹²⁸

§ 1876. **Petitions for Reclamation, Surrender or Redelivery.**—Surrender of property in the custody of the bankruptcy court but belonging to a stranger, is accomplished by filing before the referee a petition, variously styled a petition for redelivery, for surrender, for restitution or for reclamation.

These petitions should set up the facts, in accordance with the ordinary rules of pleading in an action of trover, conversion or replevin, that would entitle the claimant to the property.

Levi v. Picard, 17 A. B. R. 431 (D. C. N. Y.): "Viewing the petition in reclamation as a pleading, it seems to me obvious that it should contain all the allegations necessary to sustain a complaint in trover and conversion, or required by the strictest practice in an affidavit for replevin."

Notice should be served on the trustee and hearing be had.

The hearing should not be had upon affidavits, for the proceedings corresponds to an action of replevin; for which reason it is that the pleading is styled a petition, rather than a motion.¹²⁹

Of course, at the time of bankruptcy there are likely to be many articles in the bankrupt's possession that really do not belong to him and therefore do not belong to his creditors.

¹²⁷. In *re Drayton*, 13 A. B. R. 602, 135 Fed. 883 (D. C. Wis.); In *re Scrinopski*, 10 A. B. R. 221 (D. C. Kans.); compare, *Carriage Co. v. Solanas*, 6 A. B. R. 221, 108 Fed. 532 (D. C. La.); In *re Neely*, 5 A. B. R. 836, 108 Fed. 371 (D. C. N. Y.).

Apparently, *contra*, and that a "plenary action" is proper, In *re Russell & Birkett*, 3 A. B. R. 658 (C. C. A. N. Y.); impliedly, In *re McBride & Co.*, 12 A. B. R. 81, 132 Fed. 285 (Ref. N. Y.).

Impliedly, In *re Rochford*, 10 A. B. R. 608, 124 Fed. 184 (C. C. A. S. Dak.), which was, however, a case of a lien upon, rather than a claim to, property in the hands of the trustee; yet the principle is the same.

¹²⁸. See cases cited under §§ 1794 and 1795, et seq. Also, see *contra*, In *re Smith*, 9 A. B. R. 590 (D. C. R. I.), wherein the court seems to have assumed the right of the claimant to replevy and refused to enjoin.

And see also, apparently, *contra*, In *re Freeman*, 9 A. B. R. 68 (D. C. N. Y.), wherein the court seems to have assumed the right of the claimant to replevy from the trustee, and is concerned solely with the merits of a compromise of the controversy involved.

¹²⁹. However, in one case the court relegated the parties to a plenary action

§ 1877. **Reclamation of Property Left for Repairs, Storage or Other Bailment.**—Thus, goods left with him for repairs, or storage, or on other bailment, may be reclaimed.¹³⁰

§ 1878. **Of Property Bought on Conditional Sale.**—Property sold to the bankrupt on conditional sale is reclaimable—where it would be reclaimable under State law from the buyer.

Obiter, In re Great Western Mfg. Co., 18 A. B. R. 261, 152 Fed. 123 (C. C. A. Neb.): "The vendor had the right to take the machinery and material out of the mill and dispose of it as it saw fit. If it had applied to the court to do so and its application had been denied, it would have been entitled to recover of the trustee the value of its right."

§ 1879. **Of Goods Bought under Misrepresentations or While Grossly Insolvent.**—Thus, goods that have been procured through the misrepresentations of the buyer as to his financial condition or by other fraud; or (in some States) under such circumstances of hopeless insolvency as to have precluded any intention to pay and where there was therefore no meeting of minds and no passing of title, may be reclaimed.¹³¹

Thus, as to sales on misrepresentation as to financial condition, reclamation has, on the facts, sometimes been granted.¹³²

In re Hamilton Furn. & Carpet Co., 9 A. B. R. 65, 117 Fed. 774 (D. C. Ind.): "This is but a modern application of that ancient doctrine that where a party, by false representations as to his solvency, knowingly made, induces the owner of goods, who, in ignorance of their falsity relies upon such representations, to sell them, he is entitled to disaffirm the contract and recover the goods. Fraud renders all contracts voidable ab initio, both at law and in equity. No man is bound by a bargain into which he has been deceived by fraud, because assent is necessary to a valid contract, and there is no real assent where fraud and deception have been used as instruments to control the will and induce the assent."

In re Marco Gany, 4 A. B. R. 576, 103 Fed. 930 (D. C. N. Y.): "It is not necessary that the false representations should be the sole and exclusive consideration for the credit; but only that they were a material consideration, without which in all probability the credit would not have been given."

under the impression that the hearing otherwise would be upon affidavits, which the court evidently deemed inadequate. In re Mundle, 13 A. B. R. 490 and 14 A. B. R. 680, 139 Fed. 691 (D. C. N. Y.). Compare, In re Russell & Birkett, 3 A. B. R. 658 (C. C. A. N. Y.).

Not Triable to Jury.—Such petitions for reclamation are not triable to a jury. They are strictly in equity. *Dokken v. Page*, 17 A. B. R. 228, 147 Fed. 438 (C. A. N. Dak.).

Demurrer seems to have been permitted in an analogous case where the validity of a lien was in question and all the allegations considered together and legal conclusions disregarded. In re Gosch, 9 A. B. R. 613, 121 Fed. 604 (D. C. Ga.).

130. Instance, reclamation granted, bailment with option to purchase after trial, In re Rubber Ref. Co., 15 A. B. R. 72, 139 Fed. 201 (D. C. Penn.).

131. In re Russell & Birkett, 5 A. B. R. 608 (Ref. N. Y.). See, also, ante, § 1169.

132. In re Patterson & Co., 10 A. B. R. 748, 125 Fed. 562 (D. C. Tex.); In re Weil, 7 A. B. R. 90, 111 Fed. 897 (D. C. N. Y.).

Compare, analogously (plenary action in State Court), *Silvey & Co. v. Tift*, 17 A. B. R. 20, 123 Ga. 804: "If one purchasing goods makes a false representation as to a material matter, and the owner of the goods relies on such statement and sells upon discovering the fraud the owner may rescind and reclaim his property, or so much of it as is still in the possession of the purchaser."

And reclamation has sometimes been refused because the proof was insufficient;¹³³ or because there was no tender back of the consideration received.¹³⁴

In *re* *Murphy Barbee Shoe Co.*, 11 A. B. R. 434 (Ref. Mo.): "In order to make a complete rescission of an executed contract of sale by a vendor, it is necessary for him to tender to the vendee all of value received by him from the vendee. The parties must all be placed in statu quo."

Reclamation also has been refused where it was doubtful whether there was any reliance on the false statement: the seller admitting he would have sold anyway, and the making of the false assertion that the buyer had two dollars for every one he owed being denied by the bankrupt.¹³⁵ Where there was no reliance on a false statement made to a commercial agency, the mere fact that it was made will not entitle the seller to reclaim.¹³⁶ And intention to deceive must exist in order to entitle to reclamation on the ground of misrepresentation.¹³⁷

Where there have been sales on other frauds, reclamation has sometimes been granted;¹³⁸ and sometimes been refused.¹³⁹ In some States the rule prevails that where goods have been sold at a time when the buyer knew he was so hopelessly insolvent that he could have had no reasonable prospect of being able to pay for them and so no real meeting of minds between the parties could be held ever to have taken place and no title ever to have passed, such apparent sale may be rescinded and the goods be recovered. This rule does not appear to prevail in Pennsylvania, however;¹⁴⁰ but apparently does prevail in New York.¹⁴¹

The buyer's omission to disclose his insolvency to the seller is not fraudulent in law.¹⁴²

133. In *re* *Rose*, 14 A. B. R. 345 (D. C. Penn.); *Levi v. Picard*, 17 A. B. R. 430, 148 Fed. 654 (D. C. N. Y.).

134. Compare, obiter, to same effect, *Silvey & Co. v. Tift*, 17 A. B. R. 20, 123 Ga. 804.

135. In *re* *Davis*, 7 A. B. R. 276, 112 Fed. 294 (D. C. N. Y.).

136. In *re* *Epstein*, 6 A. B. R. 60, 109 Fed. 878 (D. C. Ark.); In *re* *Roalswick*, 6 A. B. R. 752, 110 Fed. 639 (D. C. Mont.).

137. In *re* *Russell & Birkett*, 5 A. B. R. 608 (Ref. N. Y.). Analogously, *Lumber Co. v. Taylor*, 14 A. B. R. 231, 137 Fed. 321 (C. C. A. Pa.).

138. *Bloomington v. Empire Rubber Mfg. Co.*, 8 A. B. R. 74, 114 Fed. 1016 (D. C. N. Y.).

139. In *re* *O'Connor*, 7 A. B. R. 428, 112 Fed. 666 (D. C. Ga.): But the opinion in this case was obiter, for, in fact, the court found that a general scheme to defraud, which was the basis of the proceedings, had not been proven. It does not seem to state a proper rule anyway.

140. See, In *re* *Lewis*, 10 A. B. R. 741, 125 Fed. 143 (D. C. Penn.). However, see *Lumber Co. v. Taylor*, 14 A. B. R. 231, 137 Fed. 321 (C. C. A. Penn.); In *re* *Murphy-Barbee Shoe Co.*, 11 A. B. R. 428 (Ref. Mo.).

141. In *re* *Levi & Picard*, 16 A. B. R. 756 (D. C. N. Y.).

142. In *re* *Davis*, 7 A. B. R. 276, 112 Fed. 294, 295 (D. C. N. Y.).

Strict proof seems to be required of the reclaimer where the ground urged is fraudulent misrepresentation.¹⁴³

And where the rule prevails, it depends upon the condition and intentions of the buyer at the time the contract of sale was entered into, not at the time of the delivery of the goods.

In *re Levi & Picard*, 16 A. B. R. 756 (D. C. N. Y.): "The right of the petitioners to reclaim the goods so delivered is based upon the proposition that if at the time of the receipt or delivery thereof, the vendees had reasonable cause to believe that they were unable to pay for them, and did not then intend to pay for them, the sale may be rescinded and the goods recovered, even though no such cause to believe or intent not to pay, can be proven or inferred as of the date of the sale.

"The refinement upon the well-established rule regarding rescission is not, in my opinion, sustained by authority or reason.

"*Donaldson v. Farwell*, 93 U. S. 631, is binding authority in this court. It was there held to be established that what entitles the vendee to disaffirm a contract of sale and recover his goods consists in the vendee's inducing the vendor 'to sell him goods on credit' when he was (a) insolvent, (b) concealed his insolvency, and (c) did not intend to pay for what he bought.

"Here the contract of sale was complete when the minds of the parties met on August 31st; and at that time, although the bankrupt firm was insolvent, there is no evidence that the partners knew that fact, and there is a plain inference that they then intended to pay for what they bought. * * *

"In practice, the petitioner's demand is especially vicious in bankruptcy. It is notorious that mercantile contracts for future deliveries, often many months distant, or extending over a long period of time, are the rule rather than the exception.

"That a contract for 'spring delivery' made in perfect honesty in October, may be avoided because an expert investigation after bankruptcy in May renders it probable or certain that when goods were delivered in April the vendee was insolvent, and therefore should have imputed to him an intent not to pay, contemporaneous with delivery, is intolerable. Such proceedings would render every mercantile failure a mockery to creditors who had given no credit or sold on short time, yet to this extent would the doctrine contended for lead the court."

The right of rescission is lost if the goods become a component part of a structure, not separable therefrom without manifest injury.¹⁴⁴

Reclamation will be refused where the property was not in the hands of the trustee but in the hands of the bankrupt, and the reclaimer had waited until the trustee had procured a summary order upon the bankrupt for surrender.¹⁴⁵

143. In *re Murphy-Barbee Shoe Co.*, 11 A. B. R. 428 (Ref. Mo.); *Levi v. Picard*, 17 A. B. R. 431, 148 Fed. 654 (D. C. N. Y.).

144. *Lumber Co. v. Taylor*, 14 A. B. R. 231, 137 Fed. 321 (C. C. A. Penn.).

145. In *re Eliowich*, 17 A. B. R. 419, 148 Fed. 464 (D. C. N. Y.).

Pleadings and Practice:

(a) Claimant must state the facts wherein the falsity consists. *Lumber Co. v. Taylor*, 14 A. B. R. 231, 137 Fed. 321 (C. C. A. Penn.).

(b) Claimant must state the debtor's intent to deceive. *Lumber Co. v. Taylor*, 14 A. B. R. 231, 137 Fed. 321 (C. C. A. Penn.); inferentially, In *re Russell & Birkett*, 5 A. B. R. 608 (Ref. N. Y.).

§ 1880. **Reclaiming Part Still in Trustee's Hands, Proving Claim for Balance.**—Where part of the goods have been sold and the proceeds are no longer traceable, the weight of authority seems to be that the seller may reclaim the part still in specie and make proof of debt on an implied contract for the balance sold, and that the two claims are not inconsistent and that no election need be made;¹⁴⁶ although, on reason, it would seem that such course would amount to affirming and denying contractual relations at the same time. However, the distinction seems to be that so long as the original contract of sale is not affirmed, but that what is affirmed is only the implied contract to pay for goods converted, as if bought, there is no inconsistency.¹⁴⁷

§ 1881. **Goods Stopped in Transitu.**—Goods may be reclaimed where the right of stoppage in transitu exists. In this connection it is to be borne in mind that the right of stoppage in transitu does not cease until the goods have reached the hands of the buyer or his agent, and that, therefore, if a receiver appointed by the bankruptcy court, and even perhaps a trustee, induces the railroad company to deliver to himself goods consigned to the bankrupt, or seizes them, the right of the seller to stop the goods in transitu is not impaired—for seizure by legal process against the buyer does not end the right of stoppage in transitu, and the possession of a receiver in bankruptcy is like the possession of a sheriff or constable on execution or attachment, or like the possession of a receiver in aid of execution.

§ 1882. **Converted Property or Its Traced Proceeds, Reclaimable.**—Property converted by the bankrupt may be recovered; so may its proceeds if they can be identified and traced; but if neither the property itself nor its proceeds can be identified, the fact that it was converted will not entitle its owner to priority of payment out of the estate: the owner will simply have the right to waive the tort and present his claim as on contract for the value of the goods converted and pray to be allowed to share in the dividends.¹⁴⁸

In *re Mulligan*, 9 A. B. R. 11, 116 Fed. 715 (D. C. Mass.): "On the other hand, the mere misapplication of trust funds does not create in favor of the defrauded beneficiary a claim upon the general estate of the defrauding trustee superior to that of his general creditors. There are some cases, indeed, which give to the beneficiary a general priority, or something very near it; but they are opposed to the great weight of authority. Other cases do not give to the

146. In *re Hirschman*, 4 A. B. R. 715, 104 Fed. 69 (D. C. Utah); In *re Hildebrandt*, 10 A. B. R. 184, 120 Fed. 992 (D. C. N. Y.); *Silvey & Co. v. Tift*, 17 A. B. R. 21, 123 Ga. 804; ante, § 638.

147. *Silvey & Co. v. Tift*, 17 A. B. R. 21, 123 Ga. 804; In *re Heinsfurter*, 3 A. B. R. 113, 97 Fed. 198 (D. C. Iowa). See ante, § 638.

148. In *re Neely*, 5 A. B. R. 836, 108 Fed. 371 (D. C. N. Y.); *Erie R. R. Co. v. Dial*, 15 A. B. R. 559, 140 Fed. 689 (C. C. A. Ohio), which was a case of conversion of goods sold C. O. D. taken from the carrier before payment, by the buyer and used in manufacture.

defrauded beneficiary, merely as such, a general priority, yet allow him a prior charge upon the general assets of the defrauded trustee, where it is shown that the trust fund has been absorbed in the trustee's business or general estate, though it cannot be followed into any specific property remaining. Some of these latter cases distinguish between a dissipation of the trust fund, as in the payment of the trustee's debts, and an employment of the fund in the purchase of property; but, if the purchased property cannot be traced, there would seem to be no material difference. It might be possible, indeed, to require the general creditors of the defaulting trustee, in order to defeat the prior claim of the cestui upon any remaining property, to show affirmatively that the trust fund was not converted into the specific piece of property upon which the cestui seeks to enforce a lien; but to change the cestui's claim for priority into a mere shifting of the burden of proof, finds no considerable support in the decided cases."

Thus, the proceeds of converted shares of stock in a stockbroker's hands where the relation between the stockbroker and his customer is held to be that of pledgee and pledgor rather than that of debtor and creditor, may be traced and recovered.¹⁴⁹

§ 1883. "**Tracing Trust Funds.**"—If trust property or other property belonging to another in the control of the bankrupt and passing into the custody of the trustee, or the proceeds of such trust property, or the proceeds of property not belonging to the bankrupt but sold or conveyed away by him or by the trustee, can be traced into the trustee's hands, they may be recovered from the trustee, provided the rights of innocent third parties are not prejudiced.¹⁵⁰

Smith v. Township, 17 A. B. R. 749 (C. C. A. Mich.): "Where, as in this case, a wrongdoer knowingly mingles the property of another with his own in such manner that it becomes undistinguishable, the true owner may claim the whole mass, or if it has been disposed of, may follow it, or its proceeds as the case may be, as long as he can trace them, for the purpose of fastening an equitable lien for the property of which he has thus been dispossessed."

In *re Mulligan*, 9 A. B. R. 8, 116 Fed. 715 (D. C. Mass.): "Equity does not regard the form under which the cestui's property exists. Not only the

^{149.} Instance, In *re Bolling*, 17 A. B. R. 399 (D. C. Va.); In *re Berry & Co.*, 17 A. B. R. 467, 147 Fed. 208 (C. C. A. N. Y.).

^{150.} In *re Richards*, 4 A. B. R. 700, 104 Fed. 792 (D. C. Tenn., distinguished In *re Wood & Malone*, 9 A. B. R. 615, 121 Fed. 599); In *re Marsh*, 8 A. B. R. 576, 116 Fed. 396 (D. C. Conn.); In *re Collisi*, 1 A. B. R. 625 (Ref. Mich.). See, In *re Howard*, 14 A. B. R. 296, 135 Fed. 721 (C. C. A. Calif.), where *Bills v. Schliep*, 11 A. B. R. 607, 127 Fed. 103 (C. C. A. N. Y.), again appears as res adjudicata.

Instances, *Erie R. R. Co. v. Dial*, 15 A. B. R. 559, 140 Fed. 689 (C. C. A. Ohio); In *re N. Car. Car Co.*, 11 A. B. R. 490, 127 Fed. 178 (D. C. N. C.); In *re Graff*, 8 A. B. R. 744, 117 Fed. 343 (D. C. N. Y.); In *re Oliver*, 12 A. B. R. 694, 132 Fed. 588 (D. C. Tex.); In *re Ryttenberg v. Schaefer*, 11 A. B. R. 652, 131 Fed. 313 (D. C. N. Y.); In *re McCallum*, 7 A. B. R. 596, 113 Fed. 393 (D. C. Penn.).

Instances, refused, In *re Smart*, 14 A. B. R. 672, 136 Fed. 974 (D. C. Ohio); In *re Taft*, 13 A. B. R. 417, 133 Fed. 511 (C. C. A. Ohio).

actual trust property itself, but any property substituted for it, or into which it has been converted, may be recovered."

Welch v. Polley, 11 A. B. R. 215, 177 N. Y. 117 (N. Y. Court of Appeals): "The plaintiff must be permitted to follow, if she can, her trust moneys into the hands of the trustee in bankruptcy, he having no greater right against her than the bankrupt, her trustee, possessed had he remained solvent.

"The other creditors of the bankrupt have no claim upon any of the funds derived from plaintiff's trust which can be fully identified.

"To the extent that plaintiff is able to follow the trust funds into the purchase price of the real estate, or into the bankrupt's estate generally, she points out moneys that are no part of the estate held by the bankrupt's trustee for general distribution among the creditors, and is entitled to have them restored to the trust for her benefit which is to continue during her life."

Hutchinson v. LeRoy, 8 A. B. R. 20, 113 Fed. 202 (C. C. A. Mass.): "Where the property of any person has been without his consent, and sometimes even with his consent, converted into money, the money may be followed in equity so far as it is possible to remark it, provided the rights of innocent strangers are not prejudiced."

In re Gaskell, 12 A. B. R. 251, 139 Fed. 235 (D. C. Wash.): "In accordance with the principles of equity, the courts of this country, in dealing with estates of insolvent debtors, protect trust funds for the benefit of the beneficiaries, when it is possible to trace such funds and segregate the same from the assets of the insolvent."

In re Royea 16 A. B. R. 141, 143 Fed. 182 (D. C. Wash.): quoting *National Bank v. Insurance Co.*, 104 U. S. 54, as follows: "As long as trust property can be traced and followed, the property into which it has been converted remains subject to the trust; and, if a man mixes trust funds with his, the whole will be treated as trust property, except so far as he may be able to distinguish what is his. This doctrine applies in every case of a trust relation, and as well to moneys deposited in bank, and to the debt thereby created, as to every other description of property."

In re Berry & Co., 16 A. B. R. 567; S. C., 17 A. B. R. 491, 148 Fed. 208 (C. C. A. N. Y.): "When the money was paid under a plain mistake of fact equity impressed upon it a constructive trust which followed it through the bank and into the hands of the trustees."

Obiter, *In re Wilkesbarre Furn. Mfg. Co.*, 12 A. B. R. 472, 130 Fed. 796 (D. C. Penn.): "It was undoubtedly a fraud on the creditors of Harrower Bros. for Frank B. Harrower to appropriate the money derived from the sale of the firm stock in order to make good his individual delinquencies as trustee; and upon proof of this, if the fund could be sufficiently identified and traced, an order might have been obtained restoring it to where it belonged. * * * The right that is sought to be enforced is the return of moneys wrongfully included in the fund previously distributed, which should therefore have been specifically claimed and traced."

But if the trust fund cannot be traced, it cannot be recovered.¹⁵¹

Plow Co. v. McDavid, 14 A. B. R. 653, 137 Fed. 802 (C. C. A. Mo.): "The owner of a fund which has been misappropriated by one who held it in trust cannot follow it in the hands of the trustee unless he can trace the trust fund in kind or in specific property into which it has been converted, or, if the fund has been mingled with the trustee's other property, to establish a charge on

151. *In re Mulligan*, 9 A. B. R. 8, 116 Fed. 715 (D. C. Mass.).

the mass of such property for the amount of this fund. In other words, he can secure a preference out of the proceeds of the estate of the insolvent only where he can trace the trust property or fund, in its original or some substituted form, in the estate which comes into the hands of the trustee."

Erie R. R. v. Dial, 15 A. B. R. 559, 140 Fed. 689 (C. C. A. Ohio): "We recognize that the rule only permits the following of the converted property into assets which can be traced as proceeds, and that the lien does not attach to assets in which neither the thing nor its value can be found."

And the tracing of a trust fund cannot be converted into a proceedings to recover a preference—the two positions are antagonistic.¹⁵²

The burden of proof in the tracing is upon the claimant.¹⁵³

And a deposition for proof of debt is not *prima facie* evidence.

In *re Jones*, 18 A. B. R. 208 (D. C. Mich.): "The referee rightly refused to allow priority upon the ground that the estate in the hands of the trustee in bankruptcy had been increased by the amount of the guardianship funds, through the mingling of the same by the guardian with his own assets. Had the allegations referred to been proven the priority claimed might have been established. * * * But no proofs were introduced in support of the allegations mentioned. The certificate of the referee is express that 'No proof was submitted aside from proof of claim originally filed,' and that the 'claim was submitted upon such proof and argument of counsel.'"

"It is contended by the petitioner that, as the petition was sworn to, the truth of the allegation in question is *prima facie* established upon the principle that the sworn proof of claim against the bankrupt is *prima facie* evidence of its allegations, even if objected to. This is undoubtedly the rule, as applied to the proof of the claim itself as a general claim, considered apart from the question of priority."

The rule as to the tracing of trust funds is founded on equity and is not dependent on contract; and where a trust fund is mingled with the property of the trustee, the question of whether the owner of the fund is entitled to a preference does not depend upon the construction of any contract between the parties, but upon a rule of preference in equity; and as to that the federal decisions must control and not those of the State where the contract was made.¹⁵⁴

In *re Berry & Co.*, 16 A. B. R. 567 (S. C., 17 A. B. R. 491, 149 Fed. 208, C. C. A. N. Y.): "The rule invoked by the District Court is well stated by Judge Story: 'The receiving of money, which consistently with conscience cannot

152. Impliedly, In *re Wilkesbarre Furn. Mfg. Co.*, 12 A. B. R. 472, 130 Fed. 796 (D. C. Penn.).

153. In *re Marsh*, 8 A. B. R. 576, 116 Fed. 396 (D. C. Conn.); In *re Mulligan*, 9 A. B. R. 8, 116 Fed. 715 (D. C. Mass.); impliedly, In *re Jones*, 18 A. B. R. 208 (D. C. Mich.).

154. *Plow Co. v. McDavid*, 14 A. B. R. 653, 137 Fed. 802 (C. C. A. Mo.).

Instances of tracing alleged trust funds successfully and unsuccessfully:

(a) Proceeds of collaterals; In *re Marsh*, 8 A. B. R. 576, 116 Fed. 396 (D. C. Conn.).

(b) Constitutional subscription to additional stock to pay off debts, the subscription being conditional on all paying in a like per cent. the money to be returned on failure to so pay in, some fail to pay in. Those paying in were entitled to recover in full. In *re N. Carolina Car Co.*, 11 A. B. R. 490, 127 Fed. 178 (D. C. N. Car.).

(c) Partner misappropriating firm assets to make good a shortage in his

be retained, is in equity sufficient to raise a trust in favor of the party for whom, or on whose account, it was received. This is the governing principle in all such cases. And, therefore, whenever any interest arises the true question is not whether money has been received by a party, of which he could not have compelled the payment, but whether he can now, with a safe conscience, *ex æquo et bono*, retain it. Illustrations of this doctrine are familiar in cases of money paid by accident or mistake or fraud. * * * Still, however, there are many cases of this sort, where it is indispensable to resort to courts of equity for adequate relief, and especially where the transactions are complicated, and a 'discovery from the defendants is requisite.'"

And the rules are not altered by the bankruptcy of the holder of the fund, for neither by the bankrupt's "transfer by any means" nor by any levy "under judicial process" could the cestui qui trust be deprived of the right, and it is only as to property that could be so transferred or levied on that title passes to the trustee.

accounts as trustee in bankruptcy, obiter, *In re Wilkesbarre Furn. Mfg. Co.*, 12 A. B. R. 472, 130 Fed. 796 (D. C. Penn.).

(d) Factors and principals' funds commingled, *Bills v. Schliep*, 11 A. B. R. 607, 127 Fed. 103 (C. C. A. N. Y.); *Ryttenberg v. Schaefer*, 11 A. B. R. 652, 131 Fed. 313 (D. C. N. Y.).

(e) Following proceeds of converted shares of stock, *In re Bolling*, 17 A. B. R. 399 (D. C. Va.); *In re Graff*, 8 A. B. R. 744, 117 Fed. 343 (D. C. N. Y.).

(f) Consigned goods sold partly by bankrupt, partly by assignee before bankruptcy, *In re McCallum*, 7 A. B. R. 596, 113 Fed. 393 (D. C. Penn.).

(g) Consigned, or trust, goods sold and proceeds lost in stock speculation, *In re Mulligan*, 9 A. B. R. 8, 116 Fed. 715 (D. C. Mass.).

(h) Township treasurer depositing public moneys with private banker who becomes bankrupt, *In re Smart*, 14 A. B. R. 672, 136 Fed. 974 (D. C. Ohio); Compare, *In re Salmon & Salmon*, 16 A. B. R. 626 (D. C. Mo., on review sub nom. *In re Blake*, 17 A. B. R. 668).

(i) Township treasurer becoming bankrupt, having commingled public moneys with his private funds, *Smith v. Township*, 17 A. B. R. 475, 150 Fed. 257 (C. C. A. Mich.).

(j) Recovering public moneys deposited with bankrupt bank where collusive and fraudulent combination existed among banks, *In re Salmon & Salmon*, 16 A. B. R. 626, 143 Fed. 395 (D. C. Mo.).

(k) Draft drawn by landlord on agent for future rents and discounted at bank, held to be an equitable assignment of the rents when they later arise and to be good against the landlord's trustee in bankruptcy, *In re Oliver*, 12 A. B. R. 694, 132 Fed. 588 (D. C. Tex.).

(l) Money paid to bankrupt by mutual mistake. *In re Collisi*, 1 A. B. R. 625 (Ref. Mich.).

In re Berry & Co., 16 A. B. R. 567; *S. C.*, 17 A. B. R. 491, 148 Fed. 208 (C. C. A. N. Y.).

Money collected for third party on eve of bankruptcy of the collector, *Smith v. Motley*, 17 A. B. R. 864 (C. C. A. Ohio).

Sale of merchandise in bulk (under statutes requiring notices to creditors, etc.), where the purchaser goes into bankruptcy, the seller having complied with the law as to the giving of notice: the merchandise and its proceeds (less proportionate expenses) constitute a trust fund for the creditors of the seller, *In re Gaskill*, 12 A. B. R. 251, 130 Fed. 235 (D. C. Wash.).

Proceeds of property sold as *del credere* agent, kept separate from general estate but commingled with proceeds of similar sales. *In re Taft*, 13 A. B. R. 417, 133 Fed. 511, 66 C. C. A. 385.

Conversion of goods taken from carrier by buyer before payment where sold C. O. D., *Erie R. R. v. Dial*, 15 A. B. R. 559, 140 Fed. 689 (C. C. A. Ohio).

Agreement to give contemporaneous mortgage to secure purchase price, disregarded and goods commingled, seller has lien on whole, *In re Hennis*, 17 A. B. R. 889 (Ref. N. Car.).

In *re Royea*, 16 A. B. R. 143 (D. C. Wash.): "70 (a) prescribes the rule to be applied in the determination of questions as to what property vests in the trustee of a bankrupt's estate. The rule of the statute is that the trustee shall be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt, to property, not exempt, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him.

"Consideration of this rule leads to the inquiry whether the bankrupt, after he had become insolvent and immediately before the petition was filed, could have transferred the balance to his credit in the bank, so as to have defeated the petitioner in a suit in equity to reclaim his part of it, or whether an attaching or execution creditor, by levying upon the balance in the bank under judicial process against the bankrupt, could have divested the petitioner of his beneficial interest in the fund? To this inquiry equity gives a negative answer."

And the rule does not differ, where the trust funds have been rightfully acquired, from what it is where they have been wrongfully acquired.

Smith v. Mottley, 17 A. B. R. 866, 150 Fed. 266 (C. C. A. Ohio): "But it makes no difference in the application of the principle of that decision that in one instance the wrongdoer was lawfully in the possession of the property and in the other not. The critical fact is in the wrongful appropriation by one party of the property of another by mingling it indistinguishably with his own, and it is not ordinarily important by what means he became possessed of the property."

§ 1884. Commingling of Trust Funds or Trust Property.—If the proceeds of the trust fund are deposited in bank to the bankrupt's general account, or otherwise commingled with the bankrupt's own funds, the amount may be ordered paid over in full, notwithstanding the commingling, for the trust funds will have priority over those not trust funds.¹⁵⁵

In *re Woods and Malone*, 9 A. B. R. 615, 121 Fed. 599 (D. C. Ga.): "The doctrine of Lord Ellenborough that this principle does not apply, when the subject is turned into money and confounded in a general mass of the same description, is repudiated, for said the learned Master of the Rolls: 'Equity will follow the money even if put into a bag or undistinguishable mass, by taking out the same quantity. And the doctrine that money has no earmark must be taken as subject to the application of this rule.'"

In *re Mulligan*, 9 A. B. R. 8, 116 Fed. 715 (D. C. Mass.): "Still again, if the trust fund has been mingled with funds which belong to the defaulting trustee, and the mingled mass has been converted into property which exists in specie, the cestui has a claim upon this property by way of lien for the replacement

155. In *re Berry & Co.*, 16 A. B. R. 564, 146 Fed. 623 (S. C., 17 A. B. R. 591, C. C. A. N. Y.).

Hutchinson v. LeRoy, 8 A. B. R. 20 (C. C. A. Mass.): In this case a pledgee of stock repledged the stock to a bank to secure his own debt and thereafter became bankrupt: the court held the pledgor might recover from the trustee the proceeds of the sale of the stock if he could trace them into the trustee's hands, less the re-pledgee's claim and the original debt due the bankrupt, where at all times the trustee had enough in his hands to cover such amount.

Smith v. Mottley, 17 A. B. R. 863, 150 Fed. 266 (C. C. A. Ohio). Compare, In *re Swift*, Ex parte *LeRoy*, 5 A. B. R. 232 (Ref. Mass.); inferentially, In *re Graff*, 8 A. B. R. 744 (D. C. N. Y.).

of the trust fund advanced for the purchase, or by way of equitable ownership of an aliquot part of the property, either or both. For the purposes of this discussion, it matters not which. This principle is apparently questioned in *Litchfield v. Ballou*, 114 U. S. 190, 195; but the doubt must be limited to the particular case, as the principle has been abundantly recognized. The recognition has been most complete where the trustee has mingled in one bank deposit the trust fund and moneys of his own. Whatever may have been his actual intention, he will be presumed to have acted honestly, so far as the state of the account allows the presumption. His drafts against the deposit thus mingled are taken to be applied to his own share of the deposit until that share is exhausted, and what is left is taken to belong in equity to the cestui que trust. The rule thus stated is not undisputed (see *Steamboat Co. v. Locke*, 73 Me. 370), but it is supported by the weight of authority. *Bank v. Peters*, 123 N. Y. 272, 25 N. E. 319; *Mercantile Trust Co. v. St. Louis & S. F. R. Co. (C. C.)*, 99 Fed. 485; *Bank v. Roller*, 85 Md. 495, 37 Atl. 30, 36 L. R. A. 767, 60 Am. St. Rep. 344; *In re Hallett's Estate*, 13 Ch. Div. 696, 36 Eng. Rep. 779; *McMahon v. Fetherstonhaugh* (1895), 1 Ir. R. 83. In some cases, indeed, this rule concerning bank deposits has been extended to cases in which the bank itself is the defaulting trustee. The cestui has sometimes been allowed a charge prior to that of the general creditors upon the general cash assets of the defaulting bank, or upon the minimum value of these cash assets since the date of the trust deposit. If since that date the cash assets have at any time fallen below the amount of the trust deposit, it has been held that the trust fund has been finally dissipated to that extent. *Merchants' Bank v. School Dist.*, 36 C. C. A. 432, 94 Fed. 705; *Commissioners v. Wilkinson*, 119 Mich. 655; *Bank v. Weens*, 69 Tex. 489. *See *Bank v. Down (C. C.)*, 38 Fed. 172; *Appeal of Carmany*, 166 Pa. 622."

To same effect, *Erie R. R. v. Dial*, 15 A. B. R. 559, 140 Fed. 689 (C. C. A. Ohio): "Knowing that these goods could not be lawfully taken until they were paid for, and that the railroad company had no authority to deliver them without payment, the rubber company seized an opportunity for wrongfully obtaining possession of the goods and proceeded to commingle them with its own. The title of the shippers was not divested by this trespass. It did not convert the railroad company into a debtor to the shippers, whatever the liability of the railroad company for negligence might be, or the rubber company into a debtor of the railroad company."

"The trustees say that the rubber company converted the rubber into tires and commingled them with other tires which it had on hand, and that the property can be no longer identified. But the vendors of the rubber never consented to this. In a common-law court this might, as between the owners and the trespasser, have given title to the owners of the whole mass of tires, if they were indistinguishable. But a court of equity, for the purpose of saving to creditors that value which attached to the things before owned by the trespasser, will forbear to enforce a confiscation, and, instead, will accord a lien to the owner upon the mass for the value of the things converted. We had occasion to consider this subject in *Holder v. Western German Bank*, 136 Fed. 90, 68 C. C. A. 554, where we held, upon the authority of *Knatchbull v. Hallett*, 13 Ch. Div. 696, 36 Eng. Rep. 779, and *National Bank v. Insurance Co.*, 104 U. S. 54, that, where the tort-feasor had mingled the property of the owner with his own, a lien would attach to the mass pro tanto. The assets came to the trustee in this condition. His interest therein is no other nor greater than that of the bankrupt, except where the bankrupt has conveyed his property with intent to defraud his creditors."

Smith v. Township, 17 A. B. R. 749 (C. C. A. Mich.): "When the commingled

property is of more value than that wrongfully taken, it is equitable that the excess should go to the creditors of the wrongdoer, although by the strict rule of the common law the whole mass might become the property of the innocent owner of the portion misappropriated. Justice requires that the rights of innocent third parties having acquired the property, or some interest in it, for value, should be protected, and against such the rule is not enforced. But here the trustee stands in the shoes of the bankrupt and has only his rights. Of course, we are speaking of the general rule, and do not need to notice the instances of conveyances and preferences fraudulent as against creditors. And the question is what were the respective rights of the township and the bankrupt when the creditors filed their petition against him. The bankrupt's trustee says that it is impossible to find out what parts of the stock of goods contain the money of the township, and this was the difficulty which the referee found and which controlled his decision. But it was not for the township to make the distinction. As said by Chancellor Kent in *Hart v. Ten Eyck*, 2 Johns Ch. 62, at page 108, 'If a party having charge of the property of others, so confounds it with his own, that the line of distinction cannot be traced, all the inconveniences of the confusion is thrown upon the party who produces it, and it is for him to distinguish his own property, or lose it.' That case presented a state of facts which in this respect was quite similar to those which existed here. The fair inference is that the bankrupt took the money from time to time, purchased goods and mingled them with his stock, and out of his stock he sold parcels, which were not distinguishable in respect of the means with which they were bought. From the beginning of his fraudulent intermixture of his own money and that of the township, or of goods which may have been bought with his own money and others bought with the money of the township, if the latter did not become the owner of the commingled stock, it had, at least, a lien upon it for reimbursement; and the continuance of such transactions operated in the same way."

In *re Royea*, 16 A. B. R. 142 (D. C. Wash.): "The main argument in opposition to the petition is that, trust money must be earmarked or separately kept in order to entitle the cestui que trust to reclaim it, in opposition to creditors of an insolvent debtor, and that where a bankrupt has mingled trust funds with his own, so that the identity of the trust money is lost, the beneficiaries of the trust must share *pari passu* with the creditors. * * *

"In many of the reported cases the cestui que trust failed to prove that the fund or property sought to be impressed with the trust, in fact, included trust money or acquisitions by reinvestment or exchange of trust money or property, and on that ground adverse decisions were rendered, without combating the doctrine of the Supreme Court, as expounded in the opinions by Mr. Justice Matthews above cited. In this case, although the money cannot be specifically identified, the fund is clearly proved to have been enlarged by mingling trust money with other money, and the equitable right of the petitioner to reclaim an amount equivalent to the amount intrusted is clear."

Compare, *Bills v. Schliep*, 11 A. B. R. 607, 127 Fed. 103 (C. C. A. N. Y.): "It is immaterial that Turle & Skidmore may have mingled the funds in their hands received from the various shipments, because after such shipments and notice the law will presume and a court of equity would require either that Turle & Skidmore should satisfy their claims out of the other car loads in their hands before resorting to the car loads in question, or would be deemed to have held all proceeds not necessary to satisfy their claims for the use of the owners and consignors of the cargoes in question."

At any rate, such will be the case where at no time an adverse balance occurs.

In *re Berry & Co.*, 16 A. B. R. 567, 146 Fed. 623 (C. C. A. N. Y., S. C., 17 A. B. R. 591): "The account of Berry & Co. was never overdrawn during the day of November 25; there was as much as \$5,000 to their credit during that day and at no time did the withdrawals reduce the balance below \$1,500. It is true that large sums were checked out after the deposit of the \$1,500, but the law presumes that the amounts withdrawn were not those impressed with the trust. In other words, so long as \$1,500 remained in the bank the presumption is that it was the trust fund."

But an adverse balance occurring at any time will destroy the tracing of the fund.

In *re Mulligan*, 9 A. B. R. 8, 116 Fed. 715 (D. C. Mass.): "This is not the case of a bank account, which, as has been said, is affected by a rather artificial rule. Moreover, there is no proof that the requirements of that artificial rule have here been met. At some time after the check was handed to Hornblower, the balance of the account may have been against the bankrupt, and an adverse balance at any time after the trust deposit is made destroys the claim of the cestui upon a bank account in which trust funds and private funds have been mingled. That the funds were mingled, not by the bankrupt himself, but by his broker, does not give Brown Bros. a better claim."

But where the trust funds are commingled, not only with private funds but with other trust funds; and, after checking out, there remains at any time less than the trust fund in controversy, the claimants have not succeeded in tracing out their fund.¹⁵⁶

The burden of proof that the property has been wrongfully mingled in a mass of the property of the wrongdoer is upon the owner, but when this is done, the burden shifts to the wrongdoer. It is for him to distinguish between his own property and that of the innocent party.¹⁵⁷

^{156.} In *re Mulligan*, 9 A. B. R. 8, 116 Fed. 715 (D. C. Mass.); inferentially, *Claffin Dry Goods Co. v. Eason*, 2 A. B. R. 263 (Ref. Tex.).

^{157.} *Smith v. Mottley*, 17 A. B. R. 866, 150 Fed. 266 (C. C. A. Ohio).

Laches bars right to trace: If the owners of trust funds are guilty of laches in asserting their rights, they will be denied the right to disturb distribution, or to relief in lieu of restitution.

In *re Wilkesbarre Furn. Mfg. Co.*, 12 A. B. R. 472, 130 Fed. 796 (D. C. Penn.), which was the case of a partner, misappropriating firm assets to make good a shortage in his accounts as trustee in bankruptcy; firm creditors guilty of laches in not attempting to identify and trace the appropriate assets nor to stay distribution pending the determination of a petition filed against firm; firm creditors cannot come upon the lienholders' share of the proceeds on the ground that the lienholder has received a preference; the preference is recoverable only at the suit of the trustee and the firm creditors have no prior right to any recovery thereof.

Claffin Dry Goods Co. v. Eason, 2 A. B. R. 263 (Ref. Tex.).

Interest.—Interest may be allowed in some instances, as where the trust funds were tortiously converted, *Hutchinson v. Otis*, 8 A. B. R. 392, 115 Fed. 937 (C. C. A. Mass.): "In *Hutchinson v. LeRoy* (C. C. A.), 8 Am. B. R. 20, 113 Fed. 202, already referred to, we allowed interest against the petitioner; but there the fund which it was determined belonged to him, had been held adversely from the outset, as it grew out of a tort of the bankrupt which arose before proceedings in bankruptcy were commenced. In the present case, how-

And in bankruptcy, the trustee stands in such cases in the bankrupt's shoes, and the case is different from the case of seizure by creditor's bills.

Smith v. Mottley, 17 A. B. R. 866, 150 Fed. 266 (C. C. A. Ohio): "Again, if the trustee takes the bankrupt's property in the same plight as the bankrupt held it, and while the bankrupt held the assets, they became subject to a lien upon the mass, which was not destroyed by its continual transformation in business from day to day, the paying out and receiving in, of parcels of the fund, and no creditor having levied upon it, or the right of an innocent party fastened upon it, it is difficult to see how by the succession of the trustee the lien could be lost. Whether it was a lien or not would continue to be the same question as it was between the bankrupt and the owner of the misappropriated fund.

"There would seem to be a valid distinction in the application of the rule that the misappropriated fund must be found in the assets, between the settlement of an estate in bankruptcy proceedings and proceedings upon a bill filed for the marshaling and appropriation of assets according to the principles of equity. In the latter case there is a seizure of the res for the direct purpose of fastening the inchoate rights of creditors."

DIVISION 5.

MARSHALING OF LIENS ON PROPERTY IN THE CUSTODY OF THE BANKRUPTCY COURT.

§ 1885. **Jurisdiction to Marshal Liens.**—Liens upon, and interests in, the property in the custody of the bankruptcy court may be marshaled and their validity and priority determined by the bankruptcy court, in the bankruptcy proceedings.¹⁵³

ever, the fund came into the hands of the trustee in bankruptcy, not through any tort, but through the oversight of Otis, Wilcox & Co. The trustee merely held it until the courts could determine to whom it belonged, and the record does not show that the trustee has received any increment thereof."

Costs and Expenses.—A proportionate part of the costs and expenses may be charged against the owner of the trust fund and deducted from the amount of the fund decreed to belong to him, *In re Gaskill*, 12 A. B. R. 251, 130 Fed. 235 (D. C. Wash.); contra, *Smith v. Township*, 17 A. B. R. 750, 150 Fed. 257 (C. C. A. Mich.).

Remand for Further Proof as to Identity of Proceeds.—Where it appears that some, at least, of the goods came into the custody of the court the case may be remanded to take further proof to fix the amount of the equitable lien, *Erie R. R. Co. v. Dial*, 15 A. B. R. 559, 140 Fed. 689 (C. C. A. Ohio).

Agreement to Give Mortgage on Receipt of Goods Disregarded and Goods Commingled.—Where a bankrupt disregards an agreement to give a mortgage on receipt of goods purchased, and commingles the goods with his own, the seller has a lien on the whole, *In re Hennis*, 17 A. B. R. 889 (Ref. N. Car.).

153. See ante, "Summary Jurisdiction of the Bankruptcy Court," §§ 1794, 1795. See post, "Selling Property Free from Liens," § 1965, et seq.

In re Sentenne & Green Co., 9 A. B. R. 648, 120 Fed. 436 (D. C. N. Y.), quoted at § 1795. *In re Pittelkow*, 1 A. B. R. 472, 92 Fed. 901 (D. C. Wis.), quoted at § 1795. *In re New England Piano Co. (Union Trust Co.)*, 9 A. B. R. 767, 122 Fed. 937 (C. C. A. Mass.); *In re McMahon*, 17 A. B. R. 532, 147 Fed. 648 (C. C. A. Ohio); obiter, *Whitney v. Wenham*, 14 A. B. R. 45, 198 U. S. 539; *In re Porterfield*, 15 A. B. R. 18, 138 Fed. 192 (D. C. W. Va., reversed, on other grounds, sub nom. *Moore v. Green*); impliedly, *Ludowici Roofing Tile Co. v. Penn. Inst.*, 8 A. B. R. 742 (D. C. Penn.); *In re Emslie*, 4 A. B. R. 126, 102 Fed. 292 (C. C. A. N. Y.); *In re Pratesi*, 11 A. B. R. 319, 126 Fed. 588 (D. C. Del.); *In re Rodgers*, 11 A. B. R. 89, 125 Fed. 169 (C. C. A. Ills.); *In*

In re Rochford, 10 A. B. R. 608, 124 Fed. 182 (C. C. A. S. Dak.): "The District Court sitting in bankruptcy has jurisdiction to determine, after reasonable notice to the claimants to present their claims to it, the claims of all parties to property and to the proceeds of property which its officers have lawfully reduced to their actual possession in the course of the administration of the estate of the bankrupt, and controversies between trustees in bankruptcy and adverse claimants to property which has in this way reached the custody of the District Courts are not controversies at law or in equity, as distinguished from proceedings in bankruptcy, within the proper interpretation of § 23."

Chauncey v. Dyke Bros., 9 A. B. R. 444, 119 Fed. 1 (C. C. A. Ark., affirming In re Matthews, 6 A. B. R. 96): "But if, in the exercise of its customary jurisdiction, the bankrupt court obtained the lawful custody of the res to which the liens related or of a fund realized from its sale, then the duty which was thereby devolved upon it, of distributing the fund among those to whom it rightfully belonged, did empower it to determine the relative priorities of the conflicting claims to the fund. A court which has lawfully acquired the custody of property or money must of necessity dispose of the same according to law; and,

re Southern Loan & Trust Co. v. Benbow, 3 A. B. R. 10, 96 Fed. 514 (D. C. N. Car., reversed sub nom. Frazier v. Southern Loan & Trust Co., 3 A. B. R. 710, 99 Fed. 707); obiter, In re Cobb, 3 A. B. R. 130, 96 Fed. 821 (D. C. N. Car.); Havens & Geddes Co. v. Pierck, 9 A. B. R. 569, 120 Fed. 244 (C. C. A. Ills.); In re Lemmon & Gale Co., 7 A. B. R. 291, Fed. 296 (C. C. A. Tenn.); In re Prince and Walter, 12 A. B. R. 678 (D. C. Penn.); In re Worland, 1 A. B. R. 450, 92 Fed. 893 (D. C. Iowa); In re Antigo Screen Door Co., 10 A. B. R. 359, 123 Fed. 249 (C. C. A. Wis.); In re Groetzinger, 11 A. B. R. 723, 127 Fed. 814 (C. C. A. Penn.); In re Wilka, 12 A. B. R. 727, 131 Fed. 1004 (D. C. Iowa, affirmed sub nom. In re Granite City Bk., 14 A. B. R. 404, 137 Fed. 818, C. C. A.); In re Noel, 14 A. B. R. 715, 137 Fed. 694 (D. C. Md.); inferentially, Carriage Co. v. Solanas, 6 A. B. R. 221, 108 Fed. 532 (D. C. La.); inferentially, In re Schloerb, 3 A. B. R. 224, 97 Fed. 326 (D. C. Wis., affirmed sub nom. White v. Schloerb, 4 A. B. R. 178, 178 U. S. 542); In re McCallum, 7 A. B. R. 596, 113 Fed. 393 (D. C. Penn.); obiter, In re Corbett, 5 A. B. R. 224, 104 Fed. 872 (D. C. Wis.); inferentially, In re Drayton, 13 A. B. R. 602, 135 Fed. 883 (D. C. Wis.).

Instances, In re Waterloo Organ Co., 9 A. B. R. 429, 118 Fed. 904 (D. C. N. Y.); In re Myers, 4 A. B. R. 536, 102 Fed. 869 (D. C. Penn.); In re Reliance Storage & Warehouse Co., 5 A. B. R. 249 (D. C. Pa.); In re Dunavant, 3 A. B. R. 41, 96 Fed. 542 (D. C. N. Car.); In re Hugill, 3 A. B. R. 686, 100 Fed. 616 (D. C. Ohio); In re Bartheleme, 11 A. B. R. 67 (Ref. N. Y.); In re Rude, 4 A. B. R. 319, 101 Fed. 805 (D. C. Ky.); McNair v. McIntyre, 7 A. B. R. 638, 113 Fed. 113 (C. C. A. N. Car.); Long v. Gump, 16 A. B. R. 501 (C. C. A. Ohio); Morgan v. Nat'l Bk., 16 A. B. R. 639, 145 Fed. 466 (C. C. A. W. Va.); In re Moore, 17 A. B. R. 164 (D. C. Ga.); Smith v. Township, 17 A. B. R. 747 (C. C. A. N. J.); O'Dell v. Boyden, 17 A. B. R. 759, 150 Fed. 731 (C. C. A. Ohio); Ryttenburg v. Schefer, 11 A. B. R. 652, 131 Fed. 313 (D. C. N. Y.); In re L'Honnemede, 16 A. B. R. 850 (C. C. A. N. Y.); In re McIntire, 16 A. B. R. 80 (D. C. W. Va.). Instance, and obiter, In re Cramond, 17 A. B. R. 31, 145 Fed. 566 (D. C. N. Y.).

In re Schermerhorn, 16 A. B. R. 509, 145 Fed. 341 (C. C. A.).

Instances:

(1) **Chattel Mortgages.**—In re Sentenne & Green Co., 9 A. B. R. 648, 120 Fed. 436 (D. C. N. Y.); In re Rochford, 10 A. B. R. 608, 124 Fed. 182 (C. C. A. S. Dak.).

(1½) Mechanics' liens or rights under building contracts. In re Emslie, 4 A. B. R. 126, 102 Fed. 292 (C. C. A. N. Y.); Chauncey v. Dyke Bro., 9 A. B. R. 444, 119 Fed. 1 (C. C. A. Ark.); Ludowici Tile Roofing Co. v. Penn. Inst., 8 A. B. R. 742 (D. C. Pa.).

(2) Relative priorities of mechanics' liens and bonded indebtedness of a plant, Morgan v. Nat'l Bk., 16 A. B. R. 639, 145 Fed. 466 (C. C. A. W. Va.).

(3) Subcontractors not filing liens as against valid assignments of portions

when conflicting claims are preferred, it is not bound to require the claimants to litigate their claims in some other forum, and to adopt the judgment of that tribunal, although it may do so, but it is at liberty to dispose of such controversies according to its own ideas of right and justice. This is one of those incidental powers which may be exercised by any court of record in the absence of an express prohibition."

Burleigh v. Foreman, 11 A. B. R. 75, 125 Fed. 217 (C. C. A. Mass.): "Section 2 * * * enumerates certain matters over which the courts of bankruptcy are invested with the jurisdiction at law and in equity. This gives them undoubted cognizance of the marshaling of assets in the possession of the trustee in proceedings like that underlying this appeal."

Carter v. Hobbs, 1 A. B. R. 215, 92 Fed. 594 (D. C. Ind.): "From the foregoing considerations it would seem to be clear that the District Court when sitting in bankruptcy has lawful jurisdiction over liens and mortgages upon the property of the bankrupt, so that it may inquire into their validity and extent and grant the same relief which the courts of the State might or ought to grant, and that such court may do this without the consent of the secured creditor."

of fund to bank advancing money to contractor. In *re Cramond*, 17 A. B. R. 22, 145 Fed. 566 (D. C. N. Y.).

(4) Usurious lien agreement. *Ryttenberg v. Schefer*, 11 A. B. R. 652, 131 Fed. 313 (D. C. N. Y.).

(5) Assignment of interest in estate to secure usurious claim. In *re L'Honnemieu*, 16 A. B. R. 850 (C. C. A. N. Y.).

(6) Mortgage on bankrupt's real estate tainted with usury. In *re Kellogg*, 10 A. B. R. 11, 121 Fed. 333 (C. C. A. N. Y.).

(7) Deed of trust to wife in consideration of surrender of dower. In *re Porterfield*, 15 A. B. R. 18, 138 Fed. 192 (D. C. W. Va.).

(8) Attorney's lien upon dividends coming, to client for services in successfully prosecuting the claim in the bankruptcy court. In *re Rude*, 4 A. B. R. 319, 101 Fed. 805 (D. C. Ky.).

(9) Execution creditors holding under levies made more than four months prior to bankruptcy—contending that prior lien by way of trust deed, was fraudulent. In *re Dunavant*, 3 A. B. R. 41, 96 Fed. 542 (D. C. N. Car.).

(10) Landlord, no lien for unpaid rent accruing after adjudication, in Louisiana, because chattels not on premises with express or implied consent of owner after levy. *Carriage Co. v. Solanas*, 6 A. B. R. 221, 108 Fed. 532 (D. C. La.).

(11) Landlord's priority over liens acquired after tenancy began. In *re McIntire*, 16 A. B. R. 80 (D. C. W. Va.).

(12) Real estate in one partner's name, whether firm assets. In *re Groetinger*, 11 A. B. R. 723, 127 Fed. 814 (C. C. A. Penn.).

(13) Taxes on merchandise sold in bulk becoming a lien while in the custody of the bankruptcy court before sale. In *re Keller*, 6 A. B. R. 351, 109 Fed. 131 (D. C. Iowa).

(14) Compelling resort to execution against personal property of other parties before enforcing lien on real estate of bankrupt. In *re Pollman*, 16 A. B. R. 146 (Ref. N. Y.).

(15) Partial assignments of building contract fund turned over by owner to bankruptcy court for administration. In *re Ludowici Roofing Tile Co. v. Penn. Inst.*, 8 A. B. R. 742 (D. C. Penn.).

(16) Liquor license: Bankrupt claiming liquor license not his own although in his own name but simply being used in wife's business. In *re Emrich*, 4 A. B. R. 91, 101 Fed. 231 (D. C. Pa.).

(17) Township's claim of lien by way of commingled trust funds, *Smith v. Township*, 17 A. B. R. 747 (C. C. A. N. J.).

(18) Liens and prior assignments upon seat in stock exchange. *O'Dell v. Boyden*, 17 A. B. R. 759, 150 Fed. 731 (C. C. A. Ohio).

(19) Landlord's lien under distress warrant. In *re Lines*, 13 A. B. R. 318, 133 Fed. 803 (D. C. Penn.).

(20) Landlord no priority out of proceeds of liquor license because license not subject to levy. In *re Myers*, 4 A. B. R. 536, 102 Fed. 869 (D. C. Penn.).

(21) Mortgage lien of bank where claim made that the loan was void as

In re Granite City Bk., 14 A. B. R. 408, 137 Fed. 818 (C. C. A. Iowa): "* * * he can assert his rights to the proceeds before the referee, when and where his claim can be heard and its priority be determined."

In re Kellogg, 10 A. B. R. 11, 121 Fed. 333 (C. C. A. N. Y.): "The second assignment of error raises the question as to the power of the bankruptcy court to determine the question of the validity and amount of said bond and mortgage in the summary proceedings instituted before the referee in bankruptcy. Did the bankruptcy court, after having acquired actual possession and control of the property, have power to determine the validity of the liens thereon? * * * It must be held that the bankruptcy court, upon such acquisition by the receiver of possession and undisputed legal title, had jurisdiction to determine the validity of the mortgage."

Impliedly, In re Pollman, 16 A. B. R. 146 (Ref. N. Y.): "The court of bankruptcy having possession of the property in question, must administer the same in accordance with the equitable principles of the Bankruptcy Act. * * * Thus the court will compel the creditor to resort first to the unsold portion of real estate before going to that which the debtor has alienated. * * * Incident to this system, which supersedes all other systems of administering insolvent estates, secured creditors will often be compelled to submit to delay, if delay is likely to benefit the creditors at large. In re Sabine, 1 Am. B. R. 315, 321. Stays of legal proceedings are constantly granted, and the bankruptcy court will so regulate the time and manner of enforcement of valid liens, as not to cause unnecessary loss to others. In re Baughman, 15 Am. B. R. 23, 138 Fed. 742; In re Vastbinder, 13 Am. B. R. 148, 132 Fed. 718; In re Chambers, 3 Am. B. R. 537, 98 Fed. 865."

Inferentially, In re Moody, 12 A. B. R. 724, 131 Fed. 525 (D. C. Iowa): "It is a familiar principle of equity jurisprudence that property in the custody of a court of equity is always held by it in trust for those to whom it rightly belongs; and the jurisdiction to inquire into and determine to whom it so belongs, and to that end to require all claimants thereto to present their claims within a stated time, or be barred of any interest in or right to the property, is inherent in every court of equity."

exceeding charter rights. *Cunningham v. Germ. Ins. Bk.*, 4 A. B. R. 365, 103 Fed. 932 (C. C. A. Ky.).

(22) Whether novation was made on purchaser of plant taking up old mortgage and giving new mortgage covering more. *Long v. Gump*, 16 A. B. R. 501 (C. C. A. Ohio).

(23) Factor's lien for advances, commissions and expenses, where factor is not in possession. *Ryttenberg v. Schefer*, 11 A. B. R. 652, 150 Fed. 731 (C. C. A. Ohio).

(24) Liveryman's lien, In re Pratesi, 11 A. B. R. 319, 126 Fed. 588 (D. C. Del.).

(25) Division of proceeds of insurance policy among creditors in accordance with previous agreement. In re Reliance Storage & Warehouse Co., 5 A. B. R. 249 (D. C. Penn.).

(26) Rent of mortgaged premises accruing after adjudication, or accruing beforehand but uncollected or still in the bankrupt's hands. In re Cass, 6 A. B. R. 722 (Ref. Ohio); In re Dole, 7 A. B. R. 21, 101 Fed. 926 (D. C. Vt.). Compare, to same effect, In re Hollenfeltz, 2 A. B. R. 499, 94 Fed. 629 (D. C. Iowa).

(27) Mortgages. In re Pittelkow, 1 A. B. R. 472, 92 Fed. 901 (D. C. Wis.); In re Noel, 14 A. B. R. 715, 137 Fed. 674 (D. C. Md.); *Carter v. Hobbs*, 1 A. B. R. 214, 92 Fed. 594 (D. C. Ind.); In re Wilka, 12 A. B. R. 727, 131 Fed. 1004 (D. C. Iowa); *McNair v. McIntyre*, 7 A. B. R. 638, 113 Fed. 113 (C. C. A. N. C.); In re Prince & Walter, 12 A. B. R. 678 (D. C. Penn.); In re Bartheleme, 11 A. B. R. 67 (Ref. N. Y.), mortgage alleged to be fraudulent; In re Hugill, 3 A. B. R. 686, 100 Fed. 616 (D. C. Ohio): Mortgage void for actual fraud as to part, void as to whole.

(28) Judgments. In re L'Hommedieu, 16 A. B. R. 850 (C. C. A. N. Y.).

(29) Deed given by way of security: In re Moore, 17 A. B. R. 164 (D. C. Ga.)

The bankruptcy court need not sell merely whatever title the trustee has and leave the purchaser to litigate, afterwards, the extent of it, but may determine its extent and validity in the first instance;¹⁵⁹ and may determine in advance of the sale of a leasehold the rights of the landlord under a forfeiture clause.¹⁶⁰

§ 1886. **Consent of Lienholder Not Necessary.**—The consent of the lienholder is not necessary.¹⁶¹

§ 1887. **Incidental Power to Compel Execution of Papers by Third Parties.**—As incident to the power, undoubtedly the bankruptcy court has jurisdiction to order the surrender or cancellation of instruments affecting the property so in its custody; but not by service of process upon persons outside of the district.¹⁶² And it has jurisdiction to order the execution of assignments;¹⁶³ but power to compel a pledgor to execute necessary papers to effect a sale of the pledged property, where the pledged property was in the bankrupt's possession, has been denied.¹⁶⁴

§ 1888. **Referee Has Jurisdiction.**—The referee has jurisdiction to marshal liens and to determine their extent, validity and order of priority.¹⁶⁵

In *re* Rochford, 10 A. B. R. 608, 124 Fed. 182 (C. C. A. S. Dak.): "A referee in bankruptcy has jurisdiction to draw to himself by summary process or notice, and in the first instance to determine the question of the validity of the claim of a third party to a lien upon it, or an interest in, property or the proceeds of property lawfully in the custody of a trustee in bankruptcy."

In *re* Wilka, 12 A. B. R. 728 (D. C. Iowa): "The referee finds, however, that the trustee was in the actual possession of the property. If this is true, though the property may then have been situated in South Dakota, the court was in

159. [1867] *Ray v. Norseworthy*, 23 Wall. 128; inferentially, In *re* Waterloo Organ Co., 9 A. B. R. 427, 118 Fed. 904 (D. C. N. Y.); In *re* McBride & Co., 12 A. B. R. 83, 132 Fed. 285 (Ref. N. Y.); [1841] In *re* Christy, 3 How. (U. S.) 292; In *re* Sanborn, 3 A. B. R. 54, 96 Fed. 507 (D. C. Vt.); [1841] *Houston v. Bank*, 6 How. 486.

160. *Gazlay v. Williams*, 17 A. B. R. 249 (C. C. A. Ohio).

161. See post, "Selling Property Free from Liens," § 1966. But compare, In *re* Durham, 8 A. B. R. 115, 114 Fed. 750 (D. C. Md.), where the court evidently deemed his consent necessary.

162. In *re* Waukesha Water Co., 8 A. B. R. 715, 116 Fed. 1009 (D. C. Wis.).

163. In *re* Bacon, 12 A. B. R. 732, 132 Fed. 157 (D. C. N. Y.).

164. In *re* Silberhorn, 5 A. B. R. 568, 105 Fed. 802 (D. C. Ills.).

165. In *re* Granite City Bk., 14 A. B. R. 404, 137 Fed. 818 (C. C. A. Iowa, affirming In *re* Wilka, 12 A. B. R. 727, 131 Fed. 1704); In *re* Sanborn, 3 A. B. R. 54, 96 Fed. 507 (D. C. Vt.); In *re* Kellogg, 10 A. B. R. 7, 121 Fed. 333 (C. C. A. N. Y.).

Impliedly, In *re* Keller, 6 A. B. R. 351 (D. C. Iowa); In *re* McBride & Co., 12 A. B. R. 83, 132 Fed. 285 (Ref. N. Y.); In *re* Steuer, 5 A. B. R. 209, 104 Fed. 976 (D. C. Mass.); In *re* Moad, 12 A. B. R. 725, 131 Fed. 525 (D. C. Iowa); In *re* Bacon, 12 A. B. R. 730, 132 Fed. 157 (D. C. N. Y.); In *re* Pollman, 16 A. B. R. 144 (Ref. N. Y.).

Instance, *Smith v. Township*, 17 A. B. R. 747 (C. C. A. N. J.); In *re* Pittelkow, 1 A. B. R. 472, 92 Fed. 901 (D. C. Wis.); In *re* Matthews, 6 A. B. R. 96, 109 Fed. 603 (D. C. Ark., affirmed in *Chauncey v. Dyke Bros.*, 9 A. B. R. 444, 119 Fed. 1, C. C. Ark.); In *re* Schrinopskie, 10 A. B. R. 221 (D. C. Kans.).

the actual custody and possession of the property through its trustee. * * * In this case the Granite City Bank was given the notice required by the Bankruptcy Act and by personal service of such notice upon it at Dell Rapids, S. D., as well. The conclusion is that the referee had jurisdiction to make the order of sale. This, of course, does not preclude the bank from establishing its claim, if it can do so, to the proceeds of the property covered by its mortgage. It may propound its claim thereto before the referee. In fact, the referee should require it to do so before making any order for the distribution of such proceeds. Upon the bank's presenting its claim to such proceeds, the trustee may take issue thereon, if he so elects, and the referee will then determine the matter upon evidence taken under his direction."

Whilst it is true that the referee has such jurisdiction, and that generally such proceedings should be had before the referee, and perhaps, under rule of court would be sent there if filed in the District Court, yet this is not to deny that the District Court, before the judge itself, has jurisdiction to entertain the proceedings if it so desires. However, after reference to the referee all proceedings relative to property in the custody of the court should, for the sake of due order and consistent administration, be carried on before the referee; and such is the evident design of the Act.

§ 1889. Reasonable Notice to Lienors or Other Parties in Interest Requisite.—Mere reasonable notice to the various lienholders and claimants of interest, to come in and set up their rights, is all that is requisite.¹⁶⁶

In *re Moody*, 12 A. B. R. 724, 131 Fed. 525 (D. C. Iowa): "It is a familiar principle of equity jurisprudence that property in the custody of a court of equity is always held by it in trust for those to whom it rightly belongs; and the jurisdiction to inquire into and determine to whom it so belongs, and to that end to receive all claimants thereto to present their claims within a stated time, or be barred of any interest in or right to the property, is inherent in every court of equity. In *re Rochford* (C. C.), 10 A. B. R. 608, 124 Fed. 187, above. And this though the property may have been wrongfully seized, and so brought into the custody of the court. *Krippendorf v. Hyde*, 110 U. S. 276. See, also, *Freeman v. Howe*, 24 How. 450, and *Buck v. Colbath*, 3 Wall. 334; *Bryan v. Bernheimer*, and In *re Rochford*, above, establish the rule by which the right to this stock of merchandise or its proceeds so in the custody of the court may be fully determined; and that is to require the land company to propound its claims to such property to the bankruptcy court within a stated time. The

¹⁶⁶ In *re Rochford*, 10 A. B. R. 608, 124 Fed. 182 (C. C. A. S. Dak.); In *re Granite City Bank*, 14 A. B. R. 404, 409, 137 Fed. 818 (C. C. A. Iowa, affirming In *re Wilka*, 12 A. B. R. 727, 131 Fed. 1004), which was a case of giving notice to lienors on personal property living out of the jurisdiction; In *re Kellogg*, 10 A. B. R. 7, 121 Fed. 333 (C. C. A. N. Y.). Impliedly, In *re McBride & Co.*, 12 A. B. R. 83, 132 Fed. 285 (Ref. N. Y.).

Compare, In *re Waukesha Water Co.*, 8 A. B. R. 715, 116 Fed. 1009 (D. C. Wis.), as to notice on persons in another district (in cases, however, where such persons are in possession of the instrument sought to be canceled).

In *re Pittelkow*, 1 A. B. R. 472, 92 Fed. 901 (D. C. Wis.).

In *re Scrinopskie*, 10 A. B. R. 221 (D. C. Kans.), where the referee held a sale of property to have been fraudulent as to creditors although conveyance made more than four months before bankruptcy.

In *re Wilka*, 12 A. B. R. 729, 131 Fed. 1004 (D. C. Iowa, affirmed sub nom. in In *re Granite City Bk.*, 14 A. B. R. 404, 137 Fed. 818).

motion of the Hawkeye Land Company for the release of the property will therefore be overruled, and it will be required to propound its claim to this property before the referee by September 1, 1904. The referee will so notify it at least 10 days before such date, and, if it fails to do so within such time, it will be barred of all right to or interest in said property. If it shall so propound its claim, the referee will then fix the time within which the trustee, as soon as appointed, shall plead thereto, and will make all requisite and necessary orders for speeding the matter to a final hearing, and determine the questions so presented."

In *re Noel*, 14 A. B. R. 720, 137 Fed. 694 (D. C. Md.): "That court, having possession of the property, had jurisdiction, upon notice to those claiming to have liens and incumbrances upon it, to order the property to be sold by the trustees free of all incumbrances, if the court, in its discretion, should determine that such a sale was for the benefit of the unsecured creditors; and after such a sale, having in its control the fund arising from the sale, it would have jurisdiction to determine the conflicting claims of the parties whose liens had been displaced as to the property sold, and transferred to the fund in the court. *Ray v. Norseworthy*, 23 Wall. 128, 23 L. Ed. 116."

Even when a lienor on property in the actual custody of the bankruptcy court is also a creditor, he must have due notice other than the mere ten days notice by mail given to all creditors, of any attempt to affect his property rights as such lienor.¹⁶⁷

§ 1890. **"Ten Days Notice by Mail" Insufficient; "Order to Show Cause," Proper Method.**—The usual ten days notice by mail prescribed in cases of sales, etc., will not suffice. Ordinarily, notice is given by means of the service of a certified copy of an "order to show cause" by a certain date why the prayer of the petition should not be granted.¹⁶⁸ Of course, the parties may waive service of process and enter their appearance voluntarily.

§ 1891. **Notice on Nonresidents, if Court Has Actual Possession.**—Where the bankruptcy court has actual possession of the property involved, notice may be served upon parties out of the district to set up their rights.¹⁶⁹ Service may be had on nonresidents under U. S. Rev. Stat., § 738.¹⁷⁰

§ 1892. **But Mere Possession of Res and Service of Notice Insufficient to Render Judgment in Personam.**—While possession of the property involved entitles the bankruptcy court in such summary proceedings to determine the rights of the parties thereto and to adjudicate those rights

^{167.} But see, apparently, *contra*, In *re Wilka*, 12 A. B. R. 727, 131 Fed. 1004 (D. C. Iowa). However, on review (sub nom. In *re Granite City Bk.*, 14 A. B. R. 405 [C. C. A. Iowa]) it is evident that actual notice was given to lienors.

^{168.} See post, "Selling Property Subject to and Free from Liens," § 1981.

^{169.} In *re Wilka*, 12 A. B. R. 727, 131 Fed. 1004 (D. C. Iowa), affirmed in *In re Granite City Bank*, 14 A. B. R. 404, 137 Fed. 818 (C. C. A.). Inferentially, *Horskins v. Sanderson*, 13 A. B. R. 101 (D. C. Vt.).

^{170.} Inferentially, *Horskins v. Sanderson*, 13 A. B. R. 101, 132 Fed. 415 (D. C. Vt.).

upon proper notice, yet, if there be no waiver of jurisdiction and no entry of appearance, the mere possession of the rem and service of notice on the party will not authorize the bankruptcy court to render personal judgment for costs against such third party.¹⁷¹

§ 1893. **Third Parties May Intervene.**—On the other hand third parties claiming interest in the property may intervene and apply to be made parties, set up their rights and have them determined in the bankruptcy court.

In re Goldsmith, 9 A. B. R. 426, 118 Fed. 763 (D. C. Tex.): "I. Hirsch & Son come as intervenors seeking to subject certain funds, which arose from the sale of the property on which they claim a lien, to the part payment of an alleged indebtedness. They have a right to come in this way. *Fisher v. Cushman*, 4 A. B. R. 646, 103 Fed. 860, In re Oconee Mill Co., 6 A. B. R. 475, 109 Fed. 866."

§ 1894. **Pleadings and Practice in Marshaling Liens and Interests.**—Liens may be set up on the forms prescribed by the Supreme Court's General Orders in Bankruptcy for proof of secured debts.¹⁷² But secured creditors are not obliged to prove their claims upon the form prescribed by the Supreme Court for proof of secured debts. A mere pleading in the nature of an intervening petition in equity will suffice, the regular form apparently being intended simply for secured creditors who retain the possession of their securities and desire their value credited thereon and the claim allowed for the deficit.¹⁷³

§ 1895. **Whether Proceedings to Marshal Liens on Property in Custody, on Notice, Strictly "Summary" Proceedings.**—Proceedings to marshal liens on property in the custody of the bankruptcy court, on notice and hearing, perhaps are not, strictly speaking, "summary" proceedings although they do not follow the established forms.¹⁷⁴

§ 1896. **What Law Governs Validity.**—In general the trustee takes title in the same plight and condition in which the bankrupt left it. In general the law of the State will control in the marshaling of liens; and the decisions of the highest tribunal of the State will be followed where the lien or inter-

171. *Havens & Geddes Co. v. Pierek*, 9 A. B. R. 569, 120 Fed. 244 (C. C. A. Ills.): Although this case states the rule in the broad form that the bankruptcy court has no jurisdiction at all to maintain a plenary action, as was the case before the amendment of 1903 conferred such jurisdiction, yet on the proposition of the text, it still states the true rule where the proceedings are not a plenary suit but the usual proceedings to marshal liens, etc., before the referee.

172. Inferentially, *Burow v. Grand Lodge*, 13 A. B. R. 545, 133 Fed. 542 (C. C. A. Tex.).

173. In re Goldsmith, 9 A. B. R. 419, 118 Fed. 763 (D. C. Tex.); *Burow v. Grand Lodge*, 13 A. B. R. 545, 133 Fed. 542 (C. C. A. Tex.). The subject of pleadings and practice in proceedings to marshal liens is taken up fully under the subject of "Selling Property Free from Liens," post, § 1965.

Whether petition must expressly allege possession to be in trustee, In re Granite City Bk., 14 A. B. R. 408, 137 Fed. 818 (C. C. A. Iowa).

174. In re McMahon, 17 A. B. R. 534, 147 Fed. 685 (C. C. A. Ohio). Also, see ante, "What Is Summary Process," § 1832.

est is not affected by the peculiar provisions of the Bankruptcy Act. In short, the validity and priority of liens on the property so coming into the custody of the bankruptcy court, and the extent and validity of interests therein are, in general, to be determined by the law of the State.¹⁷⁵

Hiscock v. Varick Bk., 18 A. B. R. 6, 206 U. S. 28: "The contracts of pledge were made, executed and to be performed in the State of New York, and the rights of the parties were governed by the law of that State. No preference under the Bankruptcy Act was alleged or proved, nor was there any allegation or proof that the pledge of the securities was in fraud of the rights of the creditors or trustee. The questions of the extent and validity of the pledge were

175. See the various discussions as to the title of the trustee, the same necessarily involving the law applicable to the marshaling of liens in bankruptcy.

Thompson v. Fairbanks, 13 A. B. R. 437, 196 U. S. 516; *Humphrey v. Tatman*, 14 A. B. R. 74, 198 U. S. 91; *York Mfg. Co. v. Cassell*, 15 A. B. R. 633, 201 U. S. 342; *First Nat'l Bk. v. Staake*, 15 A. B. R. 639, 202 U. S. 141; *In re Josephson*, 8 A. B. R. 423, 116 Fed. 404 (D. C. Ga.): as to unrecorded chattel mortgage. *Deland v. Miller*, 11 A. B. R. 744, 119 Iowa 368; *Morgan v. Nat'l Bk.*, 16 A. B. R. 644, 145 Fed. 466 (C. C. A. W. Va.); Analogously (a pledge in pledgee's hands). *In re Byrne*, 3 A. B. R. 268, 97 Fed. 762 (D. C. Iowa); *In re Forbes*, 7 A. B. R. 42 (Ref. Ohio): Dower computed on equity of redemption where purchase money mortgage exists, in Ohio. *In re Hawkins*, 9 A. B. R. 598 (D. C. R. I.): Dower, in Rhode Island, computed on whole value, but payable out of equity of redemption. *In re Waterloo Organ Co.*, 9 A. B. R. 429, 118 Fed. 904 (D. C. N. Y.). *Bush v. Export Storage Co.*, 14 A. B. R. 138, 136 Fed. 918 (U. S. C. C. Tenn. on page 168, interpreting *Thompson v. Fairbanks*, 13 A. B. R. 437, 196 U. S. 516).

In re Lukens, 14 A. B. R. 683, 133 Fed. 188 (D. C. Penn.), where a real estate mortgage not recorded until after adjudication of mortgagor and appointment of trustee was held void under § 67 (a). However, unless the Pennsylvania law declares a real estate mortgage void as to creditors for nonrecording, it is hard to see how it would be void as to the trustee in bankruptcy who simply represents creditors.

Instance, *In re Gosch*, 9 A. B. R. 613, 121 Fed. 604 (D. C. Ga.), wherein it was held that a sash and door factory was not a "saw mill" within the meaning of the Georgia Lien Law.

Instances, *Chauncey v. Dyke Bros.*, 9 A. B. R. 444, 119 Fed. 1 (C. C. A. Ark.), wherein the statute of Arkansas was applied, giving priority to mechanics' liens over a prior mortgage, except in so far as the prior mortgage is made to raise money to make the improvements and the improvements are actually made.

Instance, *Ludowici Roofing Tile Co. v. Penn. Inst.*, 8 A. B. R. 739 (D. C. Penn.): Building contract stipulating against liens recorded, bars subcontractors, in Pennsylvania, notwithstanding further stipulations that final payment need not be made unless receipts in full from lienholders be exhibited—later stipulation being for owner's benefit.

Instance, *Cunningham v. Germ. Ins. Bk.*, 4 A. B. R. 363 (C. C. A. Ky.): Validity of mortgage where loan in excess of charter.

Instance, *Ludowici Roofing Tile Co. v. Penn. Inst.*, 8 A. B. R. 739 (D. C. Penn.): Partial assignments of building contract fund where fund turned over to the bankruptcy court for marshaling of liens, will be honored.

Instance, *In re Byrne*, 3 A. B. R. 268, 97 Fed. 762 (D. C. Iowa): Statute of Iowa giving wages of employees priority over existing mortgage.

Instance, *Morgan v. Nat'l Bk.*, 16 A. B. R. 639, 145 Fed. 466 (C. C. A. W. Va.): Priorities in W. Va. between mechanics' liens and bonded indebtedness of a manufacturing plant.

Instance, *In re Dunavant*, 3 A. B. R. 41, 96 Fed. 542 (D. C. N. Car.): Statute of limitations as to alleged fraudulent transfers.

Instance, *In re Cannon*, 10 A. B. R. 64, 121 Fed. 582 (D. C. S. C.): Unrecorded chattel mortgage void by State law only as to subsequent creditors: fund will be divided first among subsequent creditors.

local questions, and the decisions of the courts of New York are to be followed by this court."

In re National Bk., 14 A. B. R. 180, 135 Fed. 62 (C. C. A. Ohio): "In determining the validity of a chattel mortgage, this court will endeavor to follow the settled law of the State in which the transaction occurred."

§ 1897. Where Rights under State Statute Dependent on Resort to Special Remedies.—But where the state law confers certain rights upon creditors of setting aside conveyances, wholly dependent, however, upon their institution of litigation in certain form in the state courts, the funds in the hands of the bankruptcy court probably will not be administered nor distributed in accordance therewith;¹⁷⁶ even where such a suit is already pending at the time of bankruptcy; especially where actual custody and possession of the property has not been taken by the state court but has been taken by the bankruptcy court; and especially where the state court proceedings would have resulted in "class" preference.¹⁷⁷

§ 1898. Rights of Priority under State Statutes as Related to Marshaling of Liens on Property.—Where, by state law, the putting of property into the hands of a receiver or assignee operates to give a right of priority to operatives for labor performed by them during a certain period preceding the receivership or assignment, then, in such cases, upon the subsequent bankruptcy of the debtor and the transfer of the property to the bankruptcy court for administration, the special provisions of the Bankruptcy Act giving priority to wages earned by the similar classes of "workmen, clerks and servants," supersedes the order of priority of the state statute and the claims must be made under this provision of the Bankruptcy Act and not under the state law; but as to other priorities, if the state statute confers them as general rights of priority, they will have the same priority, in the marshaling of liens in bankruptcy that they would have had in the marshaling of liens in the state court.¹⁷⁸ But in no event will workmen, clerks nor servants, under the Bankruptcy Act (nor as a general rule, operatives under the state laws) have priority of payment of their wages out of the proceeds of property over a mortgage or other contract lien thereon made upon a presently passing consideration and duly re-

176. For full discussion, see ante, § 1266, et seq.

177. In re Porterfield, 15 A. B. R. 17, 138 Fed. 192 (D. C. W. Va., reversed sub nom. Moore v. Green): "I hold that the petitioning creditors, independent of the exclusive character of the bankruptcy jurisdiction, cannot now rely upon the pendency of the case in the State court to give them the relief asked, to-wit, the distribution of the funds according to the requirements of § 2, c. 74, of the Code of West Virginia of 1899; and this for two reasons: (a) Because the State court never took possession of the property; and (b) because the parties have, in effect waived any rights they might have had in this particular, and have submitted to the federal court's jurisdiction."

178. See post, § 2202, et seq.

corded.¹⁷⁹ But such right of priority under state law given to employees may take precedence over certain statutory liens, such as landlords' liens;¹⁸⁰ and, in some states, over mortgages given on a "plant" or business.¹⁸¹

§ 1899. **"Surrender of Preference" on Distinct Transaction Not to Be Required as Prerequisite to Validity of Lien Which Itself Is Not a Preference.**—Surrender of preferences received on other and distinct transactions is not to be required upon the marshaling of assets, as a condition prerequisite to the validity of a lien, where the lien itself is not a preference. Such surrender is a prerequisite only to the allowance of claims to share in dividends.¹⁸²

DIVISION 6.

SUMMARY JURISDICTION OVER TRUSTEE AND RECEIVER TO PREVENT THEIR INTERFERENCE WITH RIGHTFUL POSSESSION OF THIRD PARTIES.

§ 1900. **Summary Jurisdiction to Prevent Trustee Intervening with Others' Rightful Custody.**—The bankruptcy court has summary jurisdiction over its own receiver, trustee or other officer to control his actions towards third parties and to prevent his interference with their lawful custody.¹⁸³

DIVISION 7.

RESTRAINING ORDERS AND INJUNCTIONS IN AID OF BANKRUPTCY PROCEEDINGS.

§ 1901. **Jurisdiction to Issue Injunctions in Aid of Bankruptcy Proceedings.**—Restraining orders may be issued by the bankruptcy court in the bankruptcy proceedings themselves, in aid of the collection of the assets and their reduction to money prohibiting third parties from interfering

179. In re Meis, 18 A. B. R. 107 (Ref. Ky.); In re Frick, 1 A. B. R. 719 (Ref. Ohio).

Compare, analogously, contra, In re Duncan, 2 A. B. R. 321 (D. C. Tex.): But this probably was a case of a landlord's right of mere priority rather than of a specific lien.

Contra, obiter, under laws of Iowa, In re Byrne, 3 A. B. R. 268, 97 Fed. 762 (D. C. Iowa). Contra, In re Tebo, 4 A. B. R. 235, 101 Fed. 235 (D. C. W. Va.). Also, see post, § 2206, et seq. At any rate, where the wages claimed upon were not even earned when the mortgage was given. In re Mulhauser Co., 10 A. B. R. 231, 121 Fed. 669 (C. C. A. Ohio).

180. See post, § 2202.

181. See post, § 2202, et seq.

182. In re Franklin, 18 A. B. R. 218, 151 Fed. 642 (D. C. N. Car.).

183. Compare, Warehousing Co. v. Hand, 16 A. B. R. 56 (C. C. A. Wis.), where the bankruptcy court entertained a plenary intervening petition to enjoin the trustee from interfering with the petitioner's possession.

Contra, In re Berkowitz, 16 A. B. R. 255, 143 Fed. 598 (D. C. Penn.), where the bankruptcy referee attempted to restrain the trustee from replevying property from the bankrupt's wife, the reviewing court reversing the referee. Compare, In re Howard, 12 A. B. R. 462 (D. C. Calif.).

with the property or its custody, or from taking other action in relation thereto.¹⁸⁴

Bear v. Chase, 3 A. B. R. 746, 99 Fed. 920 (C. C. A. S. C.): "Counsel insist with great earnestness that a bill in equity should have been filed in this case instead of proceeding by rule to show cause, as was done, and while it is not said so in words, the inference is irresistible that it was necessary to institute such suit in the State Court instead of the District Court of the United States. * * * It may be conceded that in ordinary proceedings affecting the bankrupt's estate, in which third parties or adverse claimants are interested, the better practice would be either to file a bill in equity or a separate petition in the bankruptcy proceedings, setting up the cause of action in question, on which process should be regularly issued or full opportunity otherwise given to appear. But that has no application in this case, where the alleged ground of bankruptcy is the procuring of and levying the attachments enjoined. * * * Upon the adjudication of the bankrupt, all creditors became parties to the bankruptcy proceedings

¹⁸⁴ Compare, ante, "Provisional Remedies and Restraining Orders before the Appointment of Trustees," § 359. Also various subjects wherein injunction has been sought as a remedy.

Compare, "Injunctions and Restraining Orders in Plenary Actions Brought by Trustees and Receivers," ante, § 1727.

Compare, as to law of 1867, cases cited in note to *Keegan v. King*, 3 A. B. R. 79.

In *re Goldberg*, 9 A. B. R. 156, 117 Fed. 692 (D. C. N. Y.), quoted, ante, § 359; In *re Hornstein*, 10 A. B. R. 308, 122 Fed. 266 (D. C. N. Y.), quoted, ante, § 359; In *re Breslauer*, 10 A. B. R. 33, 121 Fed. 910 (D. C. N. Y.); In *re Kenney*, 2 A. B. R. 494, 95 Fed. 427 (D. C. N. Y., affirmed in 3 A. B. R. 353 and 5 A. B. R. 355, and reaffirmed sub nom. *Clarke v. Larremore*, 9 A. B. R. 476, 188 U. S. 486); In *re Lesser Bros.*, 5 A. B. R. 320 (C. C. A. N. Y., reversed, on other grounds, sub nom. *Metcalf v. Barker*, 9 A. B. R. 36, 187 U. S. 165; *Blake v. Francis-Valentine Co.*, 1 A. B. R. 372 (D. C. Calif.): This case, however, is not to be approved to its full extent.

In *re Northrop*, 1 A. B. R. 427 (Ref. N. Y.); In *re Globe Cycle Wks.*, 2 A. B. R. 447 (Ref. N. Y.); In *re Chas. D. Adams*, 1 A. B. R. 94 (Ref. N. Y.); In *re Lemmon & Gale Co.*, 7 A. B. R. 291, 112 Fed. 296 (C. C. A. Tenn.); In *re Witener*, 5 A. B. R. 198, 105 Fed. 180 (C. C. A. N. Y.); In *re Ball*, 9 A. B. R. 276, 118 Fed. 672 (D. C. Vt.), quoted, ante, § 359. In *re Kerski*, 2 A. B. R. 79 (Ref. Wis.): This case, however, states the rule too broadly. In *re Smith*, 8 A. B. R. 55, 113 Fed. 993 (D. C. Ga.), quoted, ante, § 359. In *re Tiffany*, 13 A. B. R. 310, 133 Fed. 799 (D. C. N. Y.); In *re Miller*, 9 A. B. R. 274, 118 Fed. 360 (D. C. Ga.); In *re Jersey Island Packing Co.*, 14 A. B. R. 689, 138 Fed. 625 (C. C. A. Calif.); In *re Eastern Commission & Importing Co.*, 12 A. B. R. 305, 129 Fed. 847 (D. C. Mass.); In *re Tune*, 8 A. B. R. 285, 115 Fed. 906 (D. C. Ala.); In *re Huddleston*, 1 A. B. R. 572 (Ref. Ala.); In *re Mertens*, 12 A. B. R. 698, 131 Fed. 507 (D. C. N. Y.); In *re Booth*, 2 A. B. R. 770, 96 Fed. 943 (D. C. Ga.); In *re Jackson*, 2 A. B. R. 501, 94 Fed. 797 (D. C. Vt.); In *re Adams*, 14 A. B. R. 23, 134 Fed. 142 (D. C. Conn.); In *re Vastbinder*, 13 A. B. R. 148, 132 Fed. 718 (D. C. Penn.); In *re Baughman*, 15 A. B. R. 23, 138 Fed. 742 (D. C. Penn.); In *re Klein*, 3 A. B. R. 174, 97 Fed. 31 (D. C. Ills.); In *re Currier*, 5 A. B. R. 639 (Ref. N. Y.); obiter, *Carling v. Seymour Lumber Co.*, 8 A. B. R. 41, 113 Fed. 483 (C. C. A. Ga.); In *re Riker*, 5 A. B. R. 720, 107 Fed. 96 (C. C. A. N. Y.); *Bindseil v. Smith*, 5 A. B. R. 40 (Court of Errors N. J.); In *re Steuer*, 5 A. B. R. 209, 104 Fed. 976, 980 (D. C. Mass.); *Beach v. Macon Grocery Co.*, 8 A. B. R. 752, 116 Fed. 143 (C. C. A. Ga.); In *re Krinsky Bros.*, 7 A. B. R. 535, 112 Fed. 972 (D. C. N. Y.), quoted, ante, § 359. In *re Weinger, Bergman & Co.*, 11 A. B. R. 424, 126 Fed. 875 (D. C. N. Y.); *White v. Schloerb*, 4 A. B. R. 178, 178 U. S. 542.

Instances, *O'Dell v. Boyden*, 17 A. B. R. 755, 150 Fed. 731 (C. C. A. Ohio); In *re Kleinhans*, 7 A. B. R. 604, 113 Fed. 107 (D. C. N. Y.); In *re Barrett*, 12 A. B. R. 626, 132 Fed. 362 (D. C. Tenn.); In *re Wilkes*, 7 A. B. R. 574, 112 Fed. 975 (D. C. Ark.); In *re Martin*, 5 A. B. R. 423, 105 Fed. 753 (D. C. N. Y.).

by operation of law, and particularly these creditors by whose acts the bankruptcy was caused. No good reason would seem to exist why a court, as to any creditor before it in a bankruptcy proceeding, should not, after the service of a rule, enjoin such creditor from taking any step or doing any act affecting the bankrupt's estate, or interrupting the court in the due administration thereof. These attaching creditors do not occupy the relation of third persons in possession of, or adverse claimants dealing with, the property of the bankrupt. In *re Kennedy* (D. C.), 97 Fed. (3 Am. B. R. 353) 557, 558. They are but creditors of the bankrupt, who have, in their effort to collect their money, sought an advantage which the law does not give, and they cannot gain any favored position by reason of an act of theirs which the law condemns."

In *re Kimball*, 3 A. B. R. 161, 97 Fed. 29 (D. C. Penn.): "Where the personal property of the bankrupt at the date of the adjudication is subject to the levy of a pending execution, the right of this court to enjoin the execution creditor, if the execution is an unlawful preference and contrary to the provisions of the Bankrupt Act, is clear."

In *re Russell & Birkett*, 3 A. B. R. 658, 101 Fed. 248 (C. C. A. N. Y.): "A Federal court will neither interfere with property in the lawful custody of a State court, nor tolerate interference by a State court with property in its custody. * * * Authority to Courts of Bankruptcy to protect the property in their custody from such interference would seem to be specifically conferred by that provision of § 2 of the act permitting them to make such orders and issue such processes as may be necessary for enforcing their jurisdiction. The prohibition of § 720 of the Revised Statutes against enjoining the proceedings of a State court does not apply when any law relating to bankruptcy authorizes an injunction, nor does it where the proceedings sought to be enjoined have been commenced after the jurisdiction of the Federal court has attached."

In *re Emslie*, 4 A. B. R. 126, 102 Fed. 292 (C. C. A. N. Y.): "The order staying the action in the State court was a proper exercise of power, and should not be disturbed. That action was an interference with assets of the bankrupts in the custody of the bankruptcy court over which that court had previously acquired jurisdiction, and as it was brought without the leave of the court, the order staying its prosecution was properly granted."

In *re Pittelkow*, 1 A. B. R. 475, 92 Fed. 901 (D. C. Wis.): "* * * jurisdiction exists to restrain mortgagees, for a reasonable time, from commencing foreclosure proceedings, and to order sales free from incumbrances, in special instances, after due hearing, where the rights are clear."

§ 1902. Restraining Sale or Distribution under Levy Made within Four Months.—Thus, the sale or distribution of property or its proceeds under levy made within four months of bankruptcy, while still in the hands of the officer of the court making the levy, may be restrained before the adjudication, and pending the determination as to the bankruptcy of the debtor.¹⁸⁵

And, of course, also after adjudication.

¹⁸⁵ See ante, "Restraining Orders and Injunctions before Adjudication," § 359; In *re Hornstein*, 10 A. B. R. 308, 122 Fed. 266 (D. C. N. Y.); In *re Goldberg*, 9 A. B. R. 156, 117 Fed. 692 (D. C. N. Y.); In *re Breslauer*, 10 A. B. R. 33, 121 Fed. 910 (D. C. N. Y.). See ante, "Custodians and Court Officers in Possession under Nullified Legal Liens, Not Adverse Claimants," § 1827. Bear

§ 1903. **But No Injunction Where Levy Not Made within Four Months.**—But there will be no injunction granted where the lien of the levy was acquired before the four months preceding the filing of the bankruptcy petition, for such levies are not invalid.¹⁸⁶

§ 1904. **And Injunction May Be Refused on Ground of Comity.**—And a restraining order to enjoin a sale under an execution levied within the four months preceding the bankruptcy may be refused on the ground of comity, until application be first made to the court from which the levy was made.¹⁸⁷

§ 1905. **Adverse Claimants Restrained until Appropriate Action Can Be Taken.**—Restraining orders may be issued by the bankruptcy courts upon adverse claimants preserving the status quo until proper proceedings or applications can be instituted in the appropriate tribunals, although the bankruptcy courts might not have jurisdiction themselves to entertain such proceedings.¹⁸⁸

§ 1906. **Adverse Claimants Restrained from Interfering with Assets in Custody of Bankruptcy Court.**—Of course adverse claimants may be restrained from interfering with assets in the custody of the bankruptcy court.¹⁸⁹

v. Chase, 3 A. B. R. 746, 99 Fed. 920 (C. C. A. S. C.); *In re Kimball*, 3 A. B. R. 161, 97 Fed. 29 (D. C. Penn.); *In re Kenney*, 2 A. B. R. 494, 95 Fed. 427 (D. C. N. Y., affirmed in 3 A. B. R. 353 and 5 A. B. R. 355, and reaffirmed sub nom. *Clarke v. Larremore*, 9 A. B. R. 476, 188 U. S. 486); *In re Lesser Bros.*, 5 A. B. R. 320 (C. C. A. N. Y., reversed, on other grounds, sub nom. *Metcalf v. Barker*, 9 A. B. R. 36, 187 U. S. 165); *Blake v. Francis-Valentine Co.*, 1 A. B. R. 372 (D. C. Calif.): This case, however, is not to be approved to its full extent. *In re Northrop*, 1 A. B. R. 427 (Ref. N. Y.); *In re Globe Cycle*, 2 A. B. R. 447 (Ref. N. Y.); *In re Chas. D. Adams*, 1 A. B. R. 94 (Ref. N. Y.); *In re Booth*, 2 A. B. R. 770, 96 Fed. 943 (D. C. Ga.).

^{186.} *In re Snell*, 11 A. B. R. 35, 125 Fed. 154 (D. C. Calif.).

But compare cases where a distinction has been made between execution sales and judicial sales and where sheriffs have been restrained from sale and ordered to turn over the property, although levy was made prior to the four months, the lien following the property, *In re Vastbinder*, 13 A. B. R. 148, 132 Fed. 718 (D. C. Penn.); *In re Baughman*, 15 A. B. R. 23, 138 Fed. 742 (D. C. Penn.). See ante, § 1827, note.

^{187.} *In re Shoemaker*, 7 A. B. R. 437, 112 Fed. 648 (D. C. Va.).

^{188.} *In re Smith*, 8 A. B. R. 55, 113 Fed. 993 (D. C. Ga.): Removing of fixtures restrained; *In re Currier*, 5 A. B. R. 639 (Ref. N. Y.); *Bindseil v. Smith*, 5 A. B. R. 40 (Court of Errors N. J.): Alleged preferential transfer of note; preferred creditor enjoined. *In re Kerski*, 2 A. B. R. 79 (Ref. Wis.).

In re Miller, 9 A. B. R. 274, 118 Fed. 360 (D. C. Ga.), where a mortgagee, under deed absolute in form, was restrained from selling until question of usury was settled.

In re Jackson, 2 A. B. R. 501, 94 Fed. 797 (D. C. Vt.): Restraining endorsement of note.

In re Jersey Island Packing Co., 14 A. B. R. 689, 138 Fed. 625 (C. C. A. Calif.): Selling out of corporate assets under trust deed, restrained.

Contra, *In re Ward*, 5 A. B. R. 215 (D. C. Mass.): "To take property out of one's possession and to restrain him from dealing with it as owner are but different acts of the exercise of the same jurisdiction."

^{189.} *In re Chas. D. Adams*, 1 A. B. R. 94 (Ref. N. Y.), in which case third parties, to whom the landlord had leased the premises, upon the bankruptcy of the tenant, were enjoined.

§ 1907. **Court Proceedings Restrained until Trustee Elected and Appropriate Action Taken.**—Court proceedings may be restrained until a trustee can be elected and appropriate action be taken by him by way of intervening in the state court or otherwise;¹⁹⁰ thus, as to the foreclosure of mechanics' liens, mortgages, pledges, etc.;¹⁹¹ thus, as to an equity suit by a judgment creditor to subject the bankrupt's interest in a spendthrift trust.¹⁹²

§ 1908. **Court Proceedings Enjoined Where Property in Custody of Bankruptcy Court Sought to Be Seized or Levied on.**—Court proceedings whereby it is attempted to levy upon or seize property in the custody of the bankruptcy court may, of course, be enjoined; thus, as to attempts to replevin from the custody of the bankruptcy court or to levy execution on property in its custody, or otherwise interfere with it by court proceedings;¹⁹³ even where the property is exempt.¹⁹⁴

§ 1909. **Injunction Refused Where Legal Proceedings Not Nullified by Bankruptcy, and State Court Prior in Custody.**—Injunction will be refused, where it is not asked for merely to give time for a trustee to be elected and to intervene to protect creditors' rights, but is asked on the ground of paramount jurisdiction of the bankruptcy court, where the state court has prior custody of the res and the legal proceedings themselves are not void.¹⁹⁵

And this has been held even as to legal proceedings instituted after bankruptcy adjudication, where actual possession has not been taken by a bankruptcy officer.¹⁹⁶

§ 1910. **Whether May Restrain Levy on Exempt Property for Other Purposes than to Interpose Discharge.**—Also it has been held, but on doubtful reasoning, that injunction will be granted where the property involved is exempt and the restraining order is for the benefit of the bankrupt, but is not for the purpose of securing and interposing discharge.¹⁹⁷

190. In re Klein, 3 A. B. R. 174, 97 Fed. 31 (D. C. Ills.). Obiter, Carling v. Seymour Lumber Co., 8 A. B. R. 41, 113 Fed. 483 (C. C. A. Ga.).

191. In re Emslie, 4 A. B. R. 126, 102 Fed. 292 (C. C. A. N. Y.); In re Pittelkow, 1 A. B. R. 475, 92 Fed. 901 (D. C. Wis.); In re Ball, 9 A. B. R. 276, 118 Fed. 672 (D. C. Vt.).

192. In re Tiffany, 13 A. B. R. 310, 133 Fed. 799 (D. C. N. Y.).

193. White v. Schloerb, 4 A. B. R. 178, 178 U. S. 542; In re Russell & Birkett, 5 A. B. R. 608 (Ref. N. Y.); In re Lemmon & Gale Co., 7 A. B. R. 291, 112 Fed. 296 (C. C. A. Tenn.); In re Whitener, 5 A. B. R. 198, 105 Fed. 180 (C. C. A. N. Y.).

194. In re Huddleston, 1 A. B. R. 572 (Ref. Ala.).

195. See chapter XXXII, "Jurisdiction of Bankruptcy Court Where Another Court Already Has Custody," ante, § 1586, et seq.

196. See cases cited under § 1582, ante.

Also, injunction will be granted against the prosecution of a suit where the effect of obtaining judgment therein against the bankrupt would be to cause a surety on the bankrupt's bond in the suit to appropriate certain property of the bankrupt held by the surety as indemnity, In re Eastern Commission and Importing Co., 12 A. B. R. 305, 129 Fed. 847 (D. C. Mass.).

197. In re Tune, 8 A. B. R. 285, 115 Fed. 906 (D. C. Ala.); In re Huddleston, 1 A. B. R. 572 (Ref. Ala.). Contra, impliedly, White v. Thompson, 9 A. B. R. 653, 119 Fed. 868 (C. C. A. Ala.).

§ 1911. **Suits in Personam against Receiver, Trustee or Marshal for Wrongful Seizure Not Restrained.**—But a suit in personam in a state court individually against a receiver, trustee or marshal in bankruptcy for trespass for wrongful seizure of third parties' goods will not be restrained, as a rule, where such suit does not attempt to sequester property.¹⁹⁸

§ 1912. **No Ancillary Injunction in Aid of Bankruptcy Proceedings in Another District.**—No ancillary injunction can be obtained in one district in aid of bankruptcy proceedings in another district, unless a separate action be brought there in which the injunction would be proper.¹⁹⁹

§ 1913. **No Enjoining of Pledgee's Sale, unless Fraud or Oppression Exist.**—Pledgees and other lienholders in possession of securities upon property of the bankrupt estate will not be enjoined from selling their securities in accordance with contract, unless there be fraud or oppression.²⁰⁰

In *re Brown*, 5 A. B. R. 220, 104 Fed. 762 (D. C. Pa., distinguished in *In re Jersey Island Packing Co.*, 14 A. B. R. 693, 138 Fed. 625): "A temporary restraining order was issued, forbidding a sale under any circumstances, and it is now to be determined whether the court has the power to make the order prayed for, or any other order interfering with the creditors' right to sell.

"I do not pass upon the question, whether the court may interfere to prevent a fraudulent or oppressive exercise of such a right. No such exercise is threatened in the present case. It is agreed that the creditors intend to deal fairly with the property pledged."

Inferentially, *In re Mertens*, 15 A. B. R. 362, 142 Fed. 445 (C. C. A. N. Y., reversing 14 A. B. R. 226, and itself affirmed sub nom. *Hiscock v. Varick Bk.*, 18 A. B. R. 6, 206 U. S. 28): "The present Act provides that the value of his security may be determined, among other methods, by converting it into money, pursuant to his contract rights, and thus if he has enforced it as the contract with the debtor allowed, he is permitted to prove the unsatisfied balance of his claim. Section 57, subdivision h, prescribes several modes of valuation, and the one referred to is exclusive of the others and is superfluous and useless unless it is intended to authorize the creditor without interference by the trustee or the court to value his own security, provided he turns it into money, 'according to the terms of the agreement pursuant to which' it was delivered to him."

198. *McLean v. Mayo*, 7 A. B. R. 115, 113 Fed. 106 (D. C. N. Car.); *In re Kanter & Cohen*, 9 A. B. R. 372, 121 Fed. 984 (C. C. A. N. Y.). Contra, *In re Mertens*, 12 A. B. R. 698, 131 Fed. 507 (D. C. N. Y.). See "Plenary Actions in Personam against Trustees and Receivers," ante, § 1781.

199. *In re Williams*, 9 A. B. R. 741, 120 Fed. 38 (D. C. Ark.). Inferentially, contra, *In re Peiser*, 7 A. B. R. 690, 115 Fed. 199 (D. C. Penn.). Compare, *Horskins v. Sanderson*, 13 A. B. R. 101, 132 Fed. 415 (D. C. Vt.).

200. Contra, inferentially, *In re Cobb*, 3 A. B. R. 129, 96 Fed. 821 (D. C. N. Car.), wherein the court seems to consider that pledgees in possession at the time of bankruptcy must nevertheless submit their securities to the bankruptcy court. This case was decided, it must be remembered, before the decision of the U. S. Supreme Court in *Bardes v. Bank*, 4 A. B. R. 163, 178 U. S. 524.

And where the possession of the pledgee or other lienholder is not exclusive of the bankrupt, the bankruptcy court may enjoin.²⁰¹

In *re Jersey Island Packing Co.*, 14 A. B. R. 689, 142 Fed. 445 (C. C. A. Calif.), wherein the court held, that under § 2, a court of bankruptcy has jurisdiction to restrain a sale, where all the property of an alleged bankrupt corporation is about to be sold, at the instance of its treasurer, to obtain satisfaction of debts owing to him and his wife, secured by trust deeds covering all the property; and a restraining order should be granted where such sale would extinguish the bankrupt's equity of redemption, since by selling the property under the direction of the bankruptcy court the interests of all parties would be protected. The court in this case held that the rules protecting liens do not extend to a protection of the contract remedies for enforcing such liens; and said:

"It is true that the Bankruptcy Act provides that liens such * * * shall not be affected by bankruptcy but that is far from saying that such lienholders may, after the commencement of proceedings in bankruptcy against the debtor, proceed to enforce their liens or contracts in the manner prescribed in the instruments which create them; and this is true whether such lien is an ordinary mortgage, or a deed of trust with provision for a strict foreclosure by a notice and sale. The provision of the Bankruptcy Act that such a lien shall not be affected by the bankruptcy proceedings has reference only to the validity of the lienholder's contract. It does not have reference to his remedy to enforce his right. The remedy may be altered without impairing the obligation of his contract, so long as an equally efficient and adequate remedy is substituted. Every one who takes a mortgage, or deed of trust intended as a mortgage, takes it subject to the contingency that proceedings in bankruptcy against his mortgagor may deprive him of the specific remedy which is provided for in his contract."

§ 1914. Injunction Where Legal Action Requisite to Fix Liability of Sureties.—Injunction may be refused to restrain third parties from taking legal action requisite to fix the liability of persons secondarily liable for the bankrupt.²⁰²

Thus, it has been refused where judgment and return of execution unsatisfied against a corporation was necessary to fix the secondary liability of the stockholders.

In *re Remington Auto. & Motor Co.*, 9 A. B. R. 533, 119 Fed. 441 (D. C. N. Y.): "Some of the creditors of this alleged bankrupt corporation are now seek-

201. In *re Miller*, 9 A. B. R. 274, 118 Fed. 360 (D. C. Ga.), where the grantee of a deed absolute on its face but held as security was enjoined from sale. But compare, In *re Mertens*, 12 A. B. R. 698, 131 Fed. 507 (D. C. N. Y.).

But adverse claimants may not be enjoined from prosecuting to judgment in the state court suits against sureties holding funds of the bankrupt as indemnity, *Jacquith v. Rowley*, 9 A. B. R. 525, 188 U. S. 620 (affirming In *re Franklin*, 6 A. B. R. 285, 106 Fed. 666).

But adverse claimants may be enjoined from prosecuting to judgment in the state court suits against the bankrupt himself where the bankrupt has given such indemnity to his surety and where the effect of a judgment against the bankrupt would be to cause the appropriation of the indemnity by the surety to meet the obligation of the surety to the creditor, In *re Eastern Commission and Importing Co.*, 12 A. B. R. 305, 129 Fed. 847 (D. C. Mass.).

202. In *re Remington Auto. & Motor Co.*, 9 A. B. R. 533, 119 Fed. 441 (D. C. N. Y.). Compare, In *re Engle*, 5 A. B. R. 372, 374, 105 Fed. 893 (D. C. Penn.). See, also, subjects of "Rights of Creditors against Sureties, etc.," § 1524, and "Stay of Actions against Bankrupt," § 2711 and § 2712.

ing to put their respective claims in judgment, issue execution, and thus place themselves in a position to bring an action in equity of the nature and for the purpose mentioned. If this preliminary action be necessary when bankruptcy has intervened, the injunction should not be made permanent or continued, for if such a liability exists, and it can be enforced only by a creditor with judgment and execution returned unsatisfied, or by the trustee, when appointed, after a creditor or creditors have put themselves in this position, then to grant or make permanent this injunction will be to deprive the creditors of their rights."

But it is likewise true that injunction may be granted.

§ 1915. **No Restraining Order to Prevent Proceeding with Levy on Exempt Property after Same Set Apart.**—Likewise it has been held that no restraining order will be granted to prevent a creditor from proceeding with his levy on exempt property, after the property has been set apart.²⁰³

§ 1916. **Bankruptcy Petition "Caveat to All the World" and "Attachment and Injunction."**—It is said that the filing of the bankruptcy petition is a caveat to all the world and operates as an attachment and an injunction.²⁰⁴ The maxim is somewhat misleading, however, when it is applied to the title of the trustee, for the trustee does not apparently become "armed with process" thereby.²⁰⁵

§ 1917. **No Injunction before Filing of Bankruptcy Petition to Preserve Status Quo.**—But restraining orders will not be issued before the filing of a bankruptcy petition, either in the state or the bankruptcy courts, expressly to preserve the status quo until a bankruptcy petition can be filed: such ground is not in itself ground for a restraining order, although a restraining order may be granted in a creditor's suit brought before the filing of any bankruptcy petition which may have that effect as an incident.²⁰⁶

Clothing Co. v. Hazle, 6 A. B. R. 265 (Sup. Ct. Mich.): "It is apparent that the object of this bill was merely to preserve an estate until a time should come when it could be administered under the new law, which at the time the bill was filed did not authorize the Federal Courts to interfere. It is claimed that, as these courts were powerless to protect creditors under the Bankruptcy Act, the State courts must have the power. This does not impress us as being a

203. *In re Jackson*, 8 A. B. R. 596, 116 Fed. 46 (D. C. Pa.). Compare, ante, "Exemptions," § 1032.

204. *Mueller v. Nugent*, 7 A. B. R. 224, 184 U. S. 1; *Whitney v. Wenman*, 14 A. B. R. 51, 198 U. S. 539; *In re Gutman & Wenk*, 8 A. B. R. 252 (D. C. N. Y.); *In re Mertens*, 12 A. B. R. 698, 131 Fed. 507 (D. C. N. Y.); *In re Reynolds*, 11 A. B. R. 758, 127 Fed. 760 (D. C. Mont.); *In re Reynolds*, 13 A. B. R. 250, 133 Fed. 584 (D. C. Mont.); *In re Breslauer*, 10 A. B. R. 33, 121 Fed. 910 (D. C. N. Y.); *In re Briskman*, 13 A. B. R. 57, 132 Fed. 201 (D. C. N. Y.); *In re Jersey Island Packing Co.*, 14 A. B. R. 691, 138 Fed. 135 (C. C. A. Calif.); *In re Weinger, Bergman & Co.*, 11 A. B. R. 424, 126 Fed. 875 (D. C. N. Y.). In effect, *In re Abrahamson v. Bretstein*, 1 A. B. R. 44 (Ref. N. Y.). See ante, § 1215.

205. See ante, § 1215.

206. *Ellis v. Hays Saddlery & Leather Co.*, 8 A. B. R. 109 (Kans. Sup. Ct.); *Victor v. Lewis*, 1 A. B. R. 667, 53 N. Y. Supp. 944. Contra, *In re Valentine*, 1 A. B. R. 372 (D. C. Calif.).

sound theory. The rights and remedies in such cases under the State law were settled. They existed and were open at this time. But counsel say that they might be superseded or supplemented for the four months following July 1st by another remedy, so that they might, if they chose, avail themselves of a prospective remedy afforded by the Bankruptcy Act. We see no better reason why this should be than that an injunction should heretofore have been issued, in any case of fraud and danger, to impound the estate until creditors' claims should mature, judgment be obtained, execution issued and returned, to the end that a creditors' bill might be effectively filed. The exigency is as great in such a case as this, yet no one has heard of such a proceeding being permitted."

§ 1918. Referee Has Jurisdiction to Issue Restraining Order, Except upon Courts or Court Officers.—The referee has jurisdiction in general to issue the restraining order.²⁰⁷

Obiter, *In re Rochford*, 10 A. B. R. 615, 124 Fed. 182 (C. C. A. S. Dak.): "That portion of that order which enjoined the petitioners from threatening the purchases at the sale with their adverse claims to the property may have overstepped and probably did pass beyond the limits of the authority of the referee."

But the referee has no jurisdiction to enjoin the proceedings of a court, or of an officer.²⁰⁸

§ 1919. Petition Requisite and to Be Filed in Bankruptcy Proceedings Themselves.—The injunction is only to be granted upon proper petition. The petition is to be filed in the bankruptcy proceedings themselves. Thus, after adjudication it is usually to be filed before the referee, except in cases where a court or court officer is to be restrained. Before adjudication the petition is to be filed with the district clerk and may only be heard by the judge unless, of course, he be absent or otherwise unable to hear it, in which event the referee is vested with authority to hear it. The petition should be entitled in the bankruptcy case itself. But it is a separate proceedings within the bankruptcy proceedings, and should not form part of the bankruptcy petition itself, for fear of multifariousness.²⁰⁹

The entitling of the petition itself, without allegations in the body, suffi-

^{207.} *In re Adams*, 14 A. B. R. 23, 134 Fed. 142 (D. C. Conn.); *In re Booth*, 3 A. B. R. 770, 96 Fed. 943 (D. C. Ga.); inferentially, *In re Huddleston*, 1 A. B. R. 572 (Ref. Ala.); inferentially, *In re Kerski*, 2 A. B. R. 79 (Ref. Wis.), which case, however, states the power too broadly. *In re Steuer*, 5 A. B. R. 209, 104 Fed. 976, 980 (D. C. Mass.); *In re Martin*, 5 A. B. R. 423, 105 Fed. 753 (D. C. N. Y.); impliedly, *In re Wilkes*, 7 A. B. R. 574, 112 Fed. 975 (D. C. Ark.); *In re Moody*, 12 A. B. R. 718, 131 Fed. 525 (D. C. Iowa); *In re Currier*, 5 A. B. R. 639 (Ref. N. Y.); inferentially, *In re Rochford*, 10 A. B. R. 610, 124 Fed. 182 (C. C. A. S. Dak.).

It is doubtful, however, whether an adverse claimant should be restrained from proclaiming his adverse claim to prospective purchasers, at any rate by the referee.

^{208.} Gen. Order No. XII. *In re Seibert*, 13 A. B. R. 348 (D. C. N. J.); *In re Steuer*, 5 A. B. R. 209, 104 Fed. 980 (D. C. Mass.). Inferentially, contra, *In re Huddleston*, 1 A. B. R. 572 (Ref. Ala.). See ante, § 528.

^{209.} See ante, § 361.

ciently shows the pendency of the proceedings in bankruptcy within the district.²¹⁰

§ 1920. **Petition to Be Verified.**—The petition for the injunction should be verified; but it may be verified by an attorney, where the moving papers show the moving creditors live at a distance, and state the reason for the attorney's verifying.²¹¹

§ 1921. **Notice to Be Given, unless for Good Cause Dispensed with.**—Notice must be given of the filing of the petition for the injunction,²¹² unless, for good cause shown, the injunction is granted without notice, under the usual rules of practice.²¹³

But verbal notice of an order of injunction already granted is sufficient to subject the parties enjoined to punishment for contempt for its disobedience.²¹⁴

DIVISION 8.

CONTEMPTS FOR INTERFERENCE WITH CUSTODY OF BANKRUPTCY COURT.

§ 1922. **Jurisdiction to Punish for Contempts for Interference with Custody.**—The bankrupt or a third person interfering with property in the custody of the bankruptcy court after the filing of the bankruptcy petition, may be punished for contempt.²¹⁵

In re Arnett, 7 A. B. R. 522, 112 Fed. 776 (D. C. Tenn.): "But there remains the necessity of vindicating the authority of the law and practice of the court in the matter of the contempt of the bankrupt and the mortgage trustee of Godfrey Frank & Co. in surrendering the property held by the bankrupt to the mortgage trustee after the petition in bankruptcy had been filed. The bankrupt should either have kept the property for the bankruptcy trustee or surrendered it under the rules to the referee as caretaker."

§ 1923. **Restraining Order Not Prerequisite.**—Contempt proceedings will lie for interference with assets already in the control of the bankruptcy court, without the issuance of a restraining order.²¹⁶

210. In re Goldberg, 9 A. B. R. 156, 117 Fed. 692 (D. C. N. Y.).

211. In re Goldberg, 9 A. B. R. 156, 117 Fed. 692 (D. C. N. Y.).

212. Beach v. Macon Grocery Co., 8 A. B. R. 751, 116 Fed. 143 (C. C. A.); In re Steuer, 5 A. B. R. 209, 104 Fed. 976 (D. C. Mass.). Compare similar rule as to appointment of receivers, ante, § 383. See also, § 363.

213. Compare, In re Barrett, 12 A. B. R. 626, 132 Fed. 362 (D. C. Tenn.); In re Steuer, 5 A. B. R. 209, 104 Fed. 976 (D. C. Mass.). See also, § 363.

214. In re Krinsk Bros., 7 A. B. R. 535, 112 Fed. 972 (D. C. N. Y.). Compare, to same effect, in plenary suits by trustees, Blake v. Nesbet, 16 A. B. R. 269 (D. C. Mo.).

215. Obiter, Carter v. Hobbs, 1 A. B. R. 215, 92 Fed. 594 (D. C. Ind.).

216. Instance, In re Arnett, 7 A. B. R. 522, 112 Fed. 770 (D. C. Tenn.): Bankrupt surrendering assets to creditor after filing his petition and creditor accepting same, both fined.

Instance not contempt, mere threats to interfere: In re McBryde, 3 A. B. R. 729, 99 Fed. 686 (D. C. N. Car.), in which case the sheriff and deputies did not levy nor interfere with the property of the bankrupt after adjudication, but merely threatened to do so. The court held that this did not constitute contempt.

